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Human Rights, Title 49.

Conditions restraining marriage void, 70-1-404.

Part 1
General Provisions

40-1-101. Purposes. This chapter shall be liberally construed and applied to promote its underlying purposes, which are to:

(1) provide adequate procedures for the solemnization and registration of marriage;

(2) strengthen and preserve the integrity of marriage and safeguard family relationships.

History: En. 48-302 by Sec. 2, Ch. 536, L. 1975; R.C.M. 1947, 48-302(part).

40-1-102. Uniformity of application and construction. This chapter shall be so applied and construed as to effectuate its general purpose to make uniform the law with respect to the subject of this chapter among those states which enact it.

History: En. 48-303 by Sec. 3, Ch. 536, L. 1975; R.C.M. 1947, 48-303.

40-1-103. Formalities. Marriage is a personal relationship between a man and a woman arising out of a civil contract to which the consent of the parties is essential. A marriage licensed, solemnized, and registered as provided in this chapter is valid in this state. A marriage may be contracted, maintained, invalidated, or dissolved only as provided by the law of this state.

History: En. 48-304 by Sec. 4, Ch. 536, L. 1975; R.C.M. 1947, 48-304.

Cross-References

Obligations that cannot be specifically enforced — marriage promise, 27-1-412.

Cause of action for breach of promise abolished, 27-1-602.

Consent in general, Title 28, ch. 2, part 3.

Contracts, Title 28, ch. 2, 3.

Contracts in restraint of marriage generally void, 28-2-706.

What contracts must be in writing — marriage, 28-2-903.

40-1-104. Application. All marriages contracted within this state prior to January 1, 1976, or outside the state, that were valid at the time of the contract or subsequently validated by the laws of the place in which they were contracted or by the domicile of the parties are valid in this state.

History: En. 48-313 by Sec. 13, Ch. 536, L. 1975; R.C.M. 1947, 48-313.

40-1-105. Application of Montana Rules of Civil Procedure. (1) Except for proceedings under the Uniform Child Custody Jurisdiction and Enforcement Act, the Montana Rules of Civil Procedure apply to all proceedings under this chapter, except as otherwise provided in this chapter.

(2) A proceeding for declaration of invalidity of marriage must be entitled, "In re the Marriage of.......... and...........". A parenting or support proceeding must be entitled, "In re the (parenting) (support) of........".

(3) The initial pleading in all proceedings under this chapter must be denominated a petition. A responsive pleading must be denominated a response. Other pleadings, and all pleadings in other matters under this chapter, must be denominated as provided in the Montana Rules of Civil Procedure.

(4) In this chapter, "decree" includes "judgment".

History: En. 48-315 by Sec. 15, Ch. 536, L. 1975; amd. Sec. 26, Ch. 537, L. 1977; R.C.M. 1947, 48-315(part); amd. Sec. 2, Ch. 343, L. 1997; amd. Sec. 1, Ch. 91, L. 1999.

Compiler's Comments

1999 Amendment: Chapter 91 in (1) after "Jurisdiction" inserted "and Enforcement". Amendment effective October 1, 1999.

Cross-References

Montana Rules of Civil Procedure, Title 25, ch. 20.

Application of Montana Rules of Civil Procedure to termination of marriage, parenting, and support, 40-4-103.

Procedure — commencement — pleadings — abolition of existing defenses in termination of marriage, 40-4-105.

Uniform Child Custody Jurisdiction Act, Title 40, ch. 7, part 1.

40-1-106. Parts of code not applicable. The provisions of other portions of this code in relation to contracts and the capacity of persons to enter into them have no application to the contract of marriage.

History: En. Sec. 58, Civ. C. 1895; re-en. Sec. 3615, Rev. C. 1907; re-en. Sec. 5708, R.C.M. 1921; Field Civ. C. Sec. 43; re-en. Sec. 5708, R.C.M. 1935; R.C.M. 1947, 48-114.

Cross-References

Cause of action for breach of promise abolished, 27-1-602.

Parties to contracts, Title 28, ch. 2, part 2.

Contracts, Title 28, ch. 2, 3.

Power of married persons to contract Title 40, ch. 2, part 3.

Uniform Premarital Agreement Act, Title 40, ch. 2, part 6.

Minors — power to contract, Title 41, ch. 1, part 3.

40-1-107. Form of application, license, marriage certificate, and consent. (1) The director of the department of public health and human services shall prescribe the form for an application for a marriage license, which must include the following information:

(a) name, sex, address, [social security number,] and date and place of birth of each party to the proposed marriage;

(b) if either party was previously married, the party's name, and the date, place, and court in which the marriage was dissolved or declared invalid or the date and place of death of the former spouse;

(c) name and address of the parents or guardian of each party;

(d) whether the parties are related to each other and, if so, their relationship; and

(e) the name and date of birth of any child of whom both parties are parents born prior to the making of the application, unless their parental rights and the parent and child relationship with respect to the child have been terminated.

(2) The director of the department of public health and human services shall prescribe the forms for the marriage license, the marriage certificate, and the consent to marriage.

[(3) The license, certificate, or consent may not contain the social security number, and the department shall keep the number from this source confidential, except that the department may use the number in administering Title IV-D of the Social Security Act.] *(Bracketed language terminates on occurrence of contingency—sec. 1, Ch. 27, L. 1999.)*

History: En. 48-305 by Sec. 5, Ch. 536, L. 1975; R.C.M. 1947, 48-305; amd. Sec. 72, Ch. 418, L. 1995; amd. Sec. 112, Ch. 546, L. 1995; amd. Sec. 23, Ch. 552, L. 1997.

Compiler's Comments

Contingent Termination — Request for Federal Exemptions: Section 1, Ch. 27, L. 1999, revised sec. 104, Ch. 552, L. 1997, to contain the following contingent termination provisions and order that the department of public health and human services seek federal exemptions: "(1) [Sections 9, 11, 22 through 24, and 95] [37-1-307, 40-1-107, 40-4-105, 40-5-922, 40-5-924, and 61-5-107] and the bracketed language in [sections 1 through 3, 10, 25, 45, and 89] [40-4-204, 40-5-226, 40-5-901, 40-5-906, 40-5-907, 40-5-923, and 40-6-116] terminate on the date of the suspension if the federal government suspends federal payments to this state for this state's child support enforcement program and for this state's program relating to temporary assistance to needy families because of this state's failure to enact law as required by the federal Personal Responsibility and Work Opportunity Reconciliation Act of 1996.

(2) [Sections 9, 11, 22 through 24, and 95] [37-1-307, 40-1-107, 40-4-105, 40-5-922, 40-5-924, and 61-5-107] and the bracketed language in [sections 1 through 3, 10, 25, 45, and 89] [40-4-204, 40-5-226, 40-5-901, 40-5-906, 40-5-907, 40-5-923, and 40-6-116] terminate on the date that a final decision is rendered in federal court invalidating the child support provisions of the federal Personal Responsibility and Work Opportunity Reconciliation Act of 1996.

(3) If the director of the department of public health and human services certifies to the governor and the secretary of state in writing that one of the following provisions is no longer required by federal law because of repeal of or amendment to federal statutes that require that provision, the provision terminates on the date the certification takes effect:

(a) [section 9] [40-5-922];

(b) [section 11] [40-5-924];

(c) [sections 22 through 24] [37-1-307, 40-1-107, and 40-4-105];

(d) [section 95] [61-5-107];

(e) the bracketed provisions in [sections 1 through 3, 10, 25, 45, and 89] [40-4-204, 40-5-226, 40-5-901, 40-5-906, 40-5-907, 40-5-923, and 40-6-116].

(4) If the bracketed language in [sections 1 through 3, 10, 25, 45, and 89] [40-4-204, 40-5-226, 40-5-901, 40-5-906, 40-5-907, 40-5-923, and 40-6-116] terminates, the code commissioner is instructed to renumber subsections, adjust internal references, and correct grammar and arrangement." Amendment effective February 18, 1999.

Cross-References

Solemnization and registration — consent to marriage, 40-1-301.

Dissolution of marriage, Title 40, ch. 4, part 1.

Child legitimized by marriage of parents, 40-6-203.

Parent-child legal relationship termination, Title 41, ch. 3, part 6.

Duty to furnish information, 50-15-108.

Marriage certificates, 50-15-301.

Part 2

License Provisions

40-1-201. License application. (1) No Montana resident may be joined in marriage within this state until a license has been obtained for that purpose from a clerk of the district court.

(2) A license so issued shall authorize a marriage ceremony to be performed in the county where the license is issued or in any other county of this state.

(3) If both parties are nonresidents of the state, the license may be obtained from the clerk of the district court of the county where the marriage ceremony is to be performed. If one of the persons is a nonresident of the county where the license is to issue, his part of the application may be completed and sworn to or affirmed before the person authorized to accept such applications in the county and state in which he resides.

History: En. Sec. 5, Ch. 232, L. 1963; amd. Sec. 8, Ch. 33, L. 1977; R.C.M. 1947, 48-146; amd. Sec. 1, Ch. 42, L. 1983.

Cross-References

Duties of Clerk of District Court, Title 3, ch. 5, part 5.

Discrimination in issuance of licenses prohibited, 49-3-204.

40-1-202. License issuance. When a marriage application has been completed and signed by both parties to a prospective marriage and at least one party has appeared before the clerk of the district court and paid the marriage license fee of $30, the clerk of the district court shall issue a license to marry and a marriage certificate form upon being furnished:

(1) satisfactory proof that each party to the marriage will have attained the age of 18 years at the time the marriage license is effective or will have attained the age of 16 years and has obtained judicial approval as provided in 40-1-213;

(2) satisfactory proof that the marriage is not prohibited; and

(3) a certificate of the results of any medical examination required by the laws of this state.

History: En. 48-306 by Sec. 6, Ch. 536, L. 1975; R.C.M. 1947, 48-306; amd. Sec. 6, Ch. 677, L. 1979; amd. Sec. 2, Ch. 493, L. 1981.

Cross-References

Fees of Clerk of District Court, 25-1-201.

Prohibited marriages, 40-1-401.

Minors and adults defined, 41-1-101.

Marriage certificates, 50-15-301.

Funding for battered spouses grant programs, 52-6-105.

40-1-203. Proof of age and medical certificate required. (1) Before a person authorized by law to issue marriage licenses may issue a marriage license, each applicant for a license shall provide a birth certificate or other satisfactory evidence of age and, if the applicant is a minor, the approval required by 40-1-213. Each female applicant, unless exempted on medical grounds by rule of the department of public health and human services, shall file with the license issuer a medical certificate from a physician who is licensed to practice medicine and surgery in any state or United States territory or from any other person authorized by rule of the department to issue a medical certificate. The certificate must state that the applicant has been given a standard serological test, that the report of the results of the serological test has been shown to the applicant tested, and that the other party to the proposed marriage contract has examined the report of the serological test.

(2) A person who by law is able to obtain a marriage license in this state is also able to give consent to any examinations and tests required by this section. In submitting the blood specimen to the laboratory, the physician or other person authorized to issue a medical certificate shall designate that it is a premarital test.

History: En. Sec. 1, Ch. 208, L. 1947; amd. Sec. 1, Ch. 21, L. 1959; amd. Sec. 1, Ch. 248, L. 1973; amd. Sec. 4, Ch. 33, L. 1977; R.C.M. 1947, 48-134; amd. Sec. 1, Ch. 33, L. 1979;

amd. Sec. 1, Ch. 228, L. 1981; amd. Sec. 1, Ch. 154, L. 1983; amd. Sec. 1, Ch. 186, L. 1989; amd. Sec. 73, Ch. 418, L. 1995; amd. Sec. 113, Ch. 546, L. 1995.

Cross-References

General duties of Clerk of District Court, 3-5-501.

Declaration of invalidity, 40-1-402.

Minors and adults defined, 41-1-101.

Serological test for syphilis, 50-18-104.

Permissible release of information concerning infected persons, 50-18-109.

Certificate of freedom from sexually transmitted disease not to be issued, 50-18-111.

40-1-204. Contents and form of medical certificate. (1) The medical certificate must contain a statement from a physician or other person authorized by rule of the department of public health and human services to make the reports, setting forth:

(a) the name of the test;

(b) the name and address of the physician or other person authorized by rule of the department to sign the certificate;

(c) the name and address of the laboratory performing the test; and

(d) the name of the person whose blood was tested.

(2) In the event that an error is discovered in the results of the test, the results must be expunged from the records of the department of public health and human services.

(3) (a) The certificate and statement must be on a form to be provided and distributed, upon request, by the department of public health and human services.

(b) This form is referred to in 40-1-205 through 40-1-209 as the "certificate form".

History: En. Sec. 2, Ch. 208, L. 1947; amd. Sec. 104, Ch. 349, L. 1974; amd. Sec. 5, Ch. 33, L. 1977; R.C.M. 1947, 48-135; amd. Sec. 2, Ch. 154, L. 1983; amd. Sec. 2, Ch. 186, L. 1989; amd. Sec. 74, Ch. 418, L. 1995; amd. Sec. 114, Ch. 546, L. 1995.

Cross-References

Certificates, 50-15-109.

Certificate of freedom from sexually transmitted disease not to be issued, 50-18-111.

40-1-205. Certificates from other states or for military personnel — when acceptable. Certificate forms provided by other states having comparable laws will be accepted for persons who have received a standard serological test outside of Montana. Certificates provided by the United States armed forces will be accepted for military personnel if such certificates are signed by a medical officer commissioned in the United States armed forces or United States public health service and the certificates state the examinations are standard serological tests.

History: En. Sec. 3, Ch. 208, L. 1947; amd. Sec. 2, Ch. 248, L. 1973; R.C.M. 1947, 48-136; amd. Sec. 2, Ch. 228, L. 1981; amd. Sec. 1, Ch. 25, L. 1985; amd. Sec. 3, Ch. 186, L. 1989.

Cross-References

Serological test for syphilis, 50-18-104.

40-1-206. Premarital test — approved laboratories — rules. (1) For the purpose of 40-1-203 through 40-1-209, a standard serological test is a test for rubella immunity that is approved by the department of public health and human services.

(2) The standard serological test is acceptable for the purposes of 40-1-203 through 40-1-209 only if it is performed by one of the following:

(a) the laboratory of the department of public health and human services;

(b) a laboratory approved by the department of public health and human services;

(c) a laboratory operated by any other state; or

(d) a laboratory operated by the United States public health service or the United States armed forces.

(3) The standard serological test may be made on request at the laboratory of the department of public health and human services.

(4) The department of public health and human services shall adopt reasonable rules for:

(a) reports to be submitted by any laboratory making tests and the manner of furnishing the reports to the certifying physician and the state; and

(b) exemptions, on medical grounds, from the premarital serological test.

History: En. Sec. 4, Ch. 208, L. 1947; amd. Sec. 3, Ch. 248, L. 1973; amd. Sec. 6, Ch. 33, L. 1977; R.C.M. 1947, 48-137; amd. Sec. 3, Ch. 154, L. 1983; amd. Sec. 75, Ch. 418, L. 1995; amd. Secs. 115, 568, Ch. 546, L. 1995; amd. Sec. 4, Ch. 73, L. 1997.

Cross-References

Adoption and publication of rules, Title 2, ch. 4, part 3.

Serological test for syphilis, 50-18-104.

Permissible release of information concerning infected persons, 50-18-109.

40-1-207. Examination by health officer. Any applicant for a marriage license may, if he so chooses, be examined free of charge by the county physician or county health officer.

History: En. Sec. 5, Ch. 208, L. 1947; R.C.M. 1947, 48-138.

Cross-References

Serological test for syphilis, 50-18-104.

Powers and duties of health officers, 50-18-107.

40-1-208. Penalties. (1) An applicant for a marriage license, a physician or other person authorized by rule of the department of public health and human services to issue a medical certificate, or a person in charge of or authorized to make reports or statements for a laboratory who misrepresents the person's identity or any of the facts called for by the certificate form prescribed by 40-1-203 through 40-1-205, a licensing officer who issues a marriage license without having received the certificate form, if required, or who has reason to believe that any of the facts on the certificate form have been misrepresented and nevertheless issues a marriage license, or any person who otherwise fails to comply with the provisions of 40-1-203 through 40-1-209 is guilty of a misdemeanor and upon conviction shall be punished by a fine of not more than $100.

(2) Medical certificates, laboratory statements or reports, and applications referred to in 40-1-203 through 40-1-209 are confidential and may not be divulged to or open to inspection by any person other than state or local health officers or their representatives. A person who divulges the information or opens to inspection the certificates, statements, reports, or applications, without authority, to any person not entitled to the material by law is guilty of a misdemeanor and upon conviction shall be punished by a fine of not more than $100.

History: En. Sec. 6, Ch. 208, L. 1947; amd. Sec. 7, Ch. 33, L. 1977; R.C.M. 1947, 48-139; amd. Sec. 4, Ch. 154, L. 1983; amd. Sec. 4, Ch. 186, L. 1989; amd. Sec. 76, Ch. 418, L. 1995; amd. Sec. 116, Ch. 546, L. 1995.

Cross-References

Misdemeanors — classification of offenses, 45-1-201.

Misdemeanor defined, 45-2-101.

Permissible release of information concerning infected persons, 50-18-109.

Violation a misdemeanor, 50-18-113.

40-1-209. Expenses. The department of public health and human services shall provide the necessary printing and pay the necessary expenses related to the checking and approval of laboratories, clerical and technical assistance involved in the administration of 40-1-203 through 40-1-209, and other expenditures necessary in carrying out the provisions and purposes of 40-1-203 through 40-1-209. All claims for the expenses must be submitted for approval and audit to the department of public health and human services and must be paid in accordance with law.

History: En. Sec. 7, Ch. 208, L. 1947; amd. Sec. 104, Ch. 349, L. 1974; R.C.M. 1947, 48-140; amd. Sec. 77, Ch. 418, L. 1995; amd. Sec. 117, Ch. 546, L. 1995.

Cross-References

Rules of Department binding, 50-18-105.

40-1-210. No license to be issued when applicants under influence of liquor or drug. No license to marry shall be issued if, at the time of making application, either of the applicants is under the influence of intoxicating liquor or narcotic drug.

History: En. Sec. 6, Ch. 232, L. 1963; R.C.M. 1947, 48-147.

Cross-References

Declaration of invalidity, 40-1-402.

40-1-211. Repealed. Sec. 1, Ch. 124, L. 1979.

History: En. Sec. 7, Ch. 232, L. 1963; R.C.M. 1947, 48-148.

40-1-212. Effective period of license. A license to marry is effective upon issuance and expires after 180 days.

History: En. 48-307 by Sec. 7, Ch. 536, L. 1975; R.C.M. 1947, 48-307; amd. Sec. 1, Ch. 7, L. 1987.

40-1-213. Judicial approval. (1) The district court may order the clerk of the district court to issue a marriage license and a marriage certificate form to a party 16 or 17 years of age who has no parent capable of consenting to the party's marriage or has the consent of both parents or of the parent having the actual care, parenting authority, and control to the party's marriage, if capable of giving consent, or of the party's guardian. The court must require both parties to participate in a period of marriage counseling involving at least two separate counseling sessions not less than 10 days apart with a designated counselor as a condition of the order for issuance of a marriage license and a marriage certificate form under this section.

(2) A marriage license and a marriage certificate form may be issued under this section only if the court finds that the underaged party is capable of assuming the responsibilities of marriage and the marriage will serve the party's best interests. Pregnancy alone does not establish that the best interests of the party will be served.

(3) The district court shall authorize performance of a marriage by proxy upon the showing required by the provisions on solemnization.

History: En. 48-308 by Sec. 8, Ch. 536, L. 1975; R.C.M. 1947, 48-308; amd. Sec. 1, Ch. 183, L. 1979; amd. Sec. 3, Ch. 343, L. 1997.

Cross-References

Minors and adults defined, 41-1-101.

Release of information by physician concerning pregnant minor, 41-1-402, 41-1-403.

Part 3
Solemnization

40-1-301. Solemnization and registration. (1) A marriage may be solemnized by a judge of a court of record, by a public official whose powers include solemnization of marriages, by a mayor, city judge, or justice of the peace, by a tribal judge, or in accordance with any mode of solemnization recognized by any religious denomination, Indian nation or tribe, or native group. Either the person solemnizing the marriage or, if no individual acting alone solemnized the marriage, a party to the marriage shall complete the marriage certificate form and forward it to the clerk of the district court.

(2) If a party to a marriage is unable to be present at the solemnization, he may authorize in writing a third person to act as his proxy. If the person solemnizing the marriage is satisfied that the absent party is unable to be present and has consented to the marriage, he may solemnize the marriage by proxy. If he is not satisfied, the parties may petition the district court for an order permitting the marriage to be solemnized by proxy.

(3) The solemnization of the marriage is not invalidated by the fact that the person solemnizing the marriage was not legally qualified to solemnize it, if either party to the marriage believed him to be so qualified.

History: En. 48-309 by Sec. 9, Ch. 536, L. 1975; amd. Sec. 9, Ch. 33, L. 1977; R.C.M. 1947, 48-309(1), (2), (4); amd. Sec. 1, Ch. 247, L. 1979; amd. Sec. 3, Ch. 348, L. 1985.

Cross-References

Powers of judicial officers, Title 3, ch. 1, part 4.

Form of application, license, marriage certificate, and consent, 40-1-107.

UPC — powers of attorney, Title 72, ch. 5, part 5.

40-1-302 through 40-1-310 reserved.

40-1-311. Declaration of marriage without solemnization. (1) Persons desiring to consummate a marriage by written declaration in this state without the solemnization provided for in 40-1-301 must, prior to executing the declaration, secure the medical certificate required by this chapter, which shall be firmly attached to the declaration and shall be filed by the clerk of the district court in the county where the contract was executed.

(2) A declaration of marriage must contain substantially the following:

(a) the names, ages, and residences of the parties;

(b) the fact of marriage;

(c) the name of father and maiden name of mother of both parties and address of each;

(d) a statement that both parties are legally competent to enter into the marriage contract.

(3) The declaration must be subscribed by the parties and attested by at least two witnesses and formally acknowledged before the clerk of the district court of the county.

(4) The fee for filing a declaration is $30 and shall be paid to the clerk at time of filing.

History: En. Sec. 85, Civ. C. 1895; re-en. Sec. 3631, Rev. C. 1907; re-en. Sec. 5724, R.C.M. 1921; Cal. Civ. C. Sec. 75; re-en. Sec. 5724, R.C.M. 1935; amd. Sec. 1, Ch. 275, L. 1959; amd. Sec. 44, Ch. 536, L. 1975; R.C.M. 1947, 48-130; amd. Sec. 2, Ch. 33, L. 1979; amd. Sec. 2, Ch. 12, L. 1983.

Cross-References

General duties of Clerk of District Court, 3-5-501.

Fee for filing declaration of marriage, 25-1-201.

Who may contract, 28-2-201.

Proof of age and medical certificate required, 40-1-203.

Validity of common-law marriage, 40-1-403.

Funding of battered spouses grant program, 52-6-105.

40-1-312. Persons who may draft declaration of marriage. It shall be unlawful for any person other than the parties to such written declaration to draw any such declaration of marriage unless he shall have been duly licensed to practice law in the state of Montana.

History: En. Sec. 2, Ch. 275, L. 1959; R.C.M. 1947, 48-130.1.

40-1-313. Penalty. Any person violating the provisions of 40-1-311 or 40-1-312, upon conviction, shall be subject to a fine of not less than $300 or 6 months in a county jail, or both.

History: En. Sec. 3, Ch. 275, L. 1959; R.C.M. 1947, 48-130.2.

Cross-References

Misdemeanor defined, 45-2-101.

40-1-314 through 40-1-320 reserved.

40-1-321. Registration of marriage. (1) Upon receipt of the marriage certificate, the clerk of the district court shall register the marriage.

(2) Every person solemnizing a marriage who shall neglect to make and deliver to the clerk of the district court a certificate thereof within 30 days after having solemnized such marriage shall forfeit for such neglect a sum not less than $10 or more than $50; and any clerk of the district court who shall neglect to record such certificate so delivered within 1 month after its delivery shall forfeit the like penalty.

History: (1)En. 48-309 by Sec. 9, Ch. 536, L. 1975; amd. Sec. 9, Ch. 33, L. 1977; Sec. 48-309, R.C.M. 1947; (2)En. Sec. 7, p. 409, Bannack Stat.; re-en. Sec. 7, p. 520, Cod. Stat. 1871; re-en. Sec. 860, 5th Div. Rev. Stat. 1879; re-en. Sec. 1421, 5th Div. Comp. Stat. 1887; amd. Sec. 79, Civ. C. 1895; re-en. Sec. 3625, Rev. C. 1907; re-en. Sec. 5718, R.C.M. 1921; re-en. Sec. 5718, R.C.M. 1935; Sec. 48-124, R.C.M. 1947; R.C.M. 1947, 48-124, 48-309(3).

Cross-References

Clerk of District Court — duties generally, Title 3, ch. 5, part 5.

Manner of keeping records and storing documents, 7-4-2221.

Documents subject to recording, 7-4-2613.

Index to records of marriage certificates, 7-4-2619.

40-1-322. Certificate and copy presumptive evidence. The original certificate of marriage and the record thereof by the clerk of the district court or a copy of such record duly certified by the clerk of the district court shall be received by all courts in all places as presumptive evidence of such marriage.

History: En. Sec. 10, p. 410, Bannack Stat.; re-en. Sec. 10, p. 521, Cod. Stat. 1871; re-en. Sec. 863, 5th Div. Rev. Stat. 1879; re-en. Sec. 1424, 5th Div. Comp. Stat. 1887; amd. Sec. 81, Civ. C. 1895; re-en. Sec. 3627, Rev. C. 1907; re-en. Sec. 5720, R.C.M. 1921; re-en. Sec. 5720, R.C.M. 1935; amd. Sec. 3, Ch. 33, L. 1977; R.C.M. 1947, 48-126.

Cross-References

Clerk of District Court — duties generally, Title 3, ch. 5, part 5.

Definition and examples of disputable presumptions, 26-1-602.

40-1-323. Proof of solemnized marriage when no record. If the record of the solemnization of a marriage heretofore entered into has been lost or destroyed and not known to exist, the parties may join in a written declaration of such marriage, substantially showing:

(1) the names, ages, and residences of the parties;

(2) the date and place of marriage and other pertinent facts of the marriage;

(3) that the record of the solemnized marriage has become lost or destroyed, as the case may be, and is not known to exist.

History: En. Sec. 86, Civ. C. 1895; re-en. Sec. 3632, Rev. C. 1907; re-en. Sec. 5725, R.C.M. 1921; Cal. Civ. C. Sec. 76; re-en. Sec. 5725, R.C.M. 1935; amd. Sec. 1, Ch. 276, L. 1959; R.C.M. 1947, 48-131.

Cross-References

Validity of common-law marriage, 40-1-403.

40-1-324. Declaration to be acknowledged and recorded. The written declaration of marriage provided for in 40-1-323 shall be attested by at least two witnesses and formally acknowledged by an official authorized to administer oaths in the state of Montana. The filing of the declaration with the clerk of the district court in the county of the residence of the parties shall serve as an official record of the marriage of the parties.

History: En. Sec. 87, Civ. C. 1895; re-en. Sec. 3633, Rev. C. 1907; re-en. Sec. 5726, R.C.M. 1921; Cal. Civ. C. Sec. 77; re-en. Sec. 5726, R.C.M. 1935; amd. Sec. 2, Ch. 276, L. 1959; R.C.M. 1947, 48-132.

Cross-References

Officers who may administer oaths, 1-6-101, 3-1-402.

Duties of Clerk of District Court, Title 3, ch. 5, part 5.

Validity of common-law marriage, 40-1-403.

Part 4

Validity of Marriages — Declaration of Invalidity

40-1-401. Prohibited marriages — contracts. (1) The following marriages are prohibited:

(a) a marriage entered into prior to the dissolution of an earlier marriage of one of the parties;

(b) a marriage between an ancestor and a descendant or between a brother and a sister, whether the relationship is by the half or the whole blood, or between first cousins;

(c) a marriage between an uncle and a niece or between an aunt and a nephew, whether the relationship is by the half or the whole blood;

(d) a marriage between persons of the same sex.

(2) Parties to a marriage prohibited under this section who cohabit after removal of the impediment are lawfully married as of the date of the removal of the impediment.

(3) Children born of a prohibited marriage are legitimate.

(4) A contractual relationship entered into for the purpose of achieving a civil relationship that is prohibited under subsection (1) is void as against public policy.

History: En. 48-310 by Sec. 10, Ch. 536, L. 1975; R.C.M. 1947, 48-310; amd. Sec. 1, Ch. 424, L. 1997.

Cross-References

Presumption of legitimacy, 26-1-602.

Legitimacy of children born in wedlock, 40-6-201.

Incest, 45-5-507.

Bigamy, 45-5-611.

Marrying bigamist, 45-5-612.

Declaration of invalidity — vital statistics, 50-15-302.

40-1-402. Declaration of invalidity. (1) The district court shall enter its decree declaring the invalidity of a marriage entered into under the following circumstances:

(a) a party lacked capacity to consent to the marriage at the time that the marriage was entered into, either because of mental incapacity or infirmity or because of the influence of alcohol, drugs, or other incapacitating substances, or a party was induced to enter into a marriage by force or duress or by fraud involving the essentials of marriage;

(b) a party lacks the physical capacity to consummate the marriage by sexual intercourse, and at the time that the marriage was entered into, the other party did not know of the incapacity;

(c) a party was under 16 years of age or was 16 or 17 years of age and did not have the consent of the party's parents or guardian or judicial approval; or

(d) the marriage is prohibited.

(2) A declaration of invalidity under subsections (1)(a) through (1)(c) may be sought by any of the following persons and must be commenced within the times specified, but a declaration of invalidity may not be sought after the death of either party to the marriage:

(a) for lack of capacity to consent because of mental incapacity or infirmity, no later than 1 year after the petitioner obtained knowledge of the described condition;

(b) for lack of capacity to consent because of the influence of alcohol, drugs, or other incapacitating substances, no later than 1 year after the petitioner obtained knowledge of the described condition;

(c) for lack of capacity to consent because of force, duress, or fraud, no later than 2 years after the petitioner obtained knowledge of the described condition;

(d) for the reason set forth in subsection (1)(b), by either party, no later than 4 years after the petitioner obtained knowledge of the described condition;

(e) for the reason set forth in subsection (1)(c), by the underaged party or the party's parent or guardian, before the time that the underaged party reaches the age at which the party could have married without satisfying the omitted requirement.

(3) A declaration of invalidity for the reason set forth in subsection (1)(d) may be sought by either party, the legal spouse in case of a bigamous marriage, the county attorney, or a child of either party, at any time before the death of one of the parties.

(4) Children born of a marriage declared invalid are legitimate.

(5) Unless the court finds, after a consideration of all relevant circumstances, including the effect of a retroactive decree on third parties, that the interests of justice would be served by making the decree not retroactive, it shall declare the marriage invalid as of the date of the marriage. The provisions of chapter 4 relating to property rights of the spouses, maintenance,

support, and parenting of children on dissolution of marriage are applicable to nonretroactive decrees of invalidity.

(6) The clerk of the court shall give notice of the entry of a decree declaring the invalidity of a marriage:

(a) if the marriage is registered in this state, to the clerk of the district court of the county where the marriage is registered, who shall enter the fact of invalidity in the book in which the marriage license and certificate are recorded; or

(b) if the marriage is registered in another jurisdiction, to the appropriate official of that jurisdiction, with the request that the official enter the fact of invalidity in the appropriate record.

History: En. 48-311 by Sec. 11, Ch. 536, L. 1975; amd. Sec. 1, Ch. 279, L. 1977; R.C.M. 1947, 48-311; amd. Sec. 1, Ch. 109, L. 1995; amd. Sec. 4, Ch. 343, L. 1997.

Cross-References

Clerk of District Court — duties generally, Title 3, ch 5, part 5.

County Attorney — other duties, 7-4-2717.

Presumption of legitimacy, 26-1-602.

Who may contract, 28-2-201.

Consent in general, Title 28, ch. 2, part 3.

Circumstances that affect validity of apparent consent, Title 28, ch. 2, part 4.

Proof of age and medical certificate required, 40-1-203.

Judicial approval, 40-1-213.

Defenses to divorce abolished, 40-4-105.

Legitimacy of children born in wedlock, 40-6-201.

Incest, 45-5-507.

Bigamy, 45-5-611.

Marrying bigamist, 45-5-612.

Revocation of provision for spouse in will by divorce or annulment, 72-2-528.

40-1-403. Validity of common-law marriage. Common-law marriages are not invalidated by this chapter. Declarations of marriage pursuant to 40-1-311 through 40-1-313, 40-1-323, and 40-1-324 are not invalidated by this chapter.

History: En. 48-314 by Sec. 14, Ch. 536, L. 1975; R.C.M. 1947, 48-314.

Cross-References

Presumption of marriage, 26-1-602.

40-1-404. Putative spouse. Any person who has cohabited with another to whom he is not legally married in the good faith belief that he was married to that person is a putative spouse until knowledge of the fact that he is not legally married terminates his status and prevents acquisition of further rights. A putative spouse acquires the rights conferred upon a legal spouse, including the right to maintenance following termination of his status, whether or not the marriage is prohibited (40-1-401) or declared invalid (40-1-402). If there is a legal spouse or other putative spouses, rights acquired by a putative spouse do not supersede the rights of the legal spouse or those acquired by other putative spouses, but the court shall apportion property, maintenance, and support rights among the claimants as appropriate in the circumstances and in the interests of justice.

History: En. 48-312 by Sec. 12, Ch. 536, L. 1975; R.C.M. 1947, 48-312.

Cross-References

Good faith defined, 30-1-201.

Obligation of good faith — U.C.C., 30-1-203.

Disposition of property, 40-4-202.

Maintenance, 40-4-203.

Child support, 40-4-204.

UPC — elective share of surviving spouse, Title 72, ch. 2, part 2.

UPC — spouse and children unprovided for in wills, Title 72, ch. 2, part 3.

UPC — effect of divorce, annulment, or separation decree, 72-2-812.

CHAPTER 2

HUSBAND AND WIFE

Part 1 — Joint Interests, Obligations, and Powers

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40-2-602. Application and construction.
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40-2-606. When agreement becomes effective.
40-2-607. Amendment — revocation.
40-2-608. Enforcement.
40-2-609. Enforcement when marriage void.
40-2-610. Limitation of actions.

Chapter Cross-References

Residence of spouses, 1-1-215.

Tax law relating to family, 7-16-4105, 15-6-201, 15-7-307, 15-30-112, 15-30-113, 15-30-122, 15-30-123, 15-30-134, 15-30-142.

Person's residence presumed to be that of family for voting purposes, 13-1-112.

Beneficiaries under PERS, 19-2-801, 19-2-802.

Civil procedure provisions relating to families, 25-9-102, 27-19-306, 70-19-102, 70-27-111.

Execution of judgment when family property and interest involved, Title 25, ch. 13.

Montana Rules of Civil Procedure relating to marriage, children, and family, Rules 4D(2)(b), 4D(2)(c), 4D(5)(a)(iii), 20(a), and 27(a)(2), M.R.Civ.P. (see Title 25, ch. 20).

When appeal may be taken, Rule 1(c), M.R.App.P. (see Title 25, ch. 21).

Evidence rules relating to marriage, children, and family, 26-1-601, 26-1-602, 26-1-802.

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Contracts — what constitutes duress, 28-2-402, 28-2-403.

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Assignment of wages by married person, 31-1-306.

Labor law concerning family members, 31-1-306; 39-1-102 through 39-1-104; 39-2-101; 39-3-201; 39-3-203; 39-3-204; 39-3-406; 39-6-101; 39-6-102; 39-7-103; Title 39, ch. 7, part 2; 39-33-101 through 39-33-103; 53-7-201; 53-7-202.

Trust company — law concerning husband and wife, 32-1-107.

Insurable interests, Title 33, ch. 15, part 2.

Nursing by members of family, 37-8-103.

Payment of unemployment compensation, 39-51-102, 39-51-201 through 39-51-206, 39-51-601, 39-51-2301 through 39-51-2307.

Workers' compensation law relating to families, 39-71-116 through 39-71-120, 39-71-602, 39-71-723, 39-71-737, 39-71-741, 39-71-742, 39-71-2203.

General criminal provisions relating to families, 45-1-205, 45-2-101, 45-2-211.

Offenses against the person of family member, 45-5-206, 45-5-220, 45-5-304, 45-5-507, 45-5-511, 45-5-602 through 45-5-604, 45-5-611, 45-5-612, 45-5-621 through 45-5-627, 45-5-631 through 45-5-633, 50-20-104 through 50-20-108.

Offenses against public order by family members, 45-8-113, 45-8-344.

Criminal procedure provisions relating to family members, 46-16-212, 46-23-1022, 46-23-1102.

Human Rights, Title 49.

Discrimination based on marital status, 49-2-303, 49-3-103.

Discrimination in insurance and retirement plans prohibited, 49-2-309.

Reporting of deaths, marriages, divorces, annulments, etc., 50-15-108.

General welfare provisions relating to the family, 53-2-101; 53-2-201; 53-2-206; 53-2-610; Title 53, ch. 3.

Automobile registration may be transferred to heir without letters of administration — when, 61-3-201.

Property law concerning husband and wife, 70-1-306, 70-1-307, 70-1-314, 70-1-404, 70-1-420, 70-1-422, 70-15-303.

Homesteads, Title 70, ch. 32.

Distribution of estate property, Title 72, ch. 3, part 9.

Housing Act of 1975, Title 90, ch. 6.

Part 1

Joint Interests, Obligations, and Powers

40-2-101. Mutual obligations of husband and wife. Husband and wife contract toward each other obligations of mutual respect, fidelity, and support.

History: En. Sec. 210, Civ. C. 1895; re-en. Sec. 3690, Rev. C. 1907; re-en. Sec. 5782, R.C.M. 1921; Cal. Civ. C. Sec. 155; Field Civ. C. Sec. 75; re-en. Sec. 5782, R.C.M. 1935; R.C.M. 1947, 36-101.

Cross-References

Spousal privilege, 26-1-802.

How obligations arise, 28-1-102.

Contracts — parties — consent, Title 28, ch. 2, parts 2 and 3.

Competency of spouses, 46-16-212.

40-2-102. Duties of husband and wife as to support. Insofar as each is able, the husband and wife shall support each other out of their property and labor. As used in this section, the word "support" includes the nonmonetary support provided by a spouse as homemaker.

History: En. Sec. 212, Civ. C. 1895; re-en. Sec. 3692, Rev. C. 1907; re-en. Sec. 5784, R.C.M. 1921; Field Civ. C. Sec. 77; re-en. Sec. 5784, R.C.M. 1935; amd. Sec. 1, Ch. 293, L. 1975; R.C.M. 1947, 36-103.

Cross-References

When husband's and wife's interests separate, 40-2-201.

Earnings and accumulations of married person — when separated, 40-2-206.

Nonsupport, 45-5-621.

40-2-103. Support of spouse. If a married person who is able neglects to make adequate provision for the financial support of his spouse, except in the cases mentioned in 40-2-104, any other person may in good faith supply the spouse with articles necessary for support and recover the reasonable value thereof from the married person who has failed to provide such support.

History: En. Sec. 244, Civ. C. 1895; re-en. Sec. 3724, Rev. C. 1907; re-en. Sec. 5800, R.C.M. 1921; Cal. Civ. C. Sec. 174; Field Civ. C. Sec. 84; re-en. Sec. 5800, R.C.M. 1935; amd. Sec. 12, Ch. 293, L. 1975; R.C.M. 1947, 36-119.

Cross-References

Cases in which property may be attached, 27-18-101.

Agency, Title 28, ch. 10.

Good faith defined, 30-1-201.

Minor cannot disaffirm contract for necessaries, 41-1-305.

Nonsupport, 45-5-621.

40-2-104. Liability of married person when abandoned by spouse. A married person abandoned by his spouse is not liable for the spouse's support until the spouse offers to return, unless the spouse was justified by the person's misconduct in abandoning him, nor is a married person liable for support of a spouse who is living separate from him by agreement, unless such support is stipulated in the agreement.

History: En. Sec. 245, Civ. C. 1895; re-en. Sec. 3725, Rev. C. 1907; re-en. Sec. 5801, R.C.M. 1921; Cal. Civ. C. Sec. 175; Based on Field Civ. C. Sec. 85; re-en. Sec. 5801, R.C.M. 1935; amd. Sec. 13, Ch. 293, L. 1975; R.C.M. 1947, 36-120.

Cross-References

Extent to which existing legal or moral obligation is good consideration, 28-2-802.

Separation agreement, 40-4-201.

Nonsupport, 45-5-621.

40-2-105. Husband and wife as joint tenants. A husband and wife may hold real or personal property together, jointly or in common.

History: En. Sec. 217, Civ. C. 1895; re-en. Sec. 3697, Rev. C. 1907; re-en. Sec. 5789, R.C.M. 1921; Cal. Civ. C. Sec. 161; Field Civ. C. Sec. 82; re-en. Sec. 5789, R.C.M. 1935; R.C.M. 1947, 36-108.

Cross-References

Joint obligations, Title 28, ch. 1, part 3.

Property joint tenancy and tenancy in common, Title 70, ch. 1, part 3.

40-2-106. Liability for acts or debts of spouse. Neither husband nor wife, as such, is answerable for the acts of the other or liable for the debts contracted by the other; provided, however, that the expenses for necessaries of the family and of the education of the children are chargeable upon the property of both husband and wife, or either of them, and in relation thereto they may be sued jointly or separately.

History: En. Sec. 218, Civ. C. 1895; re-en. Sec. 3698, Rev. C. 1907; amd. Sec. 1, Ch. 129, L. 1915; re-en. Sec. 5790, R.C.M. 1921; re-en. Sec. 5790, R.C.M. 1935; R.C.M. 1947, 36-109.

Cross-References

Judgment for or against married person, 25-9-102.

Redemption by debtor from spouse, 25-13-805.

Effect of redemption by debtor or debtor's spouse, 25-13-809.

Extent to which existing legal or moral obligation is good consideration, 28-2-802.

Obligations of parents for support and education of their children, 40-6-211.

Reciprocal duties of parents and children in maintaining each other, 40-6-214.

When parent liable for necessaries supplied to child, 40-6-215.

When parent not liable for support furnished child, 40-6-216.

Married person not bound for support of spouse's children by former marriage, 40-6-217.

Minor cannot disaffirm contract for necessaries, 41-1-305.

40-2-107. May sue and be sued. A married person may sue and be sued in the same manner as if he were sole.

History: En. Sec. 1444, 5th Div. Comp. Stat. 1887; re-en. Sec. 253, Civ. C. 1895; re-en. Sec. 3733, Rev. C. 1907; re-en. Sec. 5809, R.C.M. 1921; re-en. Sec. 5809, R.C.M. 1935; amd. Sec. 15, Ch. 293, L. 1975; R.C.M. 1947, 36-128.

Cross-References

Capacity of married person to be party, 25-5-201.

Who may defend when spouse sued, 25-5-202.

Judgment for or against married person, 25-9-102.

Capacity to sue or be sued, Rule 17(b), M.R.Civ.P. (see Title 25, ch. 20).

Spousal privilege, 26-1-802.

Action by parent or guardian for injury to or death of child or ward, 27-1-512.

Action for wrongful death, 27-1-513.

Who may sue for whose seduction, 27-1-514.

Cause of action for alienation of affections abolished, 27-1-601.

Testimony of spouse admissible in promotion of prostitution cases, 45-5-604.

40-2-108. Married person as personal representative, guardian, conservator, or trustee. A married person may be a personal representative, guardian, conservator, or trustee and may bind himself and the estate he represents without any act or assent on the part of the person's spouse.

History: En. Sec. 1443, 5th Div. Comp. Stat. 1887; re-en. Sec. 252, Civ. C. 1895; re-en. Sec. 3732, Rev. C. 1907; re-en. Sec. 5808, R.C.M. 1921; re-en. Sec. 5808, R.C.M. 1935; amd. Sec. 14, Ch. 293, L. 1975; R.C.M. 1947, 36-127.

Cross-References

UPC — personal representative — powers and duties, Title 72, ch. 3, part 6.

UPC — conservators generally, Title 72, ch. 5, parts 1 and 4.

UPC — guardians of minors, Title 72, ch. 5, part 2.

UPC — guardians of incapacitated persons, Title 72, ch. 5, part 3.

Trust administration, Title 72, ch. 34.

40-2-109. Right of person to sue spouse for intentional tort. A person has a cause of action against his spouse for damages caused by the spouse's intentional tort against such person, and the common law doctrine of interspousal tort immunity is, to that extent, abolished.

History: En. Sec. 1, Ch. 407, L. 1979.

Cross-References

Capacity to sue or be sued, Rule 17(b), M.R.Civ.P. (see Title 25, ch. 20).

Liability, Title 27, ch. 1, part 7.

Duty of care, 28-1-201.

Part 2

Individual Property

40-2-201. When husband's and wife's interests separate. Neither husband nor wife has any interest in the property of the other, except as mentioned in 40-2-102, but neither can be excluded from the other's dwelling unless enjoined by a court.

History: En. Sec. 213, Civ. C. 1895; re-en. Sec. 3693, Rev. C. 1907; re-en. Sec. 5785, R.C.M. 1921; Cal. Civ. C. Sec. 157; Field Civ. C. Sec. 78; re-en. Sec. 5785, R.C.M. 1935; R.C.M. 1947, 36-104; amd. Sec. 2, Ch. 407, L. 1979.

40-2-202. Individual property of married person. All the property of a married person owned before marriage and that acquired afterwards is his individual property. The married person may, without consent, agreement, and signature of his spouse, convey and transfer his individual property, real or personal, including the fee simple title to real property, or execute a power of attorney for the conveyance and transfer thereof.

History: En. Sec. 220, Civ. C. 1895; re-en. Sec. 3700, Rev. C. 1907; re-en. Sec. 5792, R.C.M. 1921; Cal. Civ. C. Sec. 162; amd. Sec. 1, Ch. 63, L. 1923; re-en. Sec. 5792, R.C.M. 1935; amd. Sec. 3, Ch. 293, L. 1975; R.C.M. 1947, 36-111.

Cross-References

Dissolution — disposition of property, 40-4-202.

Transfer of property, Title 70, ch. 1, part 5; Title 70, ch. 20.

Married persons — execution of power in respect to real property, 70-15-303.

UPC — power of attorney — estates and probate proceedings, Title 72, ch. 5, part 5.

40-2-203. Inventory of individual personal property of married person. A married person's title to and ownership of his individual property may be proved or demonstrated in the same manner that a single person's ownership of or title to his individual property may be proved. Provided, however, that if a married person chooses, he may make out and sign an inventory of his individual personal property, which inventory shall be acknowledged or proved in the same manner required by law for the acknowledgment or proof of a grant of real property and recorded in the office of the county clerk of the county in which the person lives.

History: En. Sec. 221, Civ. C. 1895; re-en. Sec. 3701, Rev. C. 1907; re-en. Sec. 5793, R.C.M. 1921; Cal. Civ. C. Sec. 165; re-en. Sec. 5793, R.C.M. 1935; amd. Sec. 4, Ch. 293, L. 1975; R.C.M. 1947, 36-112.

Cross-References

Documents subject to recording, 7-4-2613.

Action for quieting title to personal property, 70-2-201.

Partition of personal and real property, 70-2-211, 70-2-212.

40-2-204. Effect of filing inventory. The filing of the inventory in the clerk's office is notice and prima facie evidence of the title of the person so filing.

History: En. Sec. 222, Civ. C. 1895; re-en. Sec. 3702, Rev. C. 1907; re-en. Sec. 5794, R.C.M. 1921; Cal. Civ. C. Sec. 166; re-en. Sec. 5794, R.C.M. 1935; amd. Sec. 5, Ch. 293, L. 1975; R.C.M. 1947, 36-113.

40-2-205. Earnings and accumulations of married person. The earnings and accumulations of a married person are not liable for the debts of that person's spouse except for debts incurred for necessary articles procured for the use and benefit of the married person, his spouse, or minor children.

History: En. Sec. 223, Civ. C. 1895; re-en. Sec. 3703, Rev. C. 1907; re-en. Sec. 5795, R.C.M. 1921; Cal. Civ. C. Sec. 168; re-en. Sec. 5795, R.C.M. 1935; amd. Sec. 6, Ch. 293, L. 1975; R.C.M. 1947, 36-114.

Cross-References

Liability for acts or debts of spouse, 40-2-106.

Obligations of parents for support and education of their children, 40-6-211.

Allowance to parent, 40-6-212.

Reciprocal duties of parents and children in maintaining each other, 40-6-214.

When parent liable for necessaries supplied to child, 40-6-215.

When parent not liable for support furnished child, 40-6-216.

Minor cannot disaffirm contract for necessaries, 41-1-305.

Nonsupport, 45-5-621.

Endangering welfare of children, 45-5-622.

40-2-206. Same — when separated. The earnings and accumulations of a married person and of his minor children living with him or in his custody, while he is living separate from his spouse, are the individual property of such person except that, to the extent that a mutual duty of support between the husband and wife as established by 40-2-102 still exists, such earnings and accumulations are liable for debts incurred for necessary articles procured for the use and benefit of the married person, his spouse, or minor children.

History: En. Sec. 224, Civ. C. 1895; re-en. Sec. 3704, Rev. C. 1907; re-en. Sec. 5796, R.C.M. 1921; Cal. Civ. C. Sec. 169; re-en. Sec. 5796, R.C.M. 1935; amd. Sec. 7, Ch. 293, L. 1975; R.C.M. 1947, 36-115.

Cross-References

Liability for acts or debts of spouse, 40-2-106.

Separation agreement, 40-4-201.

Obligations of parents for support and education of their children, 40-6-211.

Allowance to parent, 40-6-212.

Reciprocal duties of parents and children in maintaining each other, 40-6-214.

When parent liable for necessaries supplied to child, 40-6-215.

When parent not liable for support furnished child, 40-6-216.

Married person not bound for support of spouse's children by former marriage, 40-6-217.

Nonsupport, 45-5-621.

Endangering welfare of children, 45-5-622.

40-2-207. Work and labor of married person. All work and labor performed by a married person for a person other than his spouse and children shall, unless there is a written agreement on his part to the contrary, be presumed to be performed on his separate account. This section does not affect the liability of earnings for debts incurred for necessary articles procured for the use and benefit of the married person, his spouse, or minor children, as established by 40-2-205, 40-2-206, 40-2-209, and 40-2-210.

History: En. Sec. 1442, 5th Div. Comp. Stat. 1887; re-en. Sec. 225, Civ. C. 1895; re-en. Sec. 3705, Rev. C. 1907; re-en. Sec. 5797, R.C.M. 1921; re-en. Sec. 5797, R.C.M. 1935; amd. Sec. 8, Ch. 293, L. 1975; R.C.M. 1947, 36-116.

Cross-References

Assignment of wages by married person, 31-1-306.

Payment of wages generally, 39-3-204.

Liability for acts or debts of spouse, 40-2-106.

Obligations of parents for support and education of their children, 40-6-211.

Allowance to parent, 40-6-212.

Reciprocal duties of parents and children in maintaining each other, 40-6-214.

When parent liable for necessaries supplied to child, 40-6-215.

When parent not liable for support furnished child, 40-6-216.

Married person not bound for support of spouse's children by former marriage, 40-6-217.

Nonsupport, 45-5-621.

Endangering welfare of children, 45-5-622.

40-2-208. Debts of spouse contracted before marriage. The property of a married person is not liable for the debts of the person's spouse contracted before marriage.

History: En. Sec. 226, Civ. C. 1895; re-en. Sec. 3706, Rev. C. 1907; re-en. Sec. 5798, R.C.M. 1921; Cal. Civ. C. Sec. 170; re-en. Sec. 5798, R.C.M. 1935; amd. Sec. 9, Ch. 293, L. 1975; R.C.M. 1947, 36-117.

Cross-References

Redemption by debtor from spouse, 25-13-805.

Effect of redemption by debtor or debtor's spouse, 25-13-809.

Liability for acts or debts of spouse, 40-2-106.

Allowance to parent, 40-6-212.

Married person not bound for support of spouse's children by former marriage, 40-6-217.

40-2-209. Individual property of married person — how far liable. Individual property of a married person listed in an inventory as provided in 40-2-203 and 40-2-204 or otherwise proved to be the individual property of the married person is exempt from all debts and liabilities of that person's spouse, except:

(1) when the debt or liability is for necessary articles procured for the use and benefit of the married person, the spouse, or minor children; or

(2) when the property is in the sole and exclusive possession of the spouse and the creditors have dealt with the spouse in good faith on the credit of the individual property without knowledge that the property does not belong to the spouse.

History: En. Sec. 1, p. 369, Bannack Stat.; re-en. Sec. 1, p. 521, Cod. Stat. 1871; re-en. Sec. 866, 5th Div. Rev. Stat. 1879; re-en. Sec. 1432, 5th Div. Comp. Stat. 1887; amd. Sec. 227, Civ. C. 1895; re-en. Sec. 3707, Rev. C. 1907; re-en. Sec. 5799, R.C.M. 1921; Cal. Civ. C. Sec. 171; re-en. Sec. 5799, R.C.M. 1935; amd. Sec. 10, Ch. 293, L. 1975; R.C.M. 1947, 36-118.

Cross-References

Judgments for or against married person, 25-9-102.

Liability for acts or debts of spouse, 40-2-106.

Obligations of parents for support and education of their children, 40-6-211.

Allowance to parent, 40-6-212.

Reciprocal duties of parents and children in maintaining each other, 40-6-214.

When parent liable for necessaries supplied to child, 40-6-215.

When parent not liable for support furnished child, 40-6-216.

Married person not bound for support of spouse's children by former marriage, 40-6-217.

Nonsupport, 45-5-621.

Endangering welfare of children, 45-5-622.

40-2-210. Necessity determined by standard of living. For purposes of determining whether a married person's earnings or individual property are exempt from the debts incurred by the person's spouse, the phrase "necessary articles" includes all such goods and services as are reasonably required to provide for the health, welfare, comfort, and education of the married person, his spouse, and minor children, taking into consideration the earnings, resources, and general standard of living of such persons.

History: En. 36-118.1 by Sec. 11, Ch. 293, L. 1975; R.C.M. 1947, 36-118.1.

Cross-References

Obligations of parents for support and education of their children, 40-6-211.

When parent liable for necessaries supplied to child, 40-6-215.

Minor cannot disaffirm contract for necessaries, 41-1-305.

Nonsupport, 45-5-621.

Endangering welfare of children, 45-5-622.

Part 3

Power of Married Persons to Contract

Part Cross-References

Contracts, Title 28, ch. 2, 3.

40-2-301. Husband and wife may contract. Either husband or wife may enter into any engagement or transaction with the other or with any other person respecting property which either might, if unmarried, subject in transactions between themselves to the general rules which control the actions of persons occupying confidential relations with each other, as defined by the provisions of this code relative to trusts.

History: En. Sec. 214, Civ. C. 1895; re-en. Sec. 3694, Rev. C. 1907; re-en. Sec. 5786, R.C.M. 1921; Cal. Civ. C. Sec. 158; Field Civ. C. Sec. 79; re-en. Sec. 5786, R.C.M. 1935; R.C.M. 1947, 36-105.

Cross-References

Who may contract, 28-2-201.

Mutual obligations of husband and wife, 40-2-101.

Separation agreement, 40-4-201.

Trust Code, Title 72, ch. 33 through 36.

40-2-302. Liability of spouse. The contracts made by a married person in respect to his individual property, labor, or services shall not be binding upon the person's spouse nor render him or his property liable therefor; but the contracting person and that person's individual property shall be liable on such contracts in the same manner as if such person were sole.

History: En. Sec. 1446, 5th Div. Comp. Stat. 1887; re-en. Sec. 254, Civ. C. 1895; re-en. Sec. 3734, Rev. C. 1907; re-en. Sec. 5810, R.C.M. 1921; re-en. Sec. 5810, R.C.M. 1935; amd. Sec. 16, Ch. 293, L. 1975; R.C.M. 1947, 36-129.

Cross-References

Judgment for or against married person, 25-9-102.

Liability for acts or debts of spouse, 40-2-106.

40-2-303. Alteration of legal relation by contract — separation agreement. A husband and wife cannot by any contract with each other alter their legal relation, except as to property and except that they may agree, in writing, to an immediate separation and may make provision for the support of either of them and of their children during such separation.

History: En. Sec. 215, Civ. C. 1895; re-en. Sec. 3695, Rev. C. 1907; re-en. Sec. 5787, R.C.M. 1921; Cal. Civ. C. Sec. 159; Based on Field Civ. C. Sec. 80; re-en. Sec. 5787, R.C.M. 1935; R.C.M. 1947, 36-106.

Cross-References

What is unlawful, 28-2-701.

Contracts that violate policy of law — exemption from responsibility, 28-2-702.

Restraints upon legal proceedings void, 28-2-708.

What contracts must be in writing, 28-2-903.

Legal separation, 40-4-104.

Separation agreement, 40-4-201.

Right of election personal to surviving spouse — incapacitated surviving spouse, 72-2-223.

Waiver of rights by spouse, 72-2-224.

40-2-304. Consideration for separation. The mutual consent of the parties is a sufficient consideration for such an agreement as mentioned in 40-2-303.

History: En. Sec. 216, Civ. C. 1895; re-en. Sec. 3696, Rev. C. 1907; re-en. Sec. 5788, R.C.M. 1921; Cal. Civ. C. Sec. 160; Field Civ. C. Sec. 81; re-en. Sec. 5788, R.C.M. 1935; R.C.M. 1947, 36-107.

Cross-References

What constitutes good consideration, 28-2-801.

40-2-305 through 40-2-310 reserved.

40-2-311. Rights of husband and wife — how governed. The property rights of the husband and wife are governed by parts 1 through 3 of this chapter, unless there is a marriage settlement containing stipulations contrary thereto.

History: En. Sec. 247, Civ. C. 1895; re-en. Sec. 3727, Rev. C. 1907; re-en. Sec. 5803, R.C.M. 1921; Cal. Civ. C. Sec. 177; re-en. Sec. 5803, R.C.M. 1935; R.C.M. 1947, 36-122.

Cross-References

Separation agreement, 40-4-201.

Disposition of property, 40-4-202.

40-2-312. Marriage settlement contracts — how executed. Except as provided in part 6 of this chapter, all contracts for marriage settlements must be in writing and executed and acknowledged or proved in like manner as a grant of land is required to be executed and acknowledged or proved.

History: En. Sec. 248, Civ. C. 1895; re-en. Sec. 3728, Rev. C. 1907; re-en. Sec. 5804, R.C.M. 1921; Cal. Civ. C. Sec. 178; re-en. Sec. 5804, R.C.M. 1935; R.C.M. 1947, 36-123; amd. Sec. 11, Ch. 189, L. 1987.

Cross-References

What contracts must be in writing, 28-2-903.

Separation agreement, 40-4-201.

40-2-313. Repealed. Sec. 14, Ch. 189, L. 1987.

History: En. Sec. 249, Civ. C. 1895; re-en. Sec. 3729, Rev. C. 1907; re-en. Sec. 5805, R.C.M. 1921; Cal. Civ. C. Sec. 179; re-en. Sec. 5805, R.C.M. 1935; R.C.M. 1947, 36-124.

40-2-314. Effect of recording. Except as provided in part 6 of this chapter, the recording or nonrecording of such contract has a like effect as the recording or nonrecording of a grant of real property.

History: En. Sec. 250, Civ. C. 1895; re-en. Sec. 3730, Rev. C. 1907; re-en. Sec. 5806, R.C.M. 1921; Cal. Civ. C. Sec. 180; re-en. Sec. 5806, R.C.M. 1935; R.C.M. 1947, 36-125; amd. Sec. 12, Ch. 189, L. 1987.

Cross-References

Effect of recording, Title 70, ch. 21, part 3.

40-2-315. Marriage settlement by minors. A minor capable of contracting marriage may make a valid marriage settlement, as herein provided.

History: En. Sec. 251, Civ. C. 1895; re-en. Sec. 3731, Rev. C. 1907; re-en. Sec. 5807, R.C.M. 1921; Cal. Civ. C. Sec. 181; re-en. Sec. 5807, R.C.M. 1935; R.C.M. 1947, 36-126.

Cross-References

Minor cannot disaffirm certain obligations, 41-1-306.

Part 4

Battered Spouses Grant Programs (Renumbered by Code Commissioner, 1991)

Part Compiler's Comments

Sections Renumbered:

40-2-401. Renumbered 52-6-101.
40-2-402. Renumbered 52-6-102.
40-2-403. Renumbered 52-6-103.
40-2-404. Renumbered 52-6-104.
40-2-405. Renumbered 52-6-105.

Part 5 reserved

Part 6
Uniform Premarital Agreement Act

Part Cross-References
Individual property of married person, 40-2-202.

40-2-601. Short title. This part may be cited as the "Uniform Premarital Agreement Act".
History: **En. Sec. 1, Ch. 189, L. 1987.**

40-2-602. Application and construction. This part must be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of this part among the states enacting it.
History: **En. Sec. 2, Ch. 189, L. 1987.**

40-2-603. Definitions. As used in this part, the following definitions apply:

(1) "Premarital agreement" means an agreement between prospective spouses made in contemplation of marriage and to be effective upon marriage.

(2) "Property" means an interest, present or future, legal or equitable, vested or contingent, in real or personal property, including income and earnings.
History: **En. Sec. 3, Ch. 189, L. 1987.**

40-2-604. Formalities. A premarital agreement must be in writing and signed by both parties. It is enforceable without consideration.
History: **En. Sec. 4, Ch. 189, L. 1987.**

40-2-605. Content. (1) Parties to a premarital agreement may contract with respect to:

(a) the rights and obligations of each of the parties in any of the property of either or both of them, whenever and wherever acquired or located;

(b) the right to buy, sell, use, transfer, exchange, abandon, lease, consume, expend, assign, create a security interest in, mortgage, encumber, dispose of, or otherwise manage and control property;

(c) the disposition of property upon separation, marital dissolution, death, or the occurrence or nonoccurrence of any other event;

(d) the modification or elimination of spousal support;

(e) the making of a will, trust, or other arrangement to carry out the provisions of the agreement;

(f) the ownership rights in and disposition of the death benefit from a life insurance policy;

(g) the choice of law governing the construction of the agreement; and

(h) any other matter, including their personal rights and obligations, not in violation of public policy or a statute imposing a criminal penalty.

(2) The right of a child to support may not be adversely affected by a premarital agreement.
History: **En. Sec. 5, Ch. 189, L. 1987.**

40-2-606. When agreement becomes effective. A premarital agreement becomes effective upon marriage.
History: **En. Sec. 6, Ch. 189, L. 1987.**

40-2-607. Amendment — revocation. After marriage, a premarital agreement may be amended or revoked only by a written agreement signed by both parties. The amended agreement or the revocation is enforceable without consideration.

History: **En. Sec. 7, Ch. 189, L. 1987.**

40-2-608. Enforcement. (1) A premarital agreement is not enforceable if the party against whom enforcement is sought proves that:

(a) that party did not execute the agreement voluntarily; or

(b) the agreement was unconscionable when it was executed and, before execution of the agreement, that party:

(i) was not provided a fair and reasonable disclosure of the property or financial obligations of the other party;

(ii) did not voluntarily and expressly waive, in writing, any right to disclosure of the property or financial obligations of the other party beyond the disclosure provided; and

(iii) did not have or reasonably could not have had an adequate knowledge of the property or financial obligations of the other party.

(2) If a provision of a premarital agreement modifies or eliminates spousal support and that modification or elimination causes one party to the agreement to be eligible for support under a program of public assistance at the time of separation or marital dissolution, a court, notwithstanding the terms of the agreement, may require the other party to provide support to the extent necessary to avoid that eligibility.

(3) An issue of unconscionability of a premarital agreement must be decided by the court as a matter of law.

History: **En. Sec. 8, Ch. 189, L. 1987.**

40-2-609. Enforcement when marriage void. If a marriage is declared invalid, an agreement that would otherwise have been a premarital agreement is enforceable only to the extent necessary to avoid an inequitable result.

History: **En. Sec. 9, Ch. 189, L. 1987.**

Cross-References

Declaration of invalidity, 40-1-402.

40-2-610. Limitation of actions. Any statute of limitations applicable to an action asserting a claim for relief under a premarital agreement is tolled during the marriage of the parties to the agreement. However, equitable defenses limiting the time for enforcement, including laches and estoppel, are available to either party.

History: **En. Sec. 10, Ch. 189, L. 1987.**

CHAPTER 3

RECONCILIATION

Part 1 — Montana Conciliation Law

40-3-101. Citation.
40-3-102. Purposes.
40-3-103. Use of shall and may.
40-3-104. Application.

40-3-105 through 40-3-110 reserved.
40-3-111. Conciliation court — jurisdiction.
40-3-112. Selection of judges.
40-3-113. Transfer of cases.
40-3-114. Budget.
40-3-115. Probation officers' duties.
40-3-116. Privacy of hearings.
40-3-117 through 40-3-120 reserved.
40-3-121. Filing of petition.
40-3-122. Petition form and contents.
40-3-123. No fees.
40-3-124. Manner of conciliation.
40-3-125. Hearings.
40-3-126. Orders — reconciliation agreement.
40-3-127. Dissolution, declaration of invalidity, or separate maintenance proceeding — effect.

Part 1
Montana Conciliation Law

Part Cross-References

Montana Family Policy Act, Title 41, ch. 7.

40-3-101. Citation. This chapter may be cited as the "Montana Conciliation Law".

History: En. Sec. 1, Ch. 238, L. 1963; R.C.M. 1947, 36-201.

40-3-102. Purposes. The purposes of this chapter are to protect the rights of children and to promote the public welfare by preserving, promoting, and protecting family life and the institution of matrimony and to provide means for the reconciliation of spouses and the amicable settlement of domestic and family controversies.

History: En. Sec. 2, Ch. 238, L. 1963; R.C.M. 1947, 36-202(1).

Cross-References

Rights and obligations of minors, Title 41, ch. 1.

40-3-103. Use of shall and may. As used in this chapter "shall" is mandatory and "may" is permissive.

History: En. Sec. 2, Ch. 238, L. 1963; R.C.M. 1947, 36-202(2).

40-3-104. Application. The provisions of this chapter shall be applicable only in counties in which the district court determines that the social conditions in the county and the number of domestic relations cases in the courts render the procedures herein provided necessary to the full and proper consideration of such cases and the effectuation of the purposes of this chapter. Such determination shall be made annually in the month of January or July by the judge of the district court in counties having only one such judge and by a majority of the judges of the district court in counties having more than one such judge.

History: En. Sec. 2, Ch. 238, L. 1963; R.C.M. 1947, 36-202(3).

Cross-References

District Court — powers respecting conduct of business, 3-1-111.

District Court — means to carry jurisdiction into effect, 3-1-113.

40-3-105 through 40-3-110 reserved.

40-3-111. Conciliation court — jurisdiction. (1) Each district court shall exercise the jurisdiction conferred by this chapter and while sitting in the exercise of such jurisdiction shall be known and referred to as the "conciliation court".

(2) Whenever any controversy exists between the spouses which may, unless a reconciliation is achieved, result in the dissolution or annulment of the marriage or in the disruption of the household and there is any minor child of the spouses or of either of them whose welfare might be affected thereby, the conciliation court shall have jurisdiction over the controversy and over the parties thereto and all persons having any relation to the controversy as further provided in this chapter.

(3) Whenever application is made to the conciliation court for conciliation proceedings in respect to a controversy between spouses or a contested action for dissolution, annulment, or separate maintenance but there is no minor child whose welfare may be affected by the results of the controversy and it appears to the court that reconciliation of the spouses or amicable adjustment of the controversy can probably be achieved and that the work of the court in cases involving children will not be seriously impeded by acceptance of the case, the court may accept and dispose of the case in the same manner as similar cases involving the welfare of children are disposed of. In the event of such application and acceptance, the court shall have the same jurisdiction over the controversy and the parties thereto or having any relation thereto that it has under this chapter in similar cases involving the welfare of children.

(4) The jurisdiction of the conciliation courts and the powers thereof shall be as provided in the constitution of Montana, Title 3, chapter 5, parts 1 through 4, and acts amendatory and relating thereto, including the right of disqualification of any judge of the conciliation court.

History: (1), (4)En. Sec. 3, Ch. 238, L. 1963; amd. Sec. 16, Ch. 100, L. 1973; Sec. 36-203, R.C.M. 1947; (2), (3)En. Sec. 4, Ch. 238, L. 1963; amd. Sec. 2, Ch. 33, L. 1977; Sec. 36-204, R.C.M. 1947; R.C.M. 1947, 36-203(1), (8), 36-204(1), (13).

Cross-References

District Court — jurisdiction, Art. VII, sec. 4, Mont. Const.

Means to carry jurisdiction into effect, 3-1-113.

Child abuse, neglect, and dependency — jurisdiction and venue, 41-3-103.

Youth Court — jurisdiction, Title 41, ch. 5, part 2.

40-3-112. Selection of judges. In counties having more than one judge of the district court, the judges of such court shall annually, in the month of January or July, designate at least one judge to hear all cases under this chapter. The judge or judges so designated shall hold as many sessions of the conciliation court in each week as are necessary for the prompt disposition of the business before the court.

History: En. Sec. 3, Ch. 238, L. 1963; amd. Sec. 16, Ch. 100, L. 1973; R.C.M. 1947, 36-203(2).

40-3-113. Transfer of cases. Another district judge may be called in by the judge of the conciliation court to act as judge of the conciliation court during any period when the judge of the conciliation court is on vacation, absent, or for any reason unable to perform his duties. Any judge so appointed shall have all of the powers and authority of a judge of the conciliation court in cases under this chapter.

History: **En. Sec. 3, Ch. 238, L. 1963; amd. Sec. 16, Ch. 100, L. 1973; R.C.M. 1947, 36-203(3).**

Cross-References

Transfer when judge unable to hear motion or return of order, 25-4-102.

40-3-114. Budget. The provisions of the county budget system, Title 7, chapter 6, part 23, shall, except as provided by 40-3-125(3), be applicable to expenditures for the court of conciliation.

History: **En. Sec. 3, Ch. 238, L. 1963; amd. Sec. 16, Ch. 100, L. 1973; R.C.M. 1947, 36-203(4); amd. Sec. 3, Ch. 405, L. 1979.**

40-3-115. Probation officers' duties. The probation officer in every county shall give such assistance to the conciliation court as the court may request to carry out the purposes of this chapter, and to that end the probation officer shall, upon request and with the consent of both parties, make investigations and reports as requested and, in cases pursuant to this chapter, shall exercise all the powers and perform all the duties granted or imposed by the laws of this state relating to probation or to probation officers.

History: **En. Sec. 3, Ch. 238, L. 1963; amd. Sec. 16, Ch. 100, L. 1973; R.C.M. 1947, 36-203(6).**

Cross-References

Probation officers — appointment and supervision, 41-5-201, 41-5-1701.

Powers and duties of probation officers, 41-5-1302, 41-5-1703.

Qualifications of probation officers, 41-5-1702.

40-3-116. Privacy of hearings. (1) All district court hearings or conferences in proceedings under this chapter shall be held in private, and the court shall exclude all persons except the officers of the court, the parties, their counsel, and witnesses. Conferences may be held with each party and his counsel separately. In the discretion of the judge or counselor conducting the conference or hearing, all counsel may be excluded. All communications, verbal or written, from parties to the judge or counselor in a proceeding under this chapter shall be deemed made to such officer in official confidence.

(2) The files of the conciliation court shall be closed. The petition, supporting affidavit, reconciliation agreement, and any court order made in the matter may be opened to inspection by any party or his counsel upon the written authority of the judge of the conciliation court.

History: **En. Sec. 3, Ch. 238, L. 1963; amd. Sec. 16, Ch. 100, L. 1973; R.C.M. 1947, 36-203(7).**

Cross-References

Right to know, Art. II, sec. 9, Mont. Const.

Right of privacy, Art. II, sec. 10, Mont. Const.

Records of officers open to public inspection, 2-6-104.

Sittings of court — when private, 3-1-313.

40-3-117 through 40-3-120 reserved.

40-3-121. Filing of petition. Prior to the filing of any action for dissolution, annulment, or separate maintenance, either spouse or both spouses may file in the conciliation court a petition invoking the jurisdiction of the court for the purpose of preserving the marriage by effecting a reconciliation between the parties or for amicable settlement of the controversy between the spouses so as to avoid further litigation over the issue involved.

History: **En. Sec. 4, Ch. 238, L. 1963; amd. Sec. 2, Ch. 33, L. 1977; R.C.M. 1947, 36-204(2).**

40-3-122. Petition form and contents. (1) The petition shall be captioned substantially as follows:

District Court of the State of Montana
For the County of ....

Upon the petition of .... Petitioner	Petition for Conciliation (Under the Conciliation Court Law)
And concerning .... and .... Respondents.	

To the Conciliation Court:

(2) The petition shall:

(a) allege that a controversy exists between the spouses and request the aid of the court to effect a reconciliation or an amicable settlement of the controversy;

(b) state the name and age of each minor child whose welfare may be affected by the controversy;

(c) state the name and address of the petitioner or the names and addresses of the petitioners;

(d) if the petition is presented by one spouse only, name the other spouse as a respondent and state the address of that spouse;

(e) also name as a respondent any other person who has any relation to the controversy and state the address of the person, if known to the petitioner;

(f) state such other information as the court may by rule require.

(3) The clerk of the court shall provide, at the expense of the county, blank forms for petitions for filing pursuant to this chapter. The probation officers of the county and the attaches and employees of the conciliation court shall assist any person in the preparation and presentation of any such petition when any person requests such assistance. All public officers in each county shall refer to the conciliation court all petitions and complaints made to them in respect to controversies within the jurisdiction of the conciliation court.

History: En. Sec. 4, Ch. 238, L. 1963; amd. Sec. 2, Ch. 33, L. 1977; R.C.M. 1947, 36-204(3) thru (5).

40-3-123. No fees. No fee may be charged by any officer for filing the petition nor may any fee be charged by any officer for the performance of any duty pursuant to this chapter.

History: En. Sec. 4, Ch. 238, L. 1963; amd. Sec. 2, Ch. 33, L. 1977; R.C.M. 1947, 36-204(6).

Cross-References

Fees of Clerk of District Court, 25-1-201.

40-3-124. Manner of conciliation. (1) The judge of the conciliation court may hear all matters invoked under this chapter, or he may refer such matters to a pastor or director of any religious denomination to which the parties may belong, psychiatrist, physician, attorney, social worker, or other person who is competent and qualified by training and experience in personal counseling. Such person shall be referred to herein as the conciliation counselor.

(2) The conciliation counselor shall:

(a) hold conciliation conferences with parties to, and hearings in, proceedings under this chapter and make recommendations concerning such proceedings to the judge of the conciliation court;

(b) cause such reports to be made, such statistics to be compiled, and such records to be kept as the judge of the conciliation court may direct.

History: **En. Sec. 3, Ch. 238, L. 1963; amd. Sec. 16, Ch. 100, L. 1973; R.C.M. 1947, 36-203(5).**

40-3-125. Hearings. (1) The court shall fix a reasonable time and place for hearing on the petition and shall cause such notice of the filing of the petition and the time and place of the hearing as it considers necessary to be given to the respondents. The court may, when it considers it necessary, issue a citation to any respondent requiring him to appear at the time and place stated in the citation and may require the attendance of witnesses as in other civil cases.

(2) For the purpose of conducting hearings pursuant to this chapter, the conciliation court may be convened at any time and place within the district and the hearing may be had in chambers or otherwise, except that the time and place for hearing may not be different from the time and place provided by law for the trial of civil actions if any party, prior to the hearing, objects to any different time or place.

(3) The hearing shall be conducted informally as a conference or series of conferences to effect a reconciliation of the spouses or an amicable adjustment or settlement of the issues of the controversy. To facilitate and promote the purposes of this chapter, the court may, with the consent of both of the parties to the proceeding, recommend or invoke the aid of physicians, psychiatrists, other specialists or scientific experts, or the pastor or director of any religious denomination to which the parties may belong. Such aid, however, shall not be at the expense of the court or of the county, unless the county commissioners of the county specifically provide and authorize such aid.

History: **En. Sec. 4, Ch. 238, L. 1963; amd. Sec. 2, Ch. 33, L. 1977; R.C.M. 1947, 36-204(7) thru (9).**

Cross-References

General rules regarding procedure, Title 3, ch. 1, part 3.

Sittings of court — when private, 3-1-313.

Terms and location of District Court, 3-5-401.

40-3-126. Orders — reconciliation agreement. (1) At or after hearing, the court may make such orders in respect to the conduct of the spouses and the subject matter of the controversy as the court considers necessary to preserve the marriage or to implement the reconciliation of the spouses, but in no event may such orders be effective for more than 30 days from the hearing of the petition, unless the parties mutually consent to a continuation of such time.

(2) Any reconciliation agreement between the parties may be reduced to writing and, with the consent of the parties, a court order may be made requiring the parties to comply fully therewith.

History: **En. Sec. 4, Ch. 238, L. 1963; amd. Sec. 2, Ch. 33, L. 197; R.C.M. 1947, 36-204(10).**

40-3-127. Dissolution, declaration of invalidity, or separate maintenance proceeding — effect. (1) During a period begining upon the filing of the petition for conciliation and continuing until 30 days after the hearing of the petition for conciliation, neither spouse shall file any action for dissolution, declaration of invalidity, or separate maintenance.

(2) If after the expiration of such period the controversy between the spouses has not been terminated, either spouse may institute proceedings for dissolution, declaration of invalidity, or separate maintenance. The pendency of a dissolution, declaration of invalidity, or separate maintenance action may not operate as a bar to the instituting of proceedings for conciliation under this chapter.

(3) Whenever any action for dissolution, declaration of invalidity, or separate maintenance is filed in the district court and it appears to the court at any time during the pendency of the action that there is any minor child of the spouses or of either of them whose welfare may be adversely affected by the dissolution or declaration of invalidity of the marriage or the disruption of the household and that there appears to be some reasonable possibility of a reconciliation being effected, the case may be transferred to the conciliation court for proceedings for reconciliation of the spouses or amicable settlement of issues in controversy, in accordance with the provisions of this chapter.

History: **En. Sec. 4, Ch. 238, L. 1963; amd. Sec. 2, Ch. 33, L. 1977; R.C.M. 1947, 36-204(11), (12); amd. Sec. 169, Ch. 575, L. 1981.**

Cross-References

Declaration of invalidity, 40-1-402.

Dissolution of marriage — legal separation, 40-4-104.

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CHAPTER 4

TERMINATION OF MARRIAGE, CHILD CUSTODY, SUPPORT

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Part 1
Separation — Dissolution of Marriage

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Court proceedings may be private in divorce action, 3-1-313.

Displaced Homemaker Act, Title 39, ch. 7, part 3.

40-4-101. Purposes. This chapter shall be liberally construed and applied to promote its underlying purposes, which are to:

(1) strengthen and preserve the integrity of marriage and safeguard family relationships;

(2) promote the amicable settlement of disputes that have arisen between parties to a marriage;

(3) mitigate the potential harm to the spouses and their children caused by the process of legal dissolution of marriage;

(4) make reasonable provision for spouse and minor children during and after litigation; and

(5) make the law of legal dissolution of marriage effective for dealing with the realities of matrimonial experience by making irretrievable breakdown of the marriage relationship the sole basis for its dissolution.

History: En. 48-302 by Sec. 2, Ch. 536, L. 1975; R.C.M. 1947, 48-302(part).

Cross-References

Montana Conciliation Law, Title 40, ch. 3, part 1.

40-4-102. Uniformity of application and construction. This chapter shall be so applied and construed as to effectuate its general purpose to make uniform the law with respect to the subject of this chapter among those states which enact it.

History: En. 48-303 by Sec. 3, Ch. 536, L. 1975; R.C.M. 1947, 48-303.

40-4-103. Application of Montana Rules of Civil Procedure. (1) Except for proceedings under the Uniform Child Custody Jurisdiction and Enforcement Act, the Montana Rules of Civil Procedure apply to all proceedings under this chapter, except as otherwise provided in this chapter.

(2) A proceeding for dissolution of marriage or legal separation must be entitled, "In re the Marriage of.......... and............". A parenting or support proceeding must be entitled, "In re the (parenting) (support) of........".

(3) The initial pleading in all proceedings under this chapter must be denominated a petition. A responsive pleading must be denominated a response. Other pleadings, and all pleadings in other matters under this

chapter, must be denominated as provided in the Montana Rules of Civil Procedure.

(4) In this chapter, "decree" includes "judgment".

(5) A decree of dissolution or of legal separation, if made, may not be awarded to one of the parties but must provide that it affects the status previously existing between the parties in the manner decreed.

History: En. 48-315 by Sec. 15, Ch. 536, L. 1975; amd. Sec. 26, Ch. 537, L. 1977; R.C.M. 1947, 48-315(part); amd. Sec. 5, Ch. 343, L. 1997; amd. Sec. 2, Ch. 91, L. 1999.

Compiler's Comments

1999 Amendment: Chapter 91 in (1) after "Jurisdiction" inserted "and Enforcement". Amendment effective October 1, 1999.

Cross-References

Montana Rules of Civil Procedure, Title 25, ch. 20.

Application of Montana Rules of Civil Procedure, 40-1-105.

Uniform Child Custody Jurisdiction Act, Title 40, ch. 7, part 1.

40-4-104. Dissolution of marriage — legal separation. (1) The district court shall enter a decree of dissolution of marriage if:

(a) the court finds that one of the parties, at the time the action was commenced, was domiciled in this state or was stationed in this state while a member of the armed services and that the domicile or military presence has been maintained for 90 days preceding the making of the findings;

(b) the court finds that the marriage is irretrievably broken, which findings must be supported by evidence:

(i) that the parties have lived separate and apart for a period of more than 180 days preceding the commencement of this proceeding; or

(ii) that there is serious marital discord that adversely affects the attitude of one or both of the parties towards the marriage;

(c) the court finds that the conciliation provisions of the Montana Conciliation Law and of 40-4-107 either do not apply or have been met; and

(d) to the extent it has jurisdiction to do so, the court has considered, approved, or made provision for parenting, the support of any child entitled to support, the maintenance of either spouse, and the disposition of property.

(2) If a party requests a decree of legal separation rather than a decree of dissolution of marriage, the court shall grant the decree in that form unless the other party objects.

History: En. 48-316 by Sec. 16, Ch. 536, L. 1975; R.C.M. 1947, 48-316; amd. Sec. 1, Ch. 392, L. 1985; amd. Sec. 6, Ch. 343, L. 1997.

Cross-References

Residence — rules for determining, 1-1-215.

Proper place of trial — county in which petitioner has resided 90 days preceding commencement of action, 25-2-118.

Conciliation proceedings — effect on other proceedings, 40-3-127.

Support, parenting, parental contact, and related provisions, Title 40, ch. 4, part 2.

40-4-105. Procedure — commencement — pleadings — abolition of existing defenses. (1) The verified petition in a proceeding for dissolution of marriage or legal separation must allege that the marriage is irretrievably broken and must set forth:

(a) the age, occupation, and residence of each party and the party's length of residence in this state;

(b) the date of the marriage and the place at which it was registered;

(c) that the jurisdictional requirements of 40-4-104 exist and that the marriage is irretrievably broken in that either:

(i) the parties have lived separate and apart for a period of more than 180 days preceding the commencement of this proceeding; or

(ii) there is serious marital discord that adversely affects the attitude of one or both of the parties towards the marriage, and there is no reasonable prospect of reconciliation;

(d) the names, ages, and addresses of all living children of the marriage and whether the wife is pregnant;

(e) any arrangements as to support of the children and maintenance of a spouse;

(f) a proposed parenting plan, if applicable; and

(g) the relief sought.

(2) Either or both parties to the marriage may initiate the proceeding.

(3) If a proceeding is commenced by one of the parties, the other party must be served in the manner provided by the Montana Rules of Civil Procedure and may within 20 days after the date of service file a verified response. A decree may not be entered until 20 days after the date of service.

(4) Previously existing defenses to divorce and legal separation, including but not limited to condonation, connivance, collusion, recrimination, insanity, and lapse of time, are abolished.

(5) The court may join additional parties proper for the exercise of its authority to implement this chapter.

[(6) The social security number, if known, of a person subject to a decree of dissolution or a support order must be recorded in the records relating to the matter. At the request of a person subject to a decree of dissolution or a support order, the recordkeeper shall keep the social security number from this source confidential, except that the number may be provided to the department of public health and human services for use in administering Title IV-D of the Social Security Act.] *(Bracketed language terminates on occurrence of contingency—sec. 1, Ch. 27, L. 1999.)*

History: En. 48-317 by Sec. 17, Ch. 536, L. 1975; amd. Sec. 10, Ch. 33, L. 1977; R.C.M. 1947, 48-317; amd. Sec. 7, Ch. 343, L. 1997; amd. Sec. 24, Ch. 552, L. 1997; amd. Sec. 2, Ch. 545, L. 1999.

Compiler's Comments

1999 Amendment: Chapter 545 at beginning of second sentence in (6) inserted "At the request of a person subject to a decree of dissolution or a support order"; and made minor changes in style. Amendment effective July 1, 1999.

Contingent Termination — Request for Federal Exemptions: Section 1, Ch. 27, L. 1999, revised sec. 104, Ch. 552, L. 1997, to contain the following contingent termination provisions and order that the department of public health and human services seek federal exemptions: "(1) [Sections 9, 11, 22 through 24, and 95] [37-1-307, 40-1-107, 40-4-105, 40-5-922, 40-5-924, and 61-5-107] and the bracketed language in [sections 1 through 3, 10, 25, 45, and 89] [40-4-204, 40-5-226, 40-5-901, 40-5-906, 40-5-907, 40-5-923, and 40-6-116] terminate on the date of the suspension if the federal government suspends federal payments to this state for this state's child support enforcement program and for this state's program relating to temporary assistance to needy families because of this state's failure to enact law as required by the federal Personal Responsibility and Work Opportunity Reconciliation Act of 1996.

(2) [Sections 9, 11, 22 through 24, and 95] [37-1-307, 40-1-107, 40-4-105, 40-5-922, 40-5-924, and 61-5-107] and the bracketed language in [sections 1 through 3, 10, 25, 45, and 89] [40-4-204, 40-5-226, 40-5-901, 40-5-906, 40-5-907, 40-5-923, and 40-6-116] terminate on the date that a final decision is rendered in federal court invalidating the child support provisions of the federal Personal

Responsibility and Work Opportunity Reconciliation Act of 1996.

(3) If the director of the department of public health and human services certifies to the governor and the secretary of state in writing that one of the following provisions is no longer required by federal law because of repeal of or amendment to federal statutes that require that provision, the provision terminates on the date the certification takes effect:

(a) [section 9] [40-5-922];

(b) [section 11] [40-5-924];

(c) [sections 22 through 24] [37-1-307, 40-1-107, and 40-4-105];

(d) [section 95] [61-5-107];

(e) the bracketed provisions in [sections 1 through 3, 10, 25, 45, and 89] [40-4-204, 40-5-226, 40-5-901, 40-5-906, 40-5-907, 40-5-923, and 40-6-116].

(4) If the bracketed language in [sections 1 through 3, 10, 25, 45, and 89] [40-4-204, 40-5-226, 40-5-901, 40-5-906, 40-5-907, 40-5-923, and 40-6-116] terminates, the code commissioner is instructed to renumber subsections, adjust internal references, and correct grammar and arrangement." Amendment effective February 18, 1999.

Cross-References

Residence — rules for determining, 1-1-215.

Court proceeding may be private in divorce action, 3-1-313.

Montana Rules of Civil Procedure, Title 25, ch. 20.

Service of process, Rule 4D, M.R.Civ.P. (see Title 25, ch. 20.)

Application of Montana Rules of Civil Procedure, 40-1-105.

Alteration of legal relation by contract — separation agreement, 40-2-303.

Montana Conciliation Law, Title 40, ch. 3, part 1.

Recordation of marriage, 50-15-301.

40-4-106. Renumbered 40-4-121 by Code Commissioner, 1985.

40-4-107. Irretrievable breakdown. (1) If both of the parties by petition or otherwise have stated under oath or affirmation that the marriage is irretrievably broken or one of the parties has so stated and the other has not denied it, the court, after hearing, shall make a finding whether the marriage is irretrievably broken.

(2) If one of the parties has denied under oath or affirmation that the marriage is irretrievably broken, the court shall consider all relevant factors, including the circumstances that gave rise to filing the petition and the prospect of reconciliation, and shall:

(a) make a finding whether the marriage is irretrievably broken; or

(b) continue the matter for further hearing not fewer than 30 or more than 60 days later or as soon thereafter as the matter may be reached on the court's calendar and may suggest to the parties that they seek counseling. The court at the request of either party shall, or on its own motion may, order a conciliation conference. At the adjourned hearing the court shall make a finding whether the marriage is irretrievably broken.

(3) A finding of irretrievable breakdown is a determination that there is no reasonable prospect of reconciliation.

(4) Nothing in this section shall be interpreted to affect the provisions of chapter 3 of this title, known as the Montana Conciliation Law.

History: En. 48-319 by Sec. 19, Ch. 536, L. 1975; R.C.M. 1947, 48-319.

Cross-References

Cause of action for alienation of affections abolished, 27-1-601.

Conciliation Court — jurisdiction, 40-3-111.

Privacy of hearings, 40-3-116.

Manner of conciliation, 40-3-124.

40-4-108. Decree. (1) A decree of dissolution of marriage or of legal separation is final when entered, subject to the right of appeal. An appeal from the decree of dissolution that does not challenge the finding that the marriage is irretrievably broken does not delay the finality of that provision of the decree that dissolves the marriage beyond the time for appealing from that provision, and either of the parties may remarry pending appeal.

(2) No earlier than 6 months after entry of a decree of legal separation, the court on motion of either party shall convert the decree to a decree of dissolution of marriage.

(3) The clerk of the court shall give notice of the entry of a decree of dissolution:

(a) if the marriage is registered in this state, to the clerk of the district court of the county where the marriage is registered, who shall enter the fact of dissolution in the book in which the marriage license and certificate are recorded; or

(b) if the marriage is registered in another jurisdiction, to the appropriate official of that jurisdiction, with the request that the official enter the fact of dissolution in the appropriate record.

(4) Upon request by a wife whose marriage is dissolved or declared invalid, the court shall order the wife's maiden name or a former name restored.

History: En. 48-328 by Sec. 28, Ch. 536, L. 1975; amd. Sec. 1, Ch. 174, L. 1977; R.C.M. 1947, 48-328; amd. Sec. 2, Ch. 109, L. 1995.

Cross-References

Clerk of District Court — duties generally, 3-5-501.

Montana Rules of Appellate Procedure, Title 25, ch. 21.

Change of name, Title 27, ch. 31.

Decree of dissolution — vital statistics, 50-15-302.

Revocation of provision for spouse in will by divorce or annulment, 72-2-528.

40-4-109. Independence of provisions of decree or temporary order. If a party fails to comply with a provision of a decree or temporary order or injunction, the obligation of the other party to make payments for support or maintenance or to permit parental contact with the child is not suspended but the party may move the court to grant an appropriate order.

History: En. 48-329 by Sec. 29, Ch. 536, L. 1975; R.C.M. 1947, 48-329; amd. Sec. 8, Ch. 343, L. 1997.

Cross-References

Maintenance, 40-4-203.

Child support, 40-4-204.

Parental contact, 40-4-217.

40-4-110. Costs — professional fees. (1) The court from time to time, after considering the financial resources of both parties, may order a party to pay a reasonable amount for the cost to the other party of maintaining or defending any proceeding under chapters 1 and 4 and for professional fees, including sums for legal and professional services rendered and costs incurred prior to the commencement of the proceeding or after entry of judgment. The court may order that the amount be paid directly to the professional, who may enforce the order in the professional's name.

(2) The purpose of this section is to ensure that both parties have timely and equitable access to marital financial resources for costs incurred before, during, and after a proceeding under chapters 1 and 4.

History: En. 48-327 by Sec. 27, Ch. 536, L. 1975; R.C.M. 1947, 48-327; amd. Sec. 9, Ch. 343, L. 1997.

Cross-References

Allowable costs, Title 25, ch. 10, part 2.

Attorney fees, Title 25, ch. 10, part 3.

Representation of child, 40-4-205.

Modification, 40-4-219.

40-4-111 through 40-4-120 reserved.

40-4-121. Temporary order for maintenance or support, temporary injunction, or temporary restraining order. (1) In a proceeding for dissolution of marriage or for legal separation or in a proceeding for disposition of property or for maintenance or support following dissolution of the marriage by a court that lacked personal jurisdiction over the absent spouse, either party may move for temporary maintenance, temporary support of a child of the marriage entitled to support, or a temporary family support order. When a party is receiving public assistance, as defined in 40-5-201(12), for the minor children at issue or when a party receives public assistance during the life of a temporary family support order, the temporary family support order must designate separately the amounts of temporary child support and temporary maintenance, if any. The temporary child support order or the designated child support portion of the family support order must be determined as required in 40-4-204. The motion must be accompanied by an affidavit setting forth the factual basis for the motion, the amounts requested, a list of marital estate liabilities, a statement of sources of income of the parties and of a child of the marriage entitled to support, and, in the case of a motion for a temporary family support order, a proposal designating the party responsible for paying each liability. If ordered by a court, a temporary family support order must, without prejudice, direct one or both parties to pay, out of certain income sources, liabilities of the marital estate during the pendency of the action, including maintenance liabilities for a party or support of a child of the marriage entitled to support. If income sources are insufficient to meet the marital estate periodic liabilities, the temporary family support order may direct that certain liabilities be paid from assets of the marital estate. At any time during the proceedings, the court may order any temporary family support payments to be designated as temporary maintenance, temporary child support, or partial property distribution, retroactive to the date of the motion for a temporary family support order. When a party obtains public assistance, as defined in 40-5-201(12), or applies for services under Title IV-D of the Social Security Act, after the court has issued a temporary family support order, the petitioner shall promptly move the court for designation of the parts, if any, of the temporary family support order that are maintenance and child support and the court shall promptly so designate, determining the child support obligation as required in 40-4-204.

(2) As a part of a motion for temporary maintenance, temporary support of a child, or a temporary family support order or by independent motion accompanied by affidavit, either party may request the court to issue a temporary injunction for any of the following relief:

(a) restraining a person from transferring, encumbering, concealing, or otherwise disposing of any property, except in the usual course of business or for the necessities of life, and, if so restrained, requiring the person to notify the moving party of any proposed extraordinary expenditures made after the order is issued;

(b) restraining both parties from cashing, borrowing against, canceling, transferring, disposing of, or changing the beneficiaries of any insurance or other coverage, including life, health, automobile, and disability coverage held for the benefit of a party or a child of a party for whom support may be ordered;

(c) enjoining a party from molesting or disturbing the peace of the other party or of any family member or from stalking, as defined in 45-5-220;

(d) excluding a party from the family home or from the home of the other party upon a showing that physical or emotional harm would otherwise result;

(e) enjoining a party from removing a child from the jurisdiction of the court;

(f) ordering a party to complete counseling, including alcohol or chemical dependency counseling or treatment;

(g) providing other injunctive relief proper in the circumstances; and

(h) providing additional relief available under Title 40, chapter 15.

(3) When the clerk of the district court issues a summons pursuant to this chapter, the clerk shall issue and include with the summons a temporary restraining order:

(a) restraining both parties from transferring, encumbering, hypothecating, concealing, or in any way disposing of any property, real or personal, whether jointly or separately held, without either the consent of the other party or an order of the court, except in the usual course of business or for the necessities of life. The restraining order must require each party to notify the other party of any proposed extraordinary expenditures at least 5 business days before incurring the expenditures and to account to the court for all extraordinary expenditures made after service of the summons. However, the restraining order may not preclude either party from using any property to pay reasonable attorney fees in order to retain counsel in the proceeding.

(b) restraining both parties from cashing, borrowing against, canceling, transferring, disposing of, or changing the beneficiaries of any insurance or other coverage, including life, health, automobile, and disability coverage held for the benefit of a party or a child of a party for whom support may be ordered. However, nothing in this subsection (3) adversely affects the rights, title, or interest of a purchaser, encumbrancer, or lessee for value if the purchaser, encumbrancer, or lessee does not have actual knowledge of the restraining order.

(4) A person may seek the relief provided for in subsection (2) without filing a petition under this part for a dissolution of marriage or legal separation by filing a verified petition requesting relief under Title 27, chapter 19, part 3. Any temporary injunction entered under this subsection must be for a fixed period of time, not to exceed 1 year, and may be modified as provided in Title 27, chapter 19, part 4, and 40-4-208, as appropriate.

(5) The court may issue a temporary restraining order for a period not to exceed 20 days without requiring notice to the other party only if it finds on the basis of the moving affidavit or other evidence that irreparable injury will result to the moving party if an order is not issued until the time for responding has elapsed.

(6) A response may be filed within 20 days after service of notice of motion or at the time specified in the temporary restraining order.

(7) At the time of the hearing, the court shall determine whether good cause exists for the injunction to continue for 1 year.

(8) On the basis of the showing made and in conformity with 40-4-203 and 40-4-204, the court may issue a temporary injunction and an order for temporary maintenance, temporary child support, or temporary family support in amounts and on terms just and proper in the circumstance.

(9) A temporary order or injunction, entered pursuant to Title 40, chapter 15, or this section:

(a) may be revoked or modified on a showing by affidavit of the facts necessary to revocation or modification of a final decree under 40-4-208;

(b) terminates upon order of the court or when the petition is voluntarily dismissed and, in the case of a temporary family support order, upon entry of the decree of dissolution; and

(c) when issued under this section, must conspicuously bear the following: "Violation of this order is a criminal offense under 45-5-220 or 45-5-626."

(10) When the petitioner has fled the parties' residence, notice of the petitioner's new residence must be withheld except by order of the court for good cause shown.

History: En. 48-318 by Sec. 18, Ch. 536, L. 1975; R.C.M. 1947, 48-318; amd. Sec. 1, Ch. 180, L. 1981; amd. Sec. 4, Ch. 526, L. 1985; Sec. 40-4-106, MCA 1983; redes. 40-4-121 by Code Commissioner, 1985; amd. Sec. 1, Ch. 259, L. 1991; amd. Sec. 2, Ch. 292, L. 1993; amd. Sec. 1, Ch. 425, L. 1993; amd. Sec. 5, Ch. 350, L. 1995; amd. Sec. 1, Ch. 255, L. 1997; amd. Sec. 1, Ch. 256, L. 1997.

Cross-References

Justices' Courts, — civil jurisdiction, 3-10-301.

Injunctions, Rule 65, M.R.Civ.P. (see Title 25, ch. 20).

How preventive relief given, 27-1-403.

When preliminary injunction may be granted, 27-19-201.

Procedure for obtaining preliminary injunction, Title 27, ch. 19, part 3.

Interim parenting plan, 40-4-213.

Partner and family member assault, Title 40, ch. 15.

Order of protection, Title 40, ch. 15, part 2.

Partner or family member assault — penalty, 45-5-206.

Stalking — exemption — penalty, 45-5-220.

Sexual intercourse without consent, 45-5-503.

Endangering welfare of children, 45-5-622.

Sexual abuse of children, 45-5-625.

Ritual abuse of minor — exemptions — penalty, 45-5-627.

Circumstances in which peace officer may make arrests, 46-6-210.

Written report when no arrest made in domestic violence situation, 46-6-601.

Notice of rights to victim upon arrest in domestic violence situation, 46-6-602.

Partner or family member assault — seizure of weapon, 46-6-603.

Bringing arrested person before court, 46-7-101.

Bail — exception for partner of family member assault, 46-9-302.

Battered spouses grant program, Title 52, ch. 6, part 1.

40-4-122. Forms — distribution — filing. The attorney general shall prepare uniform sample instructions and petition and order forms necessary for allowing an applicant to obtain a temporary restraining order under 40-4-121 and uniform sample affidavits and orders of inability to pay filing fees or other costs. The attorney general shall distribute samples of the restraining order and the inability-to-pay-filing-fees order forms to the clerk of the district court in each county and to justice, city, and municipal courts. The clerk of the district court, justices of the peace, city, and municipal courts shall make forms available to the public at no charge.

History: En. Sec. 5, Ch. 526, L. 1985; amd. Sec. 2, Ch. 208, L. 1989.

40-4-123. Jurisdiction and venue. (1) District courts, municipal courts, justices' courts, and city courts have concurrent jurisdiction to hear and issue orders under 40-4-121.

(2) The municipal judge, justice of the peace, or city court judge shall on motion suspend all further proceedings in the action and certify the pleading and any orders to the clerk of the district court of the county where the action was begun if an action for declaration of invalidity of a marriage, legal separation, or dissolution of marriage or for parenting is pending between the parties. From the time of the certification of the pleadings and any orders to the clerk, the district court has the same jurisdiction over the action as if it had been commenced in district court.

(3) An action brought under 40-4-121 may be tried in the county in which either party resides or in which the physical abuse was committed.

(4) The right to petition for relief may not be denied because the plaintiff has vacated the residence or household to avoid abuse.

History: En. Sec. 6, Ch. 526, L. 1985; amd. Sec. 3, Ch. 208, L. 1989; amd. Sec. 6, Ch. 350, L. 1995; amd. Sec. 10, Ch. 343, L. 1997.

Cross-References

Justices' Courts, — civil jurisdiction, 3-10-301.

Montana Justice and City Court Rules of Civil Procedure, Title 25, ch. 23.

Appeal to District Court from Justice's Court, Rule 24, M.J.C.C.R.Civ.P. (see Title 25, ch. 23).

Procedure in Municipal Courts, Title 25, ch. 30.

Procedure in Justices' Courts, Title 25, ch. 31.

Declaration of invalidity, 40-1-402.

Dissolution of marriage — legal separation, 40-4-104.

Parenting, 40-4-211 through 40-4-221, 40-4-225.

Partner and family member assault, Title 40, ch. 15.

Orders of protection — jurisdiction and venue, 40-15-301.

Partner or family member assault — penalty, 45-5-206.

Violation of protective order — penalties, 45-5-626.

40-4-124. Review or removal — district court. (1) An order issued by a municipal court, justice's court, or city court pursuant to 40-4-121 is immediately reviewable by the judge of the district court at chambers upon the filing of a notice of appeal. The district judge may affirm, dissolve, or modify an order of a municipal court, justice's court, or city court made pursuant to 40-4-121.

(2) Any case in which an order has been issued by a municipal court, justice's court, or city court pursuant to 40-4-121 may be removed to district court upon filing of a notice of removal.

History: En. Sec. 7, Ch. 526, L. 1985; amd. Sec. 4, Ch. 208, L. 1989; amd. Sec. 7, Ch. 350, L. 1995.

Cross-References

Appeal to District Court from Justice's Court, Rule 24, M.J.C.C.R.Civ.P. (see Title 25, ch. 23).

Orders of protection — appeal to district court, 40-15-302.

40-4-125. Registration of orders. (1) The clerk of court, justice of the peace, municipal court judge, or city court judge shall, within 24 hours of receiving proof of service of an order under 40-4-121, mail a copy of the order or any extension, modification, or termination thereof along with a copy of the proof of service to the appropriate law enforcement agencies designated in the order.

(2) Law enforcement agencies shall establish procedures, using an existing system for warrant verification, to ensure that peace officers at the scene of an alleged violation of a protective order are informed of the existence and terms of such order.

History: En. Sec. 8, Ch. 526, L. 1985; amd. Sec. 5, Ch. 208, L. 1989.

Cross-References

Registration of orders of protection, 40-15-303.

Violation of protective order — penalties, 45-5-626.

40-4-126 through 40-4-129 reserved.

40-4-130. Summary dissolution — conditions necessary at commencement of proceedings. A marriage may be dissolved by the summary dissolution procedure specified in 40-4-130 through 40-4-136 if all of the following conditions exist on the date the proceeding is commenced:

(1) Each party has met the requirements of 40-4-104 with regard to dissolution of marriage.

(2) Irreconcilable differences have caused the irretrievable breakdown of the marriage, and both parties agree that the marriage should be dissolved.

(3) The wife is not pregnant and:

(a) there are no children from the relationship born before or during the marriage or adopted by the parties during the marriage; or

(b) the parties have executed an agreed-upon parenting plan and the child support and medical support have been determined by judicial or administrative order for all children from the relationship born before or during the marriage or adopted by the parties during the marriage.

(4) (a) Except as provided in subsection (4)(b), neither party has any interest in real property.

(b) The limitation of subsection (4)(a) does not apply to the lease of a residence occupied by either party if the lease does not include an option to purchase and if it terminates within 1 year from the date of the filing of the petition.

(5) There are no unpaid, unsecured obligations in excess of $8,000 incurred by either or both of the parties after the date of their marriage.

(6) The total fair market value of assets, excluding secured obligations, is less than $25,000.

(7) The parties have executed an agreement setting forth the division of assets and the assumption of liabilities and have executed any documents, title certificates, bills of sale, or other evidence of transfer necessary to effectuate the agreement.

(8) The parties waive any right to maintenance.

(9) The parties, upon entry of final judgment of dissolution of marriage, irrevocably waive their respective rights to appeal the terms of the dissolution and their rights to move for a new trial on the dissolution.

(10) The parties have read and state that they understand the contents of the summary dissolution brochure provided for in 40-4-136.

(11) The parties desire that the court dissolve the marriage.

History: En. Sec. 1, Ch. 795, L. 1991; amd. Sec. 3, Ch. 545, L. 1999.

Compiler's Comments

1999 Amendment: Chapter 545 substituted language in (3) outlining when marriage may be dissolved by summary dissolution when wife is not pregnant and other conditions exist for former language that read:

"There are no children from the relationship born before or during the marriage or adopted by the parties during the marriage, and the wife is not pregnant"; in (5) after "unpaid" inserted "unsecured", increased obligation amount from $4,000 to $8,000, and after "marriage" deleted "excluding the amount of any unpaid obligations with respect to a motor vehicle with a rated carrying load in persons and property of 1 ton or less"; in (6) before "assets" deleted "property" and after "assets" substituted "excluding secured obligations, is less than $25,000" for "excluding all encumbrances and motor vehicles with a rated carrying load in persons and property of 1 ton or less, is less than $13,000, and neither party has separate property assets in excess of $13,000, excluding all encumbrances and motor vehicles with a rated carrying load in persons and property of 1 ton or less"; and made minor changes in style. Amendment effective July 1, 1999.

40-4-131. Joint petition — filing — form — contents. (1) A proceeding for summary dissolution of marriage is commenced by filing in the district court a joint petition in the form prescribed by the court.

(2) The petition must:

(a) be signed under oath by both parties;

(b) state that, as of the date of the filing of the joint petition, each condition set forth in 40-4-130 has been met;

(c) state the mailing address of both parties; and

(d) state whether or not the wife elects to have her maiden or former name restored and, if so, state the name to be restored.

History: **En. Sec. 2, Ch. 795, L. 1991.**

40-4-132. Revocation of joint petition — termination of proceeding — notice — copy to other party. (1) At any time prior to the entry of final judgment, either party to the marriage may revoke the joint petition and thereby terminate the summary dissolution proceeding filed pursuant to 40-4-130 through 40-4-136.

(2) The revocation is effected by filing with the clerk of the court in which the proceeding was commenced a notice of revocation in the form and content prescribed by the district court.

(3) The revoking party shall send a copy of the notice of revocation to the last-known address of the other party by first-class mail, postage prepaid.

History: **En. Sec. 3, Ch. 795, L. 1991.**

40-4-133. Hearing and final judgment — entry — effect. After 20 days from the date of the filing of the joint petition for summary dissolution, the district court shall hold a hearing at which both parties must be present, and if the court determines that the conditions in 40-4-130 exist, the court shall enter the final judgment dissolving the marriage. Entry of final judgment restores each party to the status of a single person and permits either to marry.

History: **En. Sec. 4, Ch. 795, L. 1991.**

40-4-134. Final judgment as final adjudication of rights and obligations. Except as provided in 40-4-135, entry of final judgment constitutes a final adjudication of the rights and obligations of the parties with respect to the status of the marriage and property rights and constitutes a waiver of their respective rights to maintenance, rights to appeal the terms of the dissolution, and rights to a new trial.

History: **En. Sec. 5, Ch. 795, L. 1991.**

40-4-135. Actions to set aside final judgment. (1) A final judgment made pursuant to 40-4-133 does not prejudice or bar the rights of either party to institute an action to set aside the final judgment for fraud, duress, accident, mistake, or other grounds recognized at law or in equity or to make a motion pursuant to the Montana Rules of Civil Procedure.

(2) The district court shall set aside a final judgment made pursuant to 40-4-133 regarding all matters except the status of the marriage upon proof that the parties did not meet the requirements of 40-4-130 on the date the petition was filed.

History: En. Sec. 6, Ch. 795, L. 1991.

40-4-136. Brochure to describe proceedings — availability — distribution — contents and form. (1) Each district court shall make available a brochure, prepared and distributed by the attorney general, describing the requirements, nature, and effect of proceedings under 40-4-130 through 40-4-136.

(2) (a) In nontechnical language, the brochure must:

(i) state that it is in the best interests of the parties to consult an attorney regarding the dissolution of their marriage. The services of an attorney may be obtained through lawyer referral services, group or prepaid legal services, or legal aid organizations.

(ii) state that the brochure is not intended as a guide for self-representation in proceedings under 40-4-130 through 40-4-136 and should not be relied upon exclusively by the parties;

(iii) provide a concise summary of the provisions of 40-4-104 and 40-4-130 through 40-4-136;

(iv) describe the nature of services of the conciliation court, if available;

(v) state that under the provisions of 40-4-130 through 40-4-136, neither party to the marriage may obtain maintenance from the other;

(vi) state in boldface type that, upon entry of final judgment, the parties' rights and obligations with respect to the marriage, including property and maintenance rights, are permanently adjudicated without right of appeal but that neither party is barred from instituting an action to set aside the final judgment for fraud, duress, accident, mistake, or other grounds recognized at law or in equity or to make a motion pursuant to the Montana Rules of Civil Procedure; and

(vii) state that until final judgment is entered, the parties retain the status of married persons and cannot remarry.

(b) The brochure may include other matters that the attorney general considers appropriate.

History: En. Sec. 7, Ch. 795, L. 1991.

Part 2

Support, Custody, Visitation, and Related Provisions

40-4-201. Separation agreement. (1) To promote amicable settlement of disputes between parties to a marriage attendant upon their separation or the dissolution of their marriage, the parties may enter into a written separation agreement containing provisions for disposition of any property owned by either of them, maintenance of either of them, and support, parenting, and parental contact with their children. In cases in which children are involved, the separation agreement may contain a parenting plan as required in 40-4-234.

(2) Subject to subsection (7), in a proceeding for dissolution of marriage or for legal separation, the terms of the separation agreement, except those providing for the support, parenting, and parental contact with children, are binding upon the court unless it finds, after considering the economic circumstances of the parties and any other relevant evidence produced by the parties, on their own motion or on request of the court, that the separation agreement is unconscionable.

(3) If the court finds the separation agreement unconscionable, it may request that the parties submit a revised separation agreement or it may make orders for the disposition of property, maintenance, and support.

(4) If the court finds that the separation agreement is not unconscionable as to disposition of property or maintenance and not unsatisfactory as to support:

(a) unless the separation agreement provides to the contrary, its terms must be set forth in the decree of dissolution or legal separation and the parties ordered to perform them; or

(b) if the separation agreement provides that its terms may not be set forth in the decree, the decree must identify the separation agreement and state that the court has found the terms not unconscionable.

(5) Terms of the agreement set forth in the decree are enforceable by all remedies available for enforcement of a judgment, including contempt, and are enforceable as contract terms.

(6) Except as provided in subsection (7) and except for terms concerning the support, parenting, or parental contact with the children, the decree may expressly preclude or limit modification of terms set forth in the decree if provided for in the separation agreement. Otherwise, terms of a separation agreement set forth in the decree are automatically modified by modification of the decree.

(7) The decree may be modified, as provided in 40-4-251 through 40-4-258, for failure to disclose assets and liabilities.

History: En. 48-320 by Sec. 20, Ch. 536, L. 1975; R.C.M. 1947, 48-320; amd. Sec. 9, Ch. 326, L. 1997; amd. Sec. 11, Ch. 343, L. 1997.

Cross-References

Imprisonment for debt, Art. II, sec. 27, Mont. Const.

Contempts, Title 3, ch. 1, part 5.

What acts or omissions are contempts, 3-1-501.

Procedure — contempt not in presence of court, 3-1-512.

Imprisonment to compel performance, 3-1-520.

Judgments, Title 25, ch. 9.

Assignment of right to periodic installments for certain future damages, 25-9-405.

Execution of judgment, Title 25, ch. 13.

Breach of contract, 27-1-311.

Specific and preventive relief, Title 27, ch. 1, part 4.

Unconscionable contract or clause, 30-2-302.

Alteration of legal relation by contract — separation agreement, 40-2-303.

Consideration for separation, 40-2-304.

40-4-202. Division of property. (1) In a proceeding for dissolution of a marriage, legal separation, or division of property following a decree of dissolution of marriage or legal separation by a court which lacked personal jurisdiction over the absent spouse or lacked jurisdiction to divide the property, the court, without regard to marital misconduct, shall, and in a proceeding for legal separation may, finally equitably apportion between the parties the property and assets belonging to either or both, however and whenever acquired and whether the title thereto is in the name of the husband or wife or both. In making apportionment, the court shall consider the duration of the marriage and prior marriage of either party; the age, health, station, occupation, amount and sources of income, vocational skills, employability, estate, liabilities, and needs of each of the parties; custodial provisions; whether the apportionment is in lieu of or in addition to maintenance; and the opportunity of each for future acquisition of capital assets and income. The court shall also consider the contribution or dissipation of value of the respective estates and the contribution of a spouse as a homemaker or to the family unit. In dividing property acquired prior to the marriage; property acquired by gift, bequest, devise, or descent; property acquired in exchange for property acquired before the marriage or in exchange for property acquired by gift, bequest, devise, or descent; the increased value of property acquired prior to marriage; and property acquired by a spouse after a decree of legal separation, the court shall consider those contributions of the other spouse to the marriage, including:

(a) the nonmonetary contribution of a homemaker;

(b) the extent to which such contributions have facilitated the maintenance of this property; and

(c) whether or not the property division serves as an alternative to maintenance arrangements.

(2) In a proceeding, the court may protect and promote the best interests of the children by setting aside a portion of the jointly and separately held estates of the parties in a separate fund or trust for the support, maintenance, education, and general welfare of any minor, dependent, or incompetent children of the parties.

(3) Each spouse is considered to have a common ownership in marital property that vests immediately preceding the entry of the decree of dissolution or declaration of invalidity. The extent of the vested interest must be determined and made final by the court pursuant to this section.

(4) The division and apportionment of marital property caused by or incident to a decree of dissolution, a decree of legal separation, or a declaration of invalidity is not a sale, exchange, transfer, or disposition of or dealing in property but is a division of the common ownership of the parties for purposes of:

(a) the property laws of this state;

(b) the income tax laws of this state; and

(c) the federal income tax laws.

(5) Premarital agreements must be enforced as provided in Title 40, chapter 2, part 6.

History: En. 48-321 by Sec. 21, Ch. 536, L. 1975; R.C.M. 1947, 48-321; amd. Sec. 1, Ch. 613, L. 1983; amd. Sec. 13, Ch. 189, L. 1987.

Cross-References

Individual income tax, Title 15, ch. 30.

Duties of husband and wife as to support, 40-2-102.

Individual property, Title 40, ch. 2, part 2.

Alteration of legal relation by contract — separation agreement, 40-2-303.

Property rights of husband and wife — how governed, 40-2-311.

Marriage settlement contracts — how executed, 40-2-312.

Dissolution of marriage — legal separation, 40-4-104.

Best interests of child, 40-4-212.

Trust Code, Title 72, ch. 33 through 36.

40-4-203. Maintenance. (1) In a proceeding for dissolution of marriage or legal separation or a proceeding for maintenance following dissolution of the marriage by a court which lacked personal jurisdiction over the absent spouse, the court may grant a maintenance order for either spouse only if it finds that the spouse seeking maintenance:

(a) lacks sufficient property to provide for his reasonable needs; and

(b) is unable to support himself through appropriate employment or is the custodian of a child whose condition or circumstances make it appropriate that the custodian not be required to seek employment outside the home.

(2) The maintenance order shall be in such amounts and for such periods of time as the court deems just, without regard to marital misconduct, and after considering all relevant facts including:

(a) the financial resources of the party seeking maintenance, including marital property apportioned to him, and his ability to meet his needs independently, including the extent to which a provision for support of a child living with the party includes a sum for that party as custodian;

(b) the time necessary to acquire sufficient education or training to enable the party seeking maintenance to find appropriate employment;

(c) the standard of living established during the marriage;

(d) the duration of the marriage;

(e) the age and the physical and emotional condition of the spouse seeking maintenance; and

(f) the ability of the spouse from whom maintenance is sought to meet his needs while meeting those of the spouse seeking maintenance.

History: En. 48-322 by Sec. 22, Ch. 536, L. 1975; R.C.M. 1947, 48-322.

Cross-References

Assignment of right to periodic installments for certain future damages, 25-9-405.

Earnings of judgment debtor — exemption from execution for maintenance, 25-13-614.

Individual property, Title 40, ch. 2, part 2.

Necessity determined by standard of living, 40-2-210.

Dissolution of marriage — legal separation, 40-4-104.

Temporary order or temporary injunction, 40-4-121.

40-4-204. Child support — orders to address health insurance — withholding of child support. (1) In a proceeding for dissolution of marriage, legal separation, maintenance, or child support, the court shall order either or both parents owing a duty of support to a child to pay an amount reasonable or necessary for the child's support, without regard to marital misconduct.

(2) The court shall consider all relevant factors, including:

(a) the financial resources of the child;

(b) the financial resources of the parents;

(c) the standard of living that the child would have enjoyed had the marriage not been dissolved;

(d) the physical and emotional condition of the child and the child's educational and medical needs;

(e) the age of the child;

(f) the cost of day care for the child;

(g) any parenting plan that is ordered or decided upon; and

(h) the needs of any person, other than the child, whom either parent is legally obligated to support.

(3) (a) Whenever a court issues or modifies an order concerning child support, the court shall determine the child support obligation by applying the standards in this section and the uniform child support guidelines adopted by the department of public health and human services pursuant to 40-5-209. The guidelines must be used in all cases, including cases in which the order is entered upon the default of a party and those in which the parties have entered into an agreement regarding the support amount. A verified representation of the defaulting parent's income, based on the best information available, may be used when a parent fails to provide financial information for use in applying the guidelines. The amount determined under the guidelines is presumed to be an adequate and reasonable support award, unless the court finds by clear and convincing evidence that the application of the standards and guidelines is unjust to the child or to any of the parties or that it is inappropriate in that particular case.

(b) If the court finds that the guideline amount is unjust or inappropriate in a particular case, it shall state its reasons for that finding. Similar reasons must also be stated in a case in which the parties have agreed to a support amount that varies from the guideline amount. Findings that rebut and vary the guideline amount must include a statement of the amount of support that would have ordinarily been ordered under the guidelines.

(c) If the court does not order a parent owing a duty of support to a child to pay any amount for the child's support, the court shall state its reasons for not ordering child support.

(d) Child support obligations established under this section are subject to the registration and processing provisions of chapter 5, part 9.

(4) Each temporary or final district court judgment, decree, or order establishing a child support obligation under this title and each modification of a final order for child support must include a medical support order as provided for in Title 40, chapter 5, part 8.

(5) (a) Unless the court makes a written exception under 40-5-315 or 40-5-411 and the exception is included in the support order, a support obligation established by judgment, decree, or order under this section, whether temporary or final, and each modification of an existing support obligation under 40-4-208 must be enforced by immediate or delinquency income withholding, or both, under Title 40, chapter 5, part 3 or 4. A support order that omits the written exceptions provided in 40-5-315 or 40-5-411 or that provides for a payment arrangement inconsistent with this section is nevertheless subject to withholding for the payment of support without need for an amendment to the support order or for any further action by the court.

(b) If an obligor is exempt from immediate income withholding, the district court judgment or order must include a warning statement that if the obligor is delinquent in the payment of support, the obligor's income may be subject to income withholding procedures under Title 40, chapter 5, part 3 or 4. Failure to include a warning statement in a judgment or order does not preclude the use of withholding procedures.

(c) If a support order subject to income withholding is expressed in terms of a monthly obligation, the order may be annualized and withheld on a weekly or biweekly basis, corresponding to the obligor's regular pay period. When an order is annualized and withheld on a weekly or biweekly basis under this section, the support withheld from the obligor may be retained by the obligee when it exceeds the obligor's monthly support obligation if the excess support is a result of annualized withholding.

(d) If an obligor is exempted from paying support through income withholding, the support order must include a requirement that whenever the case is receiving services under Title IV-D of the Social Security Act, support payments must be paid through the department of public health and human services as provided in 40-5-909.

(6) (a) Each district court judgment, decree, or order that establishes paternity or establishes or modifies a child support obligation must include a provision requiring the parties to promptly file with the court and to update, as necessary, information on:

(i) the party's identity, residential and mailing addresses, telephone number, [social security number,] and driver's license number;

(ii) the name, address, and telephone number of the party's employer; and

(iii) if the child is covered by a health or medical insurance plan, the name of the insurance carrier or health benefit plan, the policy identification number, the names of the persons covered, and any other pertinent information regarding coverage or, if the child is not covered, information as to the availability of coverage for the child through the party's employer.

(b) The court shall keep the information provided under subsection (6)(a) confidential except that the information may be provided to the department of public health and human services for use in administering Title IV-D of the Social Security Act.

(c) The order must also require that in any subsequent child support enforcement action, upon sufficient showing that diligent effort has been made to ascertain the location of the party, the district court or the department of public health and human services, if the department is providing services under Title IV-D of the Social Security Act, may consider due process requirements for notice and service of process met with respect to the party upon delivery of written notice by regular mail to the most recent address of the party or the party's employer's address reported to the court.

(7) Each district court judgment, decree, or order establishing a final child support obligation under this part and each modification of a final order for child support must contain a statement that the order is subject to review and modification by the department of public health and human services upon the request of the department or a party under 40-5-271 through 40-5-273 when the department is providing services under Title IV-D of the Social Security Act for the enforcement of the order.

(8) (a) A district court judgment, decree, or order that establishes or modifies a child support obligation must include a provision requiring the child support obligation to be paid, without need for further court order:

(i) to the person with whom the child resides by legal order;

(ii) if the person with whom the child legally resides voluntarily or involuntarily relinquishes physical care and control of the child to another person, organization, or agency, to the person, organization, or agency to whom physical custody has been relinquished;

(iii) if any other person, organization, or agency is entitled by law, assignment, or similar reason to receive or collect the child support obligation, to the person, organization, or agency having the right to receive or collect the payment; or

(iv) to the court for the benefit of the minor child.

(b) When the department of public health and human services is providing services under Title IV-D of the Social Security Act, payment of support must be made through the department for distribution to the person, organization, or agency entitled to the payment.

(c) A judgment, decree, or order that omits the provision required by subsection (8)(a) is subject to the requirements of subsection (8)(a) without need for an amendment to the judgment, decree, or order or for any further action by the court.

(9) A judgment, decree, or order that establishes or modifies a child support obligation must include a provision that if a parent or guardian is the obligee under a child support order and is obligated to pay a contribution for the same child under 41-3-406, 41-5-1304, or 41-5-1512, the parent or guardian assigns and transfers to the department of public health and human services all rights that the parent or guardian may have to child support that are not otherwise assigned under 53-2-613. *(Bracketed language terminates on occurrence of contingency—sec. 1, Ch. 27, L. 1999.)*

History: En. 48-323 by Sec. 23, Ch. 536, L. 1975; R.C.M. 1947, 48-323; amd. Sec. 1, Ch. 590, L. 1983; amd. Sec. 1, Ch. 727, L. 1985; (3)En. Sec. 1, Ch. 434, L. 1985; (4)En. Sec. 1, Ch. 651, L. 1985; amd. Sec. 1, Ch. 702, L. 1989; amd. Sec. 4, Ch. 266, L. 1991; amd. Sec. 1, Ch. 635, L. 1991; amd. Sec. 1, Ch. 294, L. 1993; amd. Sec. 7, Ch. 631, L. 1993; amd. Sec. 7, Ch. 60, L. 1995; amd. Sec. 27, Ch. 504, L. 1995; amd. Sec. 118, Ch. 546, L. 1995; amd. Sec. 12, Ch. 343, L. 1997; amd. Sec. 25, Ch. 552, L. 1997.

Compiler's Comments

1999 Purported Amendment: Although sec. 4, Ch. 545, L. 1999, purported to amend this section, the final version of the text remained unamended.

Contingent Termination — Request for Federal Exemptions: Section 1, Ch. 27, L. 1999, revised sec. 104, Ch. 552, L. 1997, to contain the following contingent termination provisions and order that the department of public health and human services seek federal exemptions: "(1) [Sections 9, 11, 22 through 24, and 95] [37-1-307, 40-1-107, 40-4-105, 40-5-922, 40-5-924, and 61-5-107] and the bracketed language in [sections 1 through 3, 10, 25, 45, and 89] [40-4-204, 40-5-226, 40-5-901, 40-5-906, 40-5-907, 40-5-923, and 40-6-116] terminate on the date of the suspension if the federal government suspends federal payments to this state for this state's child support enforcement program and for this state's program relating to temporary assistance to needy families because of this state's failure to enact law as required by the federal Personal Responsibility and Work Opportunity Reconciliation Act of 1996.

(2) [Sections 9, 11, 22 through 24, and 95] [37-1-307, 40-1-107, 40-4-105, 40-5-922, 40-5-924, and 61-5-107] and the bracketed language in [sections 1 through 3, 10, 25, 45, and 89] [40-4-204, 40-5-226, 40-5-901, 40-5-906, 40-5-907, 40-5-923, and 40-6-116] terminate on the date that a final decision is rendered in federal court invalidating the child support provisions of the federal Personal Responsibility and Work Opportunity Reconciliation Act of 1996.

(3) If the director of the department of public health and human services certifies to the governor and the secretary of state in writing that one of the following provisions is no longer required by federal law because of repeal of or amendment to federal statutes that require that provision, the provision terminates on the date the certification takes effect:

(a) [section 9] [40-5-922];

(b) [section 11] [40-5-924];

(c) [sections 22 through 24] [37-1-307, 40-1-107, and 40-4-105];

(d) [section 95] [61-5-107];

(e) the bracketed provisions in [sections 1 through 3, 10, 25, 45, and 89] [40-4-204, 40-5-226, 40-5-901, 40-5-906, 40-5-907, 40-5-923, and 40-6-116].

(4) If the bracketed language in [sections 1 through 3, 10, 25, 45, and 89] [40-4-204, 40-5-226, 40-5-901, 40-5-906, 40-5-907, 40-5-923, and 40-6-116] terminates, the code commissioner is instructed to renumber subsections, adjust internal references, and correct grammar and arrangement." Amendment effective February 18, 1999.

Cross-References

Assignment of right to periodic installments for certain future damages, 25-9-405.

Earnings of judgment debtor — exemption from execution for support, 25-13-614.

Necessity determined by standard of living, 40-2-210.

Dissolution of marriage — legal separation, 40-4-104.

Temporary order or temporary injunction, 40-4-121.

Enforcement of support, Title 40, ch. 5.

Judgment or order — parent and child relationship, 40-6-116.

Obligations of parents, Title 40, ch. 6, part 2.

Allowance to parent, 40-6-212.

Remedy when parent dies without providing for support of child, 40-6-213.

Parenting, services, and earnings of child, 40-6-221.

Parental control over property of child, 40-6-232.

40-4-205. Guardian ad litem. (1) The court may appoint a guardian ad litem to represent the interests of a minor dependent child with respect to the child's support, parenting, and parental contact. The guardian ad litem may be an attorney. The county attorney, a deputy county attorney, if any, or the department of public health and human services or any of its staff may not be appointed for this purpose.

(2) The guardian ad litem has the following general duties:

(a) to conduct investigations that the guardian ad litem considers necessary to ascertain the facts related to the child's support, parenting, and parental contact;

(b) to interview or observe the child who is the subject of the proceeding;

(c) to make written reports to the court concerning the child's support, parenting, and parental contact;

(d) to appear and participate in all proceedings to the degree necessary to adequately represent the child and make recommendations to the court concerning the child's support, parenting, and parental contact; and

(e) to perform other duties as directed by the court.

(3) The guardian ad litem has access to court, medical, psychological, law enforcement, social services, and school records pertaining to the child and the child's siblings and parents or caretakers.

(4) The court shall enter an order for costs and fees in favor of the child's guardian ad litem. The order must be made against either or both parents, except that if the responsible party is indigent, the costs must be waived.

History: En. 48-324 by Sec. 24, Ch. 536, L. 1975; R.C.M. 1947, 48-324; amd. Sec. 1, Ch. 93, L. 1979; amd. Sec. 1, Ch. 434, L. 1993; amd. Sec. 4, Ch. 394, L. 1995; amd. Sec. 119, Ch. 546, L. 1995; amd. Sec. 13, Ch. 343, L. 1997.

Cross-References

Allowable costs, Title 25, ch. 10, part 2.

Attorney fees, Title 25, ch. 10, part 3.

Costs — attorney fees, 40-4-110.

Enforcement of minor's rights, 41-1-202.

40-4-206. Payment of maintenance or support to court — handling fee of clerk. (1) Except as provided in subsection (4), upon its own motion or upon motion of either party, the court may order at any time that maintenance or support payments be made to the clerk of the district court as trustee for remittance to the person entitled to receive the payments.

(2) The clerk of the district court shall maintain records of payments received by the clerk listing the amount of payments, the date payments are required to be made, and the names and addresses of the parties affected by the order. The clerk may charge the payor a handling fee of $2 a payment, which must be in addition to the payment. Any handling fee collected by the clerk under this subsection must be paid into the county general fund unless the county has a district court fund. If the county has a district court fund, the amount must be paid into that fund.

(3) The parties affected by the order shall inform the clerk of the district court of any change of address or of other condition that may affect the administration of the order.

(4) When the department of public health and human services is providing services under Title IV-D of the Social Security Act or when income withholding is in effect in an order issued or modified after October 1, 1998, payment of support must be made through the department for distribution to the person, organization, or agency entitled to the payment.

History: En. 48-325 by Sec. 25, Ch. 536, L. 1975; R.C.M. 1947, 48-325; amd. Sec. 1, Ch. 532, L. 1985; amd. Sec. 26, Ch. 552, L. 1997.

Cross-References

Contempts, Title 3, ch. 1, part 5.

Duties of Clerk of District Court, 3-5-501.

Assignment of right to periodic installments for certain future damages, 25-9-405.

Paternity — enforcement of judgment or order, 40-6-117.

Duties of trustees, Title 72, ch. 34, part 1.

40-4-207. Assignments. The court may order the person obligated to pay support or maintenance to make an assignment of a part of his periodic earnings or trust income to the person entitled to receive the payments. The assignment is binding on the employer, trustee, or other payor of the funds 2 weeks after service upon him of notice that it has been made. The payor shall withhold from the earnings or trust income payable to the person obligated to support the amount specified in the assignment and shall transmit the payments to the person specified in the order. The payor may deduct from each payment a sum not exceeding $1 as reimbursement for costs. An employer shall not discharge or otherwise discipline an employee as a result of a wage or salary assignment authorized by this section.

History: En. 48-326 by Sec. 26, Ch. 536, L. 1975; R.C.M. 1947, 48-326.

Cross-References

Assignment of right to periodic installments for certain future damages, 25-9-405.

Property exempt from execution — earnings of judgment debtor, 25-13-614.

What property subject to attachment, 27-18-102.

Discharge or layoff of employee because of attachment or garnishment prohibited, 39-2-302.

Powers of trustees, Title 72, ch. 34, part 3.

40-4-208. Modification and termination of provisions for maintenance, support, and property disposition. (1) Except as otherwise provided in 40-4-201(6), a decree may be modified by a court as to maintenance or support only as to installments accruing subsequent to actual notice to the parties of the motion for modification.

(2) (a) Except as provided in 40-4-251 through 40-4-258, whenever the decree proposed for modification does not contain provisions relating to

maintenance or support, modification under subsection (1) may only be made within 2 years of the date of the decree.

(b) Except as provided in 40-4-251 through 40-4-258, whenever the decree proposed for modification contains provisions relating to maintenance or support, modification under subsection (1) may only be made:

(i) upon a showing of changed circumstances so substantial and continuing as to make the terms unconscionable;

(ii) upon written consent of the parties; or

(iii) upon application by the department of public health and human services, whenever the department of public health and human services is providing services under Title IV-D of the federal Social Security Act. The support obligation must be modified, as appropriate, in accordance with the guidelines promulgated under 40-5-209. Except as provided in 40-4-251 through 40-4-258, a modification under this subsection may not be made within 12 months after the establishment of the order or the most recent modification.

(c) The nonexistence of a medical support order, as defined in 40-5-804, or a violation of a medical support order justifies an immediate modification of child support in order to:

(i) provide for the actual or anticipated costs of the child's medical care;

(ii) provide or maintain a health benefit plan or individual health insurance coverage for the child; or

(iii) eliminate any credit for a medical support obligation when it has been permitted or used as a credit in the determination of the child support obligation.

(3) The provisions as to property disposition may not be revoked or modified by a court except:

(a) upon written consent of the parties; or

(b) if the court finds the existence of conditions that justify the reopening of a judgment under the laws of this state.

(4) Unless otherwise agreed in writing or expressly provided in the decree, the obligation to pay future maintenance is terminated upon the death of either party or the remarriage of the party receiving maintenance.

(5) Provisions for the support of a child are terminated by emancipation of the child or the child's graduation from high school if the child is enrolled in high school, whichever occurs later, but in no event later than the child's 19th birthday, unless the termination date is extended or knowingly waived by written agreement or by an express provision of the decree. Provisions for the support of a child do not terminate upon the death of a parent obligated to support the child. When a parent obligated to pay support dies, the amount of support may be modified, revoked, or commuted to a lump-sum payment, to the extent just and appropriate in the circumstances.

(6) The decree may be modified, as provided in 40-4-251 through 40-4-258, for failure to disclose assets and liabilities.

History: En. 48-330 by Sec. 30, Ch. 536, L. 1975; R.C.M. 1947, 48-330; amd. Sec. 1, Ch. 464, L. 1979; amd. Sec. 1, Ch. 212, L. 1987; amd. Sec. 27, Ch. 549, L. 1989; amd. Sec. 28, Ch. 702, L. 1989; amd. Sec. 1, Ch. 342, L. 1991; amd. Sec. 28, Ch. 504, L. 1995; amd. Sec. 120, Ch. 546, L. 1995; amd. Sec. 10, Ch. 326, L. 1997.

Cross-References

Unconscionable contract or clause, 30-2-302.

Temporary order or temporary injunction, 40-4-121.

Remedy when parent dies without providing for support of child, 40-6-213.

Minors and adults defined, 41-1-101.

UPC — claims against decedent, 72-3-104.

UPC — creditors' claims, Title 72, ch. 3, part 8.

40-4-209. Security or guaranty to secure support. (1) Upon a verified application that is made by a person authorized to enforce or collect a child support obligation or by the department of public health and human services and that shows that a person obligated to pay child support or maintenance pursuant to court or administrative order is delinquent in an amount equal to the total of 6 months' support payments, the court may direct the obligated person to appear and show cause why an order should not be entered ordering that the obligated person post bond, give a mortgage, or provide other security or guaranty for the payment of the delinquency.

(2) If the court finds that a delinquency greater than the total of 6 months of support is owed and that the obligated person has the ability to post bond, give a mortgage, or provide security or other guaranty, the court may enter an order requiring the obligated person to post bond, give a mortgage, or provide security or guaranty for so long as there is a support delinquency.

(3) The bond or other security may be in an amount up to the total support due for a 2-year period and must be approved by the court. The bond must include the name and address of the issuer. Any person issuing a bond under this section must, if the bond is cancelled, notify the court and the person or public agency entitled to receive payments under the support order.

(4) If the person obligated to pay child support or maintenance fails to make payments as required by the court or administrative order, the person or public agency entitled to receive payment may recover on the bond or other security. The amount recovered on the bond or other security must first be applied toward satisfaction of any support arrearages.

(5) The department of public health and human services shall adopt guidelines that take into account the payment record of the obligated person, the availability of other remedies, and other considerations which it determines relevant for determining whether the procedure provided in this section would carry out the purpose of enforcing payments of child support or would be appropriate in the circumstances. If after application of the guidelines the department of public health and human services determines an application for an order requiring security is not appropriate, it may not request the order.

History: En. Sec. 1, Ch. 521, L. 1985; amd. Sec. 98, Ch. 370, L. 1987; amd. Sec. 26, Ch. 609, L. 1987; amd. Sec. 20, Ch. 702, L. 1989; amd. Sec. 121, Ch. 546, L. 1995.

Cross-References

Undertakings for security, Title 25, ch. 1, part 4.

Motions and other papers, Rule 7(b), M.R.Civ.P. (see Title 25, ch. 20).

Evidence on motions, Rule 43(e), M.R.Civ.P. (see Title 25, ch. 20).

Guaranty, indemnity, and suretyship, Title 28, ch. 11.

Mortgages, Title 71, ch. 1.

40-4-210. Child support jurisdiction — nonresident individual. (1) In a proceeding to establish or modify a child support order, a district court may acquire personal jurisdiction over a nonresident individual or the individual's guardian or conservator if:

(a) the individual is personally served with notice within this state in accordance with Rule 4B, Montana Rules of Civil Procedure;

(b) the individual submits to the jurisdiction of this state by consent, by entering a general appearance, or by filing a responsive document that has the effect of waiving any contest to personal jurisdiction;

(c) the individual has resided with the child within this state;

(d) the child was adopted within this state when at least one parent was a resident;

(e) the individual resided in this state and provided prenatal expenses or support for the child;

(f) the child resides in this state as a result of the acts or directives of the individual;

(g) the individual engaged in sexual intercourse in this state and the child may have been conceived by that act of intercourse; or

(h) there is any other basis consistent with the constitutions of this state and the United States for the exercise of the personal jurisdiction.

(2) A district court shall recognize and, if petitioned to do so, enforce according to its terms a child support order issued by a court or administrative agency of another state if the order was made consistent with the full faith and credit provisions of 28 U.S.C. 1738B.

(3) A district court may not establish a subsequent child support order that conflicts with an existing order entitled to recognition under subsection (2) or, except as provided in subsection (6), modify an existing order entitled to recognition under subsection (2).

(4) In interpreting a child support order issued in another state, including the duration of current payments and other obligations of support, a district court shall apply the law of the issuing state.

(5) In an action to enforce arrears under a child support order issued in another state, a district court shall apply the statute of limitations of this state or of the issuing state, whichever provides the longer period of limitation.

(6) A district court has jurisdiction to modify a child support order issued by a court or administrative agency of another state only after meeting the requirements of 40-5-194 and the standards for modification of interstate support orders set out in 28 U.S.C. 1738B.

History: En. Sec. 1, Ch. 459, L. 1989; amd. Sec. 52, Ch. 328, L. 1993; amd. Sec. 1, Ch. 579, L. 1999.

Compiler's Comments

1999 Amendment: Chapter 579 at beginning of (1) substituted "In a proceeding to establish or modify a child support order, a district court may acquire" for "A court of this state that is competent to decide child support matters may exercise" and at end deleted "in a child support determination in the initial or modification decree"; inserted (2) requiring district court to recognize and, if petitioned, enforce child support order issued by another state; inserted (3) prohibiting district court from establishing conflicting support order or modifying existing order entitled to recognition; inserted (4) requiring district court when interpreting support order to apply law of issuing state; inserted (5) requiring district court to apply statute of limitations of issuing state in action to enforce arrears under support order; inserted (6) authorizing district court to modify support order issued by another state only after meeting requirements of 40-5-194 and standards of modification of federal interstate support orders; and made minor changes in style. Amendment effective October 1, 1999.

Cross-References

Residence — rules for determining, 1-1-215.

Means to carry jurisdiction into effect, 3-1-113.

District Court jurisdiction, Title 3, ch. 5, part 3.

Jurisdiction of persons, Rule 4B, M.R.Civ.P. (see Title 25, ch. 20).

Lack of jurisdiction as defense, Rule 12(b), M.R.Civ.P. (see Title 25, ch. 20).

Child support, 40-4-204.

Obligations of parents for support of their children, 40-6-211.

40-4-211. Jurisdiction — commencement of parenting proceedings. (1) A court of this state competent to decide parenting matters has jurisdiction to make a parenting determination by initial or amended decree if:

(a) this state:

(i) is the home state of the child at the time of commencement of the proceedings; or

(ii) had been the child's home state within 6 months before commencement of the proceedings and the child is absent from this state because of the child's removal or retention by any person and a parent or person acting as parent continues to live in this state; or

(b) it is in the best interest of the child that a court of this state assume jurisdiction because:

(i) the child and the parents or the child and at least one contestant have a significant connection with this state; and

(ii) there is available in this state substantial evidence concerning the child's present or future care, protection, training, and personal relationships; or

(c) the child is physically present in this state and:

(i) has been abandoned; or

(ii) it is necessary in an emergency to protect the child because the child has been subjected to or threatened with mistreatment or abuse or is neglected or dependent; or

(d) (i) no other state has jurisdiction under prerequisites substantially in accordance with subsection (1)(a), (1)(b), or (1)(c) or another state has declined to exercise jurisdiction on the ground that this state is the more appropriate forum to determine parenting of the child; and

(ii) it is in the child's best interest that the court assume jurisdiction.

(2) Except under subsections (1)(c) and (1)(d), physical presence in this state of the child or of the child and one of the contestants is not alone sufficient to confer jurisdiction on a court of this state to make a parenting determination.

(3) Physical presence of the child, while desirable, is not a prerequisite for jurisdiction to determine parenting of the child.

(4) A parenting plan proceeding is commenced in the district court:

(a) by a parent, by filing a petition:

(i) for dissolution or legal separation; or

(ii) for parenting in the county in which the child is permanently resident or found; or

(b) by a person other than a parent if the person has established a child-parent relationship with the child, by filing a petition for parenting in the county in which the child resides or is found.

(5) Notice of a parenting proceeding must be given to the child's parent, guardian, caretaker, those persons with whom the child is physically residing, and all other contestants, who may appear, be heard, and file a responsive pleading. The court, upon a showing of good cause, may permit intervention of other interested parties.

(6) For purposes of subsection (4)(b), "child-parent relationship" means a relationship that exists or did exist, in whole or in part, preceding the filing of an action under this section, in which a person provides or provided for the physical needs of a child by supplying food, shelter, and clothing and provides or provided the child with necessary care, education, and discipline and which relationship continues or existed on a day-to-day basis through interaction, companionship, interplay, and mutuality that fulfill the child's psychological needs for a parent as well as the child's physical needs.

History: En. 48-331 by Sec. 31, Ch. 536, L. 1975; amd. Sec. 11, Ch. 33, L. 1977; amd. Sec. 27, Ch. 537, L. 1977; R.C.M. 1947, 48-331; amd. Sec. 14, Ch. 343, L. 1997; amd. Sec. 1, Ch. 414, L. 1999.

Compiler's Comments

1999 Amendment: Chapter 414 in (4)(b) after "parent" inserted "if the person has established a child-parent relationship with the child", after "child" substituted "resides" for "is permanently resident", and after "found" deleted "but only if the child is not physically residing with one of the child's parents"; inserted (6) defining child-parent relationship; and made minor changes in style. Amendment effective October 1, 1999.

Cross-References

Residence — rules for determining, 1-1-215.

Means to carry jurisdiction into effect, 3-1-113.

Service, Rule 4D, M.R.Civ.P. (see Title 25, ch. 20).

Permissive intervention, Rule 24(b), M.R.Civ.P. (see Title 25, ch. 20).

Jurisdiction and venue — abused, neglected, and dependent youths, 41-3-103.

40-4-212. Best interest of child. (1) The court shall determine the parenting plan in accordance with the best interest of the child. The court shall consider all relevant parenting factors, which may include but are not limited to:

(a) the wishes of the child's parent or parents;

(b) the wishes of the child;

(c) the interaction and interrelationship of the child with the child's parent or parents and siblings and with any other person who significantly affects the child's best interest;

(d) the child's adjustment to home, school, and community;

(e) the mental and physical health of all individuals involved;

(f) physical abuse or threat of physical abuse by one parent against the other parent or the child;

(g) chemical dependency, as defined in 53-24-103, or chemical abuse on the part of either parent;

(h) continuity and stability of care;

(i) developmental needs of the child;

(j) whether a parent has knowingly failed to pay birth-related costs that the parent is able to pay, which is considered to be not in the child's best interests;

(k) whether a parent has knowingly failed to financially support a child that the parent is able to support, which is considered to be not in the child's best interests;

(l) whether the child has frequent and continuing contact with both parents, which is considered to be in the child's best interests unless the court determines, after a hearing, that contact with a parent would be detrimental to the child's best interests. In making that determination, the court shall consider evidence of physical abuse or threat of physical abuse by one parent against the other parent or the child, including but not limited to whether a parent or other person residing in that parent's household has been convicted of any of the crimes enumerated in 40-4-219(8)(b).

(m) adverse effects on the child resulting from continuous and vexatious parenting plan amendment actions.

(2) A de facto parenting arrangement, in the absence of a prior parenting decree, does not require the child's parent or parents to prove the factors set forth in 40-4-219.

(3) The following are rebuttable presumptions and apply unless contrary to the best interest of the child:

(a) A parenting plan action brought by a parent within 6 months after a child support action against that parent is vexatious.

(b) A motion to amend a final parenting plan pursuant to 40-4-219 is vexatious if a parent seeks to amend a final parenting plan without making a good faith effort to comply with the provisions of the parenting plan or with dispute resolution provisions of the final parenting plan.

History: En. 48-332 by Sec. 32, Ch. 536, L. 1975; R.C.M. 1947, 48-332; amd. Sec. 1, Ch. 379, L. 1987; amd. Sec. 1, Ch. 303, L. 1989; amd. Sec. 1, Ch. 467, L. 1995; amd. Sec. 15, Ch. 343, L. 1997.

Cross-References

Guardians of minors, Title 72, ch. 5, part 2.

40-4-213. Interim parenting plan. (1) A party to a parenting proceeding may move for an interim parenting plan. The motion must be supported by an affidavit as provided in 40-4-220(1). The court may adopt an interim parenting plan under the standards of 40-4-212 after a hearing or under the standards of 40-4-212 and 40-4-220(2) before a hearing. If there is no objection, the court may act solely on the basis of the affidavits.

(2) If a proceeding for dissolution of marriage or legal separation is dismissed, any interim parenting plan is vacated unless a parent moves that the proceeding continue as a parenting proceeding and the court finds, after a hearing, that the circumstances of the parents and the best interests of the child require that a parenting plan be adopted. A child support delinquency existing at the time that an interim parenting plan is vacated remains a judgment subject to collection.

(3) If a parenting proceeding commenced in the absence of a petition for dissolution of marriage or legal separation is dismissed, any interim parenting plan is vacated. A child support delinquency existing at the time that an interim parenting plan is vacated remains a judgment subject to collection.

(4) Adoption of a final parenting plan under 40-4-234 vacates any interim parenting plan adopted under this section. A child support delinquency existing at the time that an interim parenting plan is vacated remains a judgment subject to collection.

History: En. 48-333 by Sec. 33, Ch. 536, L. 1975; amd. Sec. 12, Ch. 33, L. 1977; R.C.M. 1947, 48-333; amd. Sec. 1, Ch. 410, L. 1979; amd. Sec. 16, Ch. 343, L. 1997.

Cross-References

Affidavits, Title 26, ch. 1, part 10.

Dissolution of marriage — legal separation, 40-4-104.

Temporary order or temporary injunction, 40-4-121.

Declaration of purpose — Montana Youth Court Act, 41-5-102.

40-4-214. Interviews. (1) The court may interview the child in chambers to ascertain the child's wishes as to residence and parental contact. The court may permit counsel to be present at the interview. The court shall cause a record of the interview to be made and to be part of the record in the case.

(2) The court may seek the advice of professional personnel, whether or not employed by the court on a regular basis. The advice given must be in writing and made available by the court to counsel upon request. Counsel may examine as a witness any professional personnel consulted by the court.

History: En. 48-334 by Sec. 34, Ch. 536, L. 1975; R.C.M. 1947, 48-334; amd. Sec. 17, Ch. 343, L. 1997.

Cross-References

Sittings of court — when private, 3-1-313.

Court reporters — duties, 3-5-603.

Expert witnesses' fees, 26-2-505.

Opinions and expert testimony, Art. VII, M.R.Ev. (see Title 26, ch. 10).

What constitutes undue influence, 28-2-407.

40-4-215. Investigations and reports. (1) If a parent or a court-appointed third party requests, or if the court finds that a parenting proceeding is contested, the court may order an investigation and report concerning parenting arrangements for the child. The investigator may be the child's guardian ad litem or other professional considered appropriate by the court. The department of public health and human services may not be ordered to conduct the investigation or draft a report unless the person requesting the investigation is a recipient of cash assistance under the temporary assistance for needy families block grant, FAIM financial assistance, as defined in 53-2-902, food stamps, or public assistance and all reasonable options for payment of the investigation, if conducted by a person not employed by the department, are exhausted. The department may consult with any investigator and share information relevant to the child's best interests. The cost of the investigation and report must be paid according to the final order. The cost of the educational evaluation under subsection (2)(a) must be paid from the fees for filing petitions for contested amendment of a parenting plan, as provided in 25-1-201(9).

(2) The court shall determine, if appropriate, the level of evaluation necessary for adequate investigation and preparation of the report, which may include one or more of the following:

(a) parenting education;

(b) mediation pursuant to 40-4-301;

(c) factfinding by the investigator; and

(d) psychological evaluation of the parties.

(3) In preparing a report concerning a child, the investigator may consult any person who has information about the child and the child's potential parenting arrangements. Upon order of the court, the investigator may refer the child to professional personnel for diagnosis. Except as required for children 16 years of age or older, the investigator may consult with and obtain information from medical, psychiatric, or other expert persons who have served the child in the past without obtaining the consent of the persons or entities authorized by law to grant or withhold access to the records. The child's consent must be obtained if the child has reached the age of 16 unless the court finds that the child lacks mental capacity to consent. If the requirements of

subsection (4) are fulfilled, the investigator's report may be received in evidence at the hearing.

(4) The court shall mail the investigator's report to counsel and to any party not represented by counsel at least 10 days prior to the hearing. When consistent with state and federal law, the investigator shall make available to counsel and to any party not represented by counsel the investigator's file of underlying data and reports, complete texts of diagnostic reports made to the investigator pursuant to the provisions of subsection (3), and the names and addresses of all persons whom the investigator has consulted. Any party to the proceeding may call the investigator and any person the investigator has consulted for cross-examination. A party may not waive the right of cross-examination prior to the hearing. The results of the investigation must be included in the court record and may, without objection, be sealed.

History: En. 48-335 by Sec. 35, Ch. 536, L. 1975; R.C.M. 1947, 48-335; amd. Sec. 1, Ch. 277, L. 1981; amd. Sec. 1, Ch. 624, L. 1987; amd. Sec. 2, Ch. 434, L. 1993; amd. Sec. 7, Ch. 561, L. 1993; amd. Sec. 48, Ch. 18, L. 1995; amd. Sec. 122, Ch. 546, L. 1995; amd. Sec. 18, Ch. 343, L. 1997; amd. Sec. 3, Ch. 486, L. 1997.

Cross-References

Opinions and expert testimony, Art. VII, M.R.Ev. (see Title 26, ch. 10).

Consent in general, Title 28, ch. 2, part 3.

40-4-216. Hearings. (1) Parenting plan proceedings shall receive priority in being set for hearing.

(2) The court may tax as costs the payment of necessary travel and other expenses incurred by any person whose presence at the hearing the court considers necessary to determine the best interest of the child.

(3) The court, without a jury, shall determine questions of law and fact. If it finds that a public hearing may be detrimental to the child's best interest, the court may exclude the public from a parenting hearing but may admit any person who has a direct and legitimate interest in the particular case or a legitimate educational or research interest in the work of the court.

(4) If the court finds it necessary that the record of any interview, report, investigation, or testimony in a parenting proceeding be kept secret to protect the child's welfare, the court may make an appropriate order sealing the record.

History: En. 48-336 by Sec. 36, Ch. 536, L. 1975; R.C.M. 1947, 48-336; amd. Sec. 21, Ch. 343, L. 1997.

Cross-References

Right to know, Art. II, sec. 9, Mont. Const.

Right of privacy, Art. II, sec. 10, Mont. Const.

Sittings of court — when private, 3-1-313.

Costs, Title 25, ch. 10.

Allowable costs, Title 25, ch. 10, part 2.

Costs — attorney fees, 40-4-110.

Priority of custody proceedings, 40-7-125.

40-4-217. Notice of intent to move. (1) A parent who intends to change residence shall, unless precluded under 40-4-234, provide written notice to the other parent.

(2) If a parent's change in residence will significantly affect the child's contact with the other parent, notice must be served personally or given by certified mail not less than 30 days before the proposed change in residence and must include a proposed revised residential schedule. Proof of service must be filed with the court that adopted the parenting plan. Failure of the parent who receives notice to respond to the written notice or to seek amendment of

the residential schedule pursuant to 40-4-219 within the 30-day period constitutes acceptance of the proposed revised residential schedule.

History: En. 48-337 by Sec. 37, Ch. 536, L. 1975; R.C.M. 1947, 48-337; amd. Sec. 3, Ch. 17, L. 1979; amd. Sec. 1, Ch. 509, L. 1987; amd. Sec. 1, Ch. 405, L. 1989; amd. Sec. 8, Ch. 350, L. 1995; amd. Sec. 2, Ch. 467, L. 1995; amd. Sec. 22, Ch. 343, L. 1997.

Cross-References

Montana Rules of Civil Procedure, Title 25, ch. 20.

Grandparent-grandchild contact, 40-9-102.

Interference with parent-child contact, 45-5-631 through 45-5-633.

40-4-218. Judicial supervision. (1) Except as otherwise agreed by the parties in writing at the time of the custody decree, the custodian may determine the child's upbringing, including the child's education, health care, and religious training, unless the court after hearing finds, upon motion by the noncustodial parent, that in the absence of a specific limitation of the custodian's authority, the child's physical health would be endangered or the child's emotional development significantly impaired.

(2) If both parents or all contestants agree to the order or if the court finds that in the absence of the order the child's physical health would be endangered or the child's emotional development significantly impaired, the court may order supervised visitation by the noncustodial parent. The court may not order the department of public health and human services to supervise the visitation.

History: En. 48-338 by Sec. 38, Ch. 536, L. 1975; R.C.M. 1947, 48-338; amd. Sec. 12, Ch. 609, L. 1987; amd. Sec. 123, Ch. 546, L. 1995; amd. Sec. 1, Ch. 514, L. 1997.

Cross-References

District Court jurisdiction, Title 3, ch. 5, part 3.

Obligations of parents for support and education of their children, 40-6-211.

Endangering welfare of children, 45-5-622.

Child welfare services, Title 52, ch. 2, part 1.

40-4-219. Amendment of parenting plan — mediation. (1) The court may in its discretion amend a prior parenting plan if it finds, upon the basis of facts that have arisen since the prior plan or that were unknown to the court at the time of entry of the prior plan, that a change has occurred in the circumstances of the child and that the amendment is necessary to serve the best interest of the child. In determining the child's best interest under this section, the court may, in addition to the criteria in 40-4-212, also consider whether:

(a) the parents agree to the amendment;

(b) the child has been integrated into the family of the petitioner with consent of the parents;

(c) the child is 14 years of age or older and desires the amendment;

(d) one parent has willfully and consistently:

(i) refused to allow the child to have any contact with the other parent; or

(ii) attempted to frustrate or deny contact with the child by the other parent; or

(e) one parent has changed or intends to change the child's residence in a manner that significantly affects the child's contact with the other parent.

(2) A court may modify a de facto parenting arrangement in accordance with the factors set forth in 40-4-212.

(3) The court shall presume a parent is not acting in the child's best interest if the parent does any of the acts specified in subsection (1)(d) or (8).

(4) The court may amend the prior parenting plan based on subsection (1)(e) to provide a new residential schedule for parental contact with the child and to apportion transportation costs between the parents.

(5) Attorney fees and costs must be assessed against a party seeking frivolous or repeated amendment if the court finds that the amendment action is vexatious and constitutes harassment.

(6) A parenting plan may be amended upon the death of one parent pursuant to 40-4-221.

(7) As used in this section, "prior parenting plan" means a parenting determination contained in a judicial decree or order made in a parenting proceeding. In proceedings for amendment under this section, a proposed amended parenting plan must be filed and served with the motion for amendment and with the response to the motion for amendment. Preference must be given to carrying out the parenting plan.

(8) (a) If a parent or other person residing in that parent's household has been convicted of any of the crimes listed in subsection (8)(b), the other parent or any other person who has been granted rights to the child pursuant to court order may file an objection to the current parenting order with the court. The parent or other person having rights to the child pursuant to court order shall give notice to the other parent of the objection as provided by the Montana Rules of Civil Procedure, and the other parent has 20 days from the notice to respond. If the parent who receives notice of objection fails to respond within 20 days, the parenting rights of that parent are suspended until further order of the court. If that parent responds and objects, a hearing must be held within 30 days of the response.

(b) This subsection (8) applies to the following crimes:

(i) deliberate homicide, as described in 45-5-102;

(ii) mitigated deliberate homicide, as described in 45-5-103;

(iii) sexual assault, as described in 45-5-502;

(iv) sexual intercourse without consent, as described in 45-5-503;

(v) deviate sexual conduct with an animal, as described in 45-2-101 and prohibited under 45-5-505;

(vi) incest, as described in 45-5-507;

(vii) aggravated promotion of prostitution of a child, as described in 45-5-603(1)(b);

(viii) endangering the welfare of children, as described in 45-5-622;

(ix) partner or family member assault of the type described in 45-5-206(1)(a);

(x) sexual abuse of children, as described in 45-5-625.

(9) Except in cases of physical abuse or threat of physical abuse by one parent against the other parent or the child, or when a parent has been convicted of a crime enumerated in subsection (8)(b), the court may, in its discretion, order the parties to participate in a dispute resolution process to assist in resolving any conflicts between the parties regarding amendment of the parenting plan. The dispute resolution process may include counseling or mediation by a specified person or agency, and court action.

History: En. 48-339 by Sec. 39, Ch. 536, L. 1975; R.C.M. 1947, 48-339; amd. Sec. 4, Ch. 127, L. 1979; amd. Sec. 2, Ch. 410, L. 1979; amd. Sec. 1, Ch. 449, L. 1983; amd. Sec. 2, Ch. 509, L. 1987; amd. Sec. 2, Ch. 303, L. 1989; amd. Sec. 2, Ch. 405, L. 1989; amd. Sec. 9, Ch. 350, L. 1995; amd. Sec. 3, Ch. 467, L. 1995; amd. Sec. 23, Ch. 343, L. 1997.

Cross-References

Montana Rules of Civil Procedure, Title 25, ch. 20.

Costs — attorney fees, 40-4-110.

Jurisdiction — commencement of parenting proceedings, 40-4-211.

Custodial interference, 45-5-304.

Endangering welfare of children, 45-5-622.

Interference with parent-child contact, 45-5-631 through 45-5-633.

40-4-220. Affidavit practice. (1) Unless the parties agree to an interim parenting plan or an amended parenting plan, the moving party seeking an interim parenting plan or amendment of a final parenting plan shall submit, together with the moving papers, an affidavit setting forth facts supporting the requested plan or amendment and shall give notice, together with a copy of the affidavit, to other parties to the proceeding, who may file opposing affidavits. The court shall deny the motion unless it finds that adequate cause for hearing the motion is established by the affidavits, based on the best interests of the child, in which case it shall set a date for hearing on an order to show cause why the requested plan or amendment should not be granted.

(2) (a) A party seeking an interim parenting plan may request that the court grant a temporary order providing for living arrangements for the child ex parte. The party shall make the request in the moving papers and shall submit an affidavit showing that:

(i) no previous parenting plan has been ordered by a court and it would be in the child's best interest under the standards of 40-4-212 if temporary living arrangements for the child were as proposed by the moving party; or

(ii) although a previous parenting plan has been ordered, an emergency situation has arisen in the child's present environment that endangers the child's physical, mental, or emotional health and an immediate change in the parenting plan is necessary to protect the child.

(b) If the court finds from the affidavits submitted by the moving party that the interim parenting plan proposed by the moving party would be in the child's best interest under the standards of 40-4-212 and that the child's present environment endangers the child's physical, mental, or emotional health and the child would be protected by the interim parenting plan, the court shall make an order implementing the interim parenting plan proposed by the moving party. The court shall require all parties to appear and show cause within 20 days from the execution of the interim parenting plan why the interim parenting plan should not remain in effect until further order of court.

History: En. 48-340 by Sec. 40, Ch. 536, L. 1975; R.C.M. 1947, 48-340; amd. Sec. 3, Ch. 410, L. 1979; amd. Sec. 24, Ch. 343, L. 1997; amd. Sec. 1, Ch. 541, L. 1999.

Compiler's Comments

1999 Amendment: Chapter 541 in two places in section substituted "endangers the child's physical, mental, or emotional health" for "is detrimental to the child's best interests"; and made minor changes in style. Amendment effective April 29, 1999.

Cross-References

Affidavits, Title 26, ch. 1, part 10.

Information under oath to be submitted to court, 40-7-110.

40-4-221. Determination of child's care upon death of parent. (1) Upon the death of a parent, one or more parties named in subsection (2) may request a parenting plan hearing. The surviving parent must be a party in any proceeding brought under this section.

(2) Upon the death of a parent, any of the following parties may request a parenting plan hearing:

(a) the natural parent;
(b) the surviving spouse of the deceased parent;
(c) a person nominated by the will of the deceased parent;
(d) any person nominated by the child if the child is at least 12 years old;
(e) any other person if that person has actual physical control over the child;
(f) a person who has established with the child a child-parent relationship, as defined in 40-4-211;
(g) any other party whom, upon showing of good cause, the court permits to intervene as an interested party.

(3) The hearing and determination of a parenting plan is governed by this part.

History: En. Secs. 1, 2, 3, Ch. 127, L. 1979; amd. Sec. 25, Ch. 343, L. 1997; amd. Sec. 2, Ch. 414, L. 1999.

Compiler's Comments

1999 Amendment: Chapter 414 inserted (2)(f) authorizing person who has established child-parent relationship with child to request parenting plan hearing; and made minor changes in style. Amendment effective October 1, 1999.

Cross-References

Permissive intervention, Rule 24(b), M.R.Civ.P. (see Title 25, ch. 20).

Remedy when parent dies without providing for support of child, 40-6-213.

Parenting, services, and earnings of child, 40-6-221.

40-4-222. Repealed. Sec. 39, Ch. 343, L. 1997.
History: En. Sec. 1, Ch. 416, L. 1981.

40-4-223. Repealed. Sec. 39, Ch. 343, L. 1997.
History: En. Sec. 2, Ch. 416, L. 1981; amd. Sec. 2, Ch. 727, L. 1985.

40-4-224. Repealed. Sec. 39, Ch. 343, L. 1997.
History: En. Sec. 3, Ch. 416, L. 1981; amd. Sec. 1, Ch. 496, L. 1985; amd. Sec. 3, Ch. 727, L. 1985; amd. Sec. 2, Ch. 379, L. 1987; amd. Sec. 1, Ch. 365, L. 1989.

40-4-225. Access to records by parent. Notwithstanding any other provision of law, access to records and information pertaining to a minor child, including but not limited to medical, dental, law enforcement, and school records, may not be denied to a parent who is a party to a parenting plan.

History: En. Sec. 4, Ch. 416, L. 1981; amd. Sec. 26, Ch. 343, L. 1997.

Cross-References

Right to know, Art. II, sec. 9, Mont. Const.

Right of privacy, Art. II, sec. 10, Mont. Const.

Immunization record, 20-5-406.

40-4-226. Court-sanctioned educational program on effects of dissolution of marriage on children. (1) In a proceeding for dissolution of marriage involving a minor child or in a parenting plan proceeding involving a minor child, a court shall inform the parties, excluding the minor child, of available educational programs concerning the effects of dissolution of marriage on children and, if the court finds that it would be in the best interest of the minor child, shall order the parties to attend a court-sanctioned program. The program may be divided into sessions. The program must be educational in nature and may not be designed for individual therapy.

(2) The cost of implementing the court-sanctioned educational program for each district court, provided for in subsection (1), must be paid from the fees for filing petitions for contested amendment of a parenting plan, provided

for in 25-1-201(9). Costs may include parenting evaluation and guardian ad litem services.

History: En. Sec. 1, Ch. 201, L. 1995; amd. Sec. 27, Ch. 343, L. 1997.

Cross-References

Montana Family Policy Act, Title 41, ch. 7.

40-4-227. Rights of parents and children — policy — findings. (1) It is the policy of the state of Montana:

(a) to recognize the constitutionally protected rights of parents and the integrity of the family unit;

(b) to recognize a child's constitutionally protected rights, including all fundamental rights unless those rights are specifically precluded by laws that enhance their protection; and

(c) to ensure that the best interests of the child are met in parenting proceedings.

(2) The legislature finds:

(a) that while it is in the best interests of a child to maintain a relationship with a natural parent, a natural parent's inchoate interest in the child requires constitutional protection only when the parent has demonstrated a timely commitment to the responsibilities of parenthood; and

(b) that a parent's constitutionally protected interest in the parental control of a child should yield to the best interests of the child when the parent's conduct is contrary to the child-parent relationship.

History: En. Sec. 3, Ch. 414, L. 1999.

Compiler's Comments

Effective Date: This section is effective October 1, 1999.

40-4-228. Parenting and visitation matters between natural parent and third party. (1) In cases when a nonparent seeks a parental interest in a child under 40-4-211 or visitation with a child, the provisions of this chapter apply unless a separate action is pending under Title 41, chapter 3.

(2) A court may award a parental interest to a person other than a natural parent when it is shown by clear and convincing evidence that:

(a) the natural parent has engaged in conduct that is contrary to the child-parent relationship; and

(b) the nonparent has established with the child a child-parent relationship, as defined in 40-4-211, and it is in the best interests of the child to continue that relationship.

(3) For purposes of an award of visitation rights under this section, a court may order visitation based on the best interests of the child.

(4) For purposes of this section, voluntarily permitting a child to remain continuously in the care of others for a significant period of time so that the others stand in loco parentis to the child is conduct that is contrary to the parent-child relationship.

(5) It is not necessary for the court to find a natural parent unfit before awarding a parental interest to a third party under this section.

History: En. Sec. 4, Ch. 414, L. 1999.

Compiler's Comments

Effective Date: This section is effective October 1, 1999.

40-4-229 through 40-4-232 reserved.

40-4-233. Final parenting plan — purpose and objectives. The objectives of a final parenting plan are to:

(1) protect the best interest of the child, consistent with 40-4-212;

(2) provide for the physical care of the child;

(3) maintain the child's emotional stability and minimize the child's exposure to parental conflict;

(4) provide for the child's changing needs as the child grows and matures, in a way that minimizes the need for future amendment to the final parenting plan;

(5) set forth the authority and responsibilities of each parent with respect to the child, consistent with the criteria in 40-4-234; and

(6) encourage the parents, when appropriate under 40-4-234, to meet their responsibilities to their minor children through agreements in the parenting plan rather than through judicial intervention.

History: En. Sec. 19, Ch. 343, L. 1997.

40-4-234. Final parenting plan criteria. (1) In every dissolution proceeding, proceeding for declaration of invalidity of marriage, parenting plan proceeding, or legal separation proceeding that involves a child, each parent or both parents jointly shall submit to the court, in good faith, a proposed final plan for parenting the child, which may include the allocation of parenting functions. A final parenting plan must be incorporated into any final decree or amended decree, including cases of dissolution by default. As used in this section, parenting functions means those aspects of the parent-child relationship in which the parent makes decisions and performs functions necessary for the care and growth of the child, which may include:

(a) maintaining a loving, stable, consistent, and nurturing relationship with the child;

(b) attending to the daily needs of the child, such as feeding, physical care, development, and grooming, supervision, spiritual growth and development, health care, day care, and engaging in other activities that are appropriate to the developmental level of the child and that are within the social and economic circumstances of the particular family;

(c) attending to adequate education for the child, including remedial or other education essential to the best interest of the child;

(d) ensuring the interactions and interrelationship of the child with the child's parents and siblings and with any other person who significantly affects the child's best interest; and

(e) exercising appropriate judgment regarding the child's welfare, consistent with the child's developmental level and the family's social and economic circumstances.

(2) Based on the best interest of the child, a final parenting plan may include, at a minimum, provisions for:

(a) designation of a parent as custodian of the child, solely for the purposes of all other state and federal statutes that require a designation or determination of custody, but the designation may not affect either parent's rights and responsibilities under the parenting plan;

(b) designation of the legal residence of both parents and the child, except as provided in 40-4-217;

(c) a residential schedule specifying the periods of time during which the child will reside with each parent, including provisions for holidays, birthdays of family members, vacations, and other special occasions;

(d) finances to provide for the child's needs;

(e) any other factors affecting the physical and emotional health and well-being of the child;

(f) periodic review of the parenting plan when requested by either parent or the child or when circumstances arise that are foreseen by the parents as triggering a need for review, such as attainment by the child of a certain age or if a change in the child's residence is necessitated;

(g) sanctions that will apply if a parent fails to follow the terms of the parenting plan, including contempt of court;

(h) allocation of parental decisionmaking authority regarding the child's:

(i) education;

(ii) spiritual development; and

(iii) health care and physical growth;

(i) the method by which future disputes concerning the child will be resolved between the parents, other than court action; and

(j) the unique circumstances of the child or the family situation that the parents agree will facilitate a meaningful, ongoing relationship between the child and parents.

(3) The court may in its discretion order the parties to participate in a dispute resolution process to assist in resolving any conflicts between the parties regarding adoption of the parenting plan. The dispute resolution process may include counseling or mediation by a specified person or agency or court action.

(4) Each parent may make decisions regarding the day-to-day care and control of the child while the child is residing with that parent, and either parent may make emergency decisions affecting the child's safety or health. When mutual decisionmaking is designated in the parenting plan but cannot be achieved regarding a particular issue, the parents shall make a good faith effort to resolve the issue through any dispute resolution process provided for in the final parenting plan.

(5) If a parent fails to comply with a provision of the parenting plan, the other parent's obligations under the parenting plan are not affected.

(6) At the request of either parent or appropriate party, the court shall order that the parenting plan be sealed except for access by the parents, guardian, or other person having custody of the child.

History: En. Sec. 20, Ch. 343, L. 1997; amd. Sec. 5, Ch. 545, L. 1999.

Compiler's Comments

1999 Amendment: Chapter 545 at beginning of (6) inserted "At the request of either parent or appropriate party"; and made minor changes in style. Amendment effective July 1, 1999.

40-4-235 through 40-4-250 reserved.

40-4-251. Definitions. As used in 40-4-251 through 40-4-258, the following definitions apply:

(1) "Asset" includes but is not limited to any real or personal property of any nature however and whenever acquired, whether the property is tangible or intangible, whether the property is currently existing or contingent, and whether the title is in the name of the husband or wife, or both.

(2) "Default judgment" does not include a stipulated judgment or any judgment pursuant to a marital settlement agreement.

(3) "Earnings and accumulations" includes income from any source.

(4) "Expenses" includes but is not limited to all personal living expenses, but does not include business-related expenses.

(5) "Liability" includes but is not limited to any debt or obligation, however and whenever acquired, whether the debt or obligation is currently existing or contingent or is in the name of the husband or wife, or both.

(6) "Marital estate" includes all assets and liabilities.

History: En. Sec. 1, Ch. 326, L. 1997.

40-4-252. Preliminary declaration of disclosure — penalty. (1) Within 60 days of service of a petition for dissolution or nullity of marriage or for legal separation of the parties, each party shall serve on the other party a preliminary declaration of disclosure, executed under penalty of perjury. The parties may, by written stipulation or by oral stipulation made in open court, agree to waive the exchange of or change the time for exchange of preliminary declarations of disclosure.

(2) The preliminary declaration of disclosure may not be filed with the court, except on the court's order.

(3) The preliminary declaration of disclosure must set forth with sufficient particularity, which a person of reasonable and ordinary intelligence can ascertain, all of the following:

(a) the identity of all assets in which the declarant has or may have an interest and all liabilities for which the declarant is or may be liable, regardless of the characterization of an asset or liability; and

(b) the declarant's percentage of ownership in each asset and percentage of obligation for each liability when property is not solely owned by one or both of the parties. The preliminary declaration may also set forth the declarant's characterization of each asset or liability.

(4) A declarant may amend the declarant's preliminary declaration of disclosure without permission of the court.

(5) Along with the preliminary declaration of disclosure, each party shall provide the other party with a completed income and expense declaration unless an income and expense declaration has already been provided and is current and valid.

(6) In addition to any other civil or criminal remedy available under law for the commission of perjury, the court may set aside the judgment, or part of the judgment, if the court discovers that a party has committed perjury in the preliminary declaration of disclosure.

History: En. Sec. 2, Ch. 326, L. 1997; amd. Sec. 6, Ch. 545, L. 1999.

Compiler's Comments

1999 Amendment: Chapter 545 in second sentence in (1) inserted "waive the exchange of or". Amendment effective July 1, 1999.

40-4-253. Final declaration of disclosure — failure to disclose current income and expense declaration — penalty. (1) (a) Each party shall serve on the other party a final declaration of disclosure and a current income and expense declaration, executed under penalty of perjury:

(i) before or at the time that the parties enter into an agreement for the resolution of property or support issues, other than pendente lite support; or

(ii) in the event that the case goes to trial, no later than 45 days before the first assigned trial date.

(b) The parties may, by written stipulation or by oral stipulation made in open court, agree to change the time for exchange of final declarations of disclosure.

(2) The final declaration of disclosure must include all material facts and information regarding the:

(a) characterization of all assets and liabilities;

(b) valuation of all assets that are contended to be marital or for which it is contended that the marital estate has an interest;

(c) amounts of all obligations that are contended to be marital obligations or for which it is contended that the marital estate has liability; and

(d) expenses and earnings and accumulations of each party that have been set forth in the income and expense declaration.

(3) Along with the final declaration of disclosure, each party shall serve on the other party an updated income and expense declaration unless a current income and expense declaration is on file.

(4) The failure of a party to disclose an asset or liability on the final declaration of disclosure is presumed to be grounds for the court, without taking into account the equitable division of the marital estate, to award the undisclosed asset to the opposing party or the undisclosed liability to the noncomplying party.

(5) In addition to any other civil or criminal remedy available under law for the commission of perjury, the court may set aside the judgment, or part of the judgment, if the court discovers, within 5 years from the date of entry of judgment, that a party has committed perjury in the final declaration of disclosure.

History: En. Sec. 3, Ch. 326, L. 1997.

40-4-254. Execution and service of final declaration of disclosure and current income and expense declaration. Absent good cause, the court may not enter a judgment with respect to the parties' property rights unless each party has executed and served a copy of the final declaration of disclosure and current income and expense declaration. Each party shall execute and file with the court a declaration signed under penalty of perjury stating that service of the final declaration of disclosure and current income and expense declaration was made on the other party.

History: En. Sec. 4, Ch. 326, L. 1997.

40-4-255. Noncomplying disclosure declarations — requests to comply — remedies. (1) A party who has served on the other party a preliminary declaration of disclosure under 40-4-252 or a final declaration of disclosure under 40-4-253 and who has provided the information required in the declarations with sufficient particularity may, within a reasonable time, request from a noncomplying party preparation of the appropriate declaration of disclosure or further particularity in a declaration.

(2) If a noncomplying party fails to comply with a request under subsection (1), the complying party may file either or both of the following:

(a) a motion to compel a further response;

(b) a motion for an order preventing the noncomplying party from presenting evidence on issues that should have been covered in the declaration of disclosure.

(3) If a party fails to comply with any provision of 40-4-251 through 40-4-258, the court shall, in addition to any other remedy provided by law, order the noncomplying party to pay to the complying party any reasonable attorney fees or costs incurred, or both, unless the court finds that the noncomplying party acted with substantial justification or that other circumstances make the imposition of the sanction unjust.

History: **En. Sec. 5, Ch. 326, L. 1997.**

40-4-256. Liquidation — transfer of marital estate assets to avoid encumbrance, devaluation, or market or investment risk — authority of court. (1) Except as provided in subsection (2), at any time during the proceedings, the court may, upon application of a party and for good cause and after consideration of the relative nature, scope, and extent of the marital estate, order the liquidation or transfer of title of marital estate assets to avoid unreasonable encumbrance, devaluation, or market or investment risk.

(2) The court may not grant an application under subsection (1) unless the appropriate declaration of disclosure has been served on the opposing party by the moving party as provided in 40-4-252 through 40-4-254.

History: **En. Sec. 6, Ch. 326, L. 1997.**

40-4-257. Default judgments — disclosures. In the case of a default judgment, a petitioner may waive the final disclosure requirements of 40-4-253 and 40-4-254. However, the petitioner shall comply with the preliminary declaration of disclosure requirements of 40-4-252.

History: **En. Sec. 7, Ch. 326, L. 1997.**

40-4-258. Disclosures — attorney work product privilege — protective orders — Montana Rules of Civil Procedure. A disclosure required by 40-4-252 through 40-4-254 does not abrogate the attorney work product privilege or the formal discovery procedures provided by the Montana Rules of Civil Procedure or does not impede the power of the court to issue protective orders.

History: **En. Sec. 8, Ch. 326, L. 1997.**

Part 3

Family Law Mediation

40-4-301. Family law mediation — exception. (1) The district court may at any time consider the advisability of requiring the parties to a proceeding under this chapter to participate in the mediation of the case. Any party may request the court to order mediation. If the parties agree to mediation, the court may require the attendance of the parties or the representatives of the parties with authority to settle the case at the mediation sessions.

(2) The court may not authorize or permit continuation of mediated negotiations if the court has reason to suspect that one of the parties or a child of a party has been physically, sexually, or emotionally abused by the other party.

(3) The court shall appoint a mediator from the list maintained pursuant to 40-4-306. By agreement of all parties, mediators not on the list may be appointed.

(4) The court may adopt rules to implement this part.

History: **En. Sec. 1, Ch. 199, L. 1993.**

40-4-302. Mediation proceeding — tolling of statute of limitations. (1) The purpose of a mediation proceeding is to reduce the acrimony that may exist between the parties and to develop an agreement that is supportive of the best interests of a child involved in the proceeding.

(2) The mediator shall attempt to effect a settlement of the parenting, child support, parental contact with the child, maintenance, or property settlement dispute. The mediator may not use coercive measures to effect the settlement. The mediator may recommend that a party obtain assistance from other resources in the community.

(3) Subject to 40-4-301(1), the mediator may exclude attorneys from the mediation sessions. The parties' attorneys may confer with the mediator prior to the mediation session and may review and approve any agreement.

(4) An applicable statute of limitations is tolled as to the participants during the period of mediation. The tolling commences on the date the parties agree in writing to participate in the mediation or when the court orders mediation, whichever is later, and ends on the date the mediation is officially terminated by the mediator.

History: **En. Sec. 2, Ch. 199, L. 1993; amd. Sec. 28, Ch. 343, L. 1997.**

40-4-303. Proceedings — records — confidentiality. Mediation proceedings under this part are subject to the confidentiality and privilege provisions of 26-1-813. Mediation proceedings must be conducted in private unless otherwise agreed to in writing by the parties and the mediator. All records of a mediation proceeding are confidential and may not be used in evidence in an action enumerated in 40-4-301. A mediator and the parties to a mediation under this part are entitled to the confidentiality and privilege provisions of 26-1-813.

History: **En. Sec. 3, Ch. 199, L. 1993; amd. Sec. 2, Ch. 481, L. 1999.**

Compiler's Comments

1999 Amendment: Chapter 481 inserted first sentence providing that mediation proceedings are subject to statutory confidentiality and privilege provisions; at end of second sentence after "private" inserted "unless otherwise agreed to in writing by the parties and the mediator"; deleted former fourth sentence that read: "Matters subject to the mediation proceeding are confidential"; at end of fourth sentence after "mediation" substituted "under this part are entitled to the confidentiality and privilege provisions of 26-1-813" for "is not subject to compelled disclosure of any part of the mediation proceeding"; and made minor changes in style. Amendment effective October 1, 1999.

40-4-304. Mediator recommendation. The mediator may, upon stipulation by the parties, recommend temporary orders to the court prior to the final decree.

History: **En. Sec. 4, Ch. 199, L. 1993.**

40-4-305. Mediation agreement. An agreement reached by the parties as a result of mediation must be discussed by the parties with their attorneys, if any, and the approved agreement may be submitted to the court. An agreement may not be submitted to the court if any party objects. The court may adopt the agreement.

History: En. Sec. 5, Ch. 199, L. 1993.

40-4-306. Mediator list. The district court shall establish and maintain a list of mediators available to assist parties in formally mediating disputes as provided in 40-4-301 and 40-4-302. The list of mediators must be maintained by the clerk of court. The clerk of court may accept the applications of individuals who meet the qualifications required under 40-4-307 and who seek placement on the mediator list. The applications must be presented to the court for review and approval. A mediator may be a member of the staff or contracted staff of a district court, probation department, mental health services agency, or private mediation service.

History: En. Sec. 6, Ch. 199, L. 1993.

40-4-307. Mediator qualifications. A mediator must meet the following minimum qualifications:

(1) knowledge of the court system and the procedures used in family law matters;

(2) knowledge of other resources in the community to which the parties may be referred for assistance;

(3) if applicable, knowledge of child development, clinical issues relating to children, the effects of marriage dissolution on children, and parenting research; and

(4) knowledge of the mediation process.

History: En. Sec. 7, Ch. 199, L. 1993; amd. Sec. 29, Ch. 343, L. 1997.

40-4-308. Court to establish fees. A court may establish a fee schedule for the costs of administering this part. The fees must be paid by the parties to the mediation proceeding.

History: En. Sec. 8, Ch. 199, L. 1993.

CHAPTER 5

ENFORCEMENT OF SUPPORT

Part 1 — Uniform Interstate Family Support Act

40-5-101. Short title.
40-5-102. Repealed.
40-5-103. Definitions.
40-5-104. Renumbered 40-5-144 by Code Commissioner, 1993.
40-5-105. Repealed.
40-5-106. Renumbered 40-5-153 by Code Commissioner, 1993.
40-5-107. Renumbered 40-5-154 by Code Commissioner, 1993.
40-5-108 through 40-5-114. Repealed.
40-5-115. Renumbered 40-5-161 by Code Commissioner, 1993.
40-5-116. Repealed.
40-5-117. Repealed.
40-5-118. Renumbered 40-5-165 by Code Commissioner, 1993.
40-5-119. Renumbered 40-5-166 by Code Commissioner, 1993.

40-5-120 through 40-5-132. Repealed.
40-5-133. Renumbered 40-5-183 by Code Commissioner, 1993.
40-5-134. Repealed.
40-5-135. Repealed.
40-5-136. Repealed.
40-5-137. Renumbered 40-5-184 by Code Commissioner, 1993.
40-5-138. Repealed.
40-5-139. Repealed.
40-5-140. Renumbered 40-5-185 by Code Commissioner, 1993.
40-5-141. Renumbered 40-5-186 by Code Commissioner, 1993.
40-5-142. Renumbered 40-5-197 by Code Commissioner, 1993.
40-5-143. Tribunals of this state.
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40-5-157. Income-withholding orders of another state — employer compliance — employer immunity — penalties for noncompliance.
40-5-158. Proceedings under this part.
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40-5-160. Application of law of this state.
40-5-161. Duties of initiating tribunal.
40-5-162. Duties and powers of responding tribunal.
40-5-163. Inappropriate tribunal.
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40-5-167 through 40-5-169 reserved.
40-5-170. Private counsel.
40-5-171. Pleadings and accompanying documents.
40-5-172. Nondisclosure of information in exceptional circumstances.
40-5-173. Costs and fees.
40-5-174. Nonparentage as defense — limitation.
40-5-175. Special rules of evidence and procedure.
40-5-176. Communications between tribunals.
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40-5-181. Credit for payments.
40-5-182 reserved.
40-5-183. Limited immunity of petitioner.
40-5-184. Registration of order for enforcement.
40-5-185. Procedure to register order for enforcement.
40-5-186. Effect of registration enforcement.
40-5-187. Choice of law.
40-5-188. Notice of registration of order.
40-5-189. Procedure to contest validity or enforcement of registered order.
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40-5-196. Proceeding to determine parentage.
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40-5-202. Department of public health and human services — powers and duties regarding collection of support debt.
40-5-203. Child support enforcement services.
40-5-204. Cooperation by obligee.
40-5-205. Payment of support money collected to department — notice.
40-5-206. Central unit for information and administration — cooperation enjoined — availability of records.
40-5-207. Department authorized to enforce maintenance awards.
40-5-208. Medical support — obligation enforcement.
40-5-209. Child support guidelines — periodic review.
40-5-210. Standardized fee schedule — rules.
40-5-211. Repealed.
40-5-212. Repealed.
40-5-213. Financial statements by obligor — penalty.
40-5-214. Scale of suggested minimum contributions.
40-5-215 through 40-5-220 reserved.
40-5-221. Debt to state by obligor — limitations.
40-5-222. Support debt based upon support order — notice — contents — action to collect.
40-5-223. Repealed.
40-5-224. Finding of support liability based upon payment of public assistance — support lien — bond to release warrant — action to collect.
40-5-225. Notice of financial responsibility — temporary and final support obligations — administrative procedure.
40-5-226. Administrative hearing — nature — place — time — determinations — failure to appear — entry of final decision and order.
40-5-227. Filing and docketing of final orders — orders effective as district court decrees.
40-5-228 through 40-5-230 reserved.
40-5-231. Jurisdiction and venue.
40-5-232. Establishment of paternity — notice of parental responsibility — contents.
40-5-233. Establishment of paternity — administrative hearing — subpoena — compulsory blood testing.
40-5-234. Paternity blood tests — use of expert's affidavit — effect of test results — records — presumption.
40-5-235. Effect of order establishing paternity — birth records — relief from order.
40-5-236. Referral of paternity issue to district court — record — parties — exclusion of other matters — fees.
40-5-237. District court paternity proceedings — objection to tests — additional tests — expert's report — admissibility of evidence.
40-5-238. Confidentiality of paternity hearings and records of proceedings.
40-5-239 and 40-5-240 reserved.
40-5-241. Repealed.
40-5-242. Notice of support lien — civil liability upon failure to honor support lien or to comply with warrant for distraint.
40-5-243. Release of excess to obligor.
40-5-244. Banks and savings and loan associations — service effective only as to branch office served.
40-5-245. Repealed.
40-5-246. Repealed.
40-5-247. Warrant for distraint — effect — satisfaction of support lien — redemption.

40-5-248. Lien against real and personal property — effect of lien — interest — warrant for distraint.
40-5-249 and 40-5-250 reserved.
40-5-251. Debt payment schedule.
40-5-252. Interest on debts due — waiver.
40-5-253. Administrative findings and order — administrative remedies — judicial review.
40-5-254. Statutory limitations.
40-5-255. Charging off child support debts as uncollectible — sale of support debts.
40-5-256. Employee debtor rights protected — limitation.
40-5-257. Assignment of earnings to be honored — effect.
40-5-258 through 40-5-260 reserved.
40-5-261. Procedures for making information available to consumer reporting agencies.
40-5-262. Rules.
40-5-263. Central clearinghouse — interstate enforcement services — powers and duties of the department.
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40-5-273. Administrative review of child support orders — modifying orders.
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40-5-311. Remedy not exclusive.
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40-5-313. Obligor rights protected — penalties.
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40-5-406 through 40-5-410 reserved.
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40-5-413. Notice of income withholding.
40-5-414. Hearing.
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40-5-418. Payment records.
40-5-419 and 40-5-420 reserved.
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40-5-423. Priority of income withholding.

40-5-424. Civil liability for failure to comply with income withholding order.
40-5-425. Repealed.
40-5-426 through 40-5-430 reserved.
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40-5-703. Hearing — order suspending license.
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40-5-921. Certification of records.
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Part 1

Uniform Interstate Family Support Act

Part Cross-References

Uniform Enforcement of Foreign Judgments Act, Title 25, ch.9, part 5.

Uniform Foreign Money-Judgments Recognition Act, Title 25, ch.9, part 6.

When action not abated by death or other disability, 27-1-501.

Duties of husband and wife as to support, 40-2-102.

Support of spouse, 40-2-103.

Child support, 40-4-204.

Registration and enforcement of interstate income withholding orders, 40-5-431 through 40-5-434.

40-5-101. Short title. This part may be cited as the "Uniform Interstate Family Support Act".

History: En. Sec. 42, Ch. 237, L. 1969; R.C.M. 1947, 93-2601-82; amd. Sec. 1, Ch. 328, L. 1993.

40-5-102. Repealed. Sec. 58, Ch. 328, L. 1993.

History: En. Sec. 1, Ch. 237, L. 1969; R.C.M. 1947, 93-2601-41.

40-5-103. Definitions. (1) "Child" means an individual, whether over or under the age of majority, who is or is alleged to be owed a duty of support by the individual's parent or who is or is alleged to be the beneficiary of a child support order directed to the parent.

(2) "Child support order" means a support order for a child, including a child who has attained the age of majority under the law of the issuing state.

(3) "Duty of support":

(a) means an obligation imposed or imposable by law to provide support for a child, spouse, or former spouse; and

(b) includes an unsatisfied obligation to provide support.

(4) "Governor" includes an individual performing the functions of governor or the executive authority of any state covered by this part.

(5) "Home state" means the state in which a child lived with a parent or a person acting as parent for at least 6 consecutive months immediately preceding the time of filing of a petition or comparable pleading for support and, if a child is less than 6 months old, the state in which the child lived from birth with a parent or person acting as parent. A period of temporary absence of a parent or person acting as parent is counted as part of the 6-month or other period.

(6) "Income" includes:

(a) earnings or other periodic entitlements to money from any source; and

(b) any other property subject to withholding for support under the law of this state.

(7) "Income-withholding order" means an order or other legal process directed to an obligor's employer, as provided in Title 40, chapter 5, parts 3 and 4, or by a tribunal of another state to withhold support from the income of the obligor.

(8) "Initiating state" means a state from which a proceeding is forwarded or in which a proceeding is filed for forwarding to a responding state pursuant to this part or a law or procedure substantially similar to this part, the Uniform Reciprocal Enforcement of Support Act, the Revised Uniform Reciprocal Enforcement of Support Act, or a law or procedure substantially similar to either of those acts or pursuant to a proceeding initiated by the department of public health and human services under 40-5-263.

(9) "Initiating tribunal" means the authorized tribunal in an initiating state.

(10) "Issuing state" means the state in which a tribunal issues a support order or renders a judgment determining parentage.

(11) "Issuing tribunal" means the tribunal that issues a support order or renders a judgment determining parentage.

(12) "Law" includes decisional and statutory law and rules and regulations having the force of law.

(13) "Obligee" means:

(a) an individual to whom a duty of support is or is alleged to be owed or in whose favor a support order has been issued or a judgment determining parentage has been rendered;

(b) a state or political subdivision to which the rights under a duty of support or a support order have been assigned or that has independent claims based on financial assistance provided to an individual obligee; or

(c) an individual seeking a judgment determining parentage of that individual's child.

(14) "Obligor" means an individual or the estate of a decedent:

(a) who owes or is alleged to owe a duty of support;

(b) who is alleged but has not been adjudicated to be a parent of a child; or

(c) who is liable under a support order.

(15) "Prosecuting attorney" means the public official in the appropriate place who has the duty to enforce criminal laws relating to the failure to provide for the support of any person.

(16) "Register" means to file a support order or judgment determining parentage in the registry of foreign support orders.

(17) "Registering tribunal" means a tribunal in which a support order is registered.

(18) "Responding state" means a state in which a proceeding is filed or to which a proceeding is forwarded for filing from an initiating state under this part or a law or procedure substantially similar to this part, the Uniform Reciprocal Enforcement of Support Act, the Revised Uniform Reciprocal Enforcement of Support Act, or a law or procedure substantially similar to

either of those acts or under a proceeding initiated by the department of public health and human services under 40-5-263.

(19) "Responding tribunal" means the authorized tribunal in a responding state.

(20) "Spousal support order" means a support order for a spouse or former spouse of the obligor.

(21) "State" means a state of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States. The term "state" includes an Indian tribe or a foreign jurisdiction that has enacted a law or established procedures for issuance and enforcement of support orders that are substantially similar to the procedures under this part, the Uniform Reciprocal Enforcement of Support Act, or the Revised Uniform Reciprocal Enforcement of Support Act.

(22) (a) "Support enforcement agency" means a public official or agency authorized to seek:

(i) enforcement of support orders or laws relating to the duty of support;

(ii) establishment or modification of child support;

(iii) a determination of parentage; or

(iv) to locate obligors or their assets.

(b) Support enforcement agency includes:

(i) in cases brought under Title IV-D of the Social Security Act, the department of public health and human services; and

(ii) in all other cases, the prosecuting attorney.

(23) "Support order" means a judgment, decree, or order, whether temporary, final, or subject to modification, that:

(a) is for the benefit of a child, a spouse or a former spouse, or a state or political subdivision;

(b) provides for monetary support, health care, arrearages, or reimbursement; and

(c) may include related costs and fees, interest, income withholding, attorney fees, and other relief.

(24) "Tribunal" means a court, administrative agency, or quasi-judicial entity authorized to establish, enforce, or modify support orders or to determine parentage.

History: **En. Sec. 2, Ch. 237, L. 1969; R.C.M. 1947, 93-2601-42; amd. Sec. 2, Ch. 328, L. 1993; amd. Sec. 124, Ch. 546, L. 1995; amd. Sec. 27, Ch. 552, L. 1997.**

40-5-104. Renumbered 40-5-144 by Code Commissioner, 1993.

40-5-105. Repealed. Sec. 58, Ch. 328, L. 1993.

History: **En. Sec. 4, Ch. 237, L. 1969; R.C.M. 1947, 93-2601-44.**

40-5-106. Renumbered 40-5-153 by Code Commissioner, 1993.

40-5-107. Renumbered 40-5-154 by Code Commissioner, 1993.

40-5-108 through 40-5-114. Repealed. Sec. 58, Ch. 328, L. 1993.

Compiler's Comments

Histories of Repealed Sections:

40-5-108. En. Sec. 7, Ch. 237, L. 1969; R.C.M. 1947, 93-2601-47.

40-5-109. En. Sec. 8, Ch. 237, L. 1969; R.C.M. 1947, 93-2601-48.

40-5-110. En. Sec. 9, Ch. 237, L. 1969; R.C.M. 1947, 93-2601-49.

40-5-111. En. Sec. 10, Ch. 237, L. 1969; R.C.M. 1947, 93-2601-50.

40-5-112. En. Sec. 11, Ch. 237, L. 1969; amd. Sec. 6, Ch. 379, L. 1977; R.C.M. 1947, 93-2601-51; amd. Sec. 3, Ch. 33, L. 1979; amd. Sec. 27, Ch. 609, L. 1987.

40-5-113. En. Sec. 12, Ch. 237, L. 1969; R.C.M. 1947, 93-2601-52; amd. Sec. 1, Ch. 189, L. 1981; amd. Sec. 28, Ch. 609, L. 1987; amd. Sec. 21, Ch. 702, L. 1989.

40-5-114. En. Sec. 13, Ch. 237, L. 1969; R.C.M. 1947, 93-2601-53.

40-5-115. Renumbered 40-5-161 by Code Commissioner, 1993.

40-5-116. Repealed. Sec. 58, Ch. 328, L. 1993.

History: En. Sec. 15, Ch. 237, L. 1969; R.C.M. 1947, 93-2601-55.

40-5-117. Repealed. Sec. 58, Ch. 328, L. 1993.

History: En. Sec. 16, Ch. 237, L. 1969; R.C.M. 1947, 93-2601-56.

40-5-118. Renumbered 40-5-165 by Code Commissioner, 1993.

40-5-119. Renumbered 40-5-166 by Code Commissioner, 1993.

40-5-120 through 40-5-132. Repealed. Sec. 58, Ch. 328, L. 1993.

Compiler's Comments

Histories of Repealed Sections:

40-5-120. En. Sec. 19, Ch. 237, L. 1969; R.C.M. 1947, 93-2601-59.

40-5-121. En. Sec. 20, Ch. 237, L. 1969; amd. Sec. 24, Ch. 33, L. 1977; R.C.M. 1947, 93-2601-60.

40-5-122. En. Sec. 21, Ch. 237, L. 1969; R.C.M. 1947, 93-2601-61.

40-5-123. En. Sec. 22, Ch. 237, L. 1969; R.C.M. 1947, 93-2601-62.

40-5-124. En. Sec. 23, Ch. 237, L. 1969; R.C.M. 1947, 93-2601-63.

40-5-125. En. Sec. 24, Ch. 237, L. 1969; R.C.M. 1947, 93-2601-64; amd. Sec. 2, Ch. 532, L. 1985.

40-5-126. En. Sec. 25, Ch. 237, L. 1969; R.C.M. 1947, 93-2601-65.

40-5-127. En. Sec. 26, Ch. 237, L. 1969; R.C.M. 1947, 93-2601-66.

40-5-128. En. Sec. 27, Ch. 237, L. 1969; R.C.M. 1947, 93-2601-67.

40-5-129. En. Sec. 28, Ch. 237, L. 1969; R.C.M. 1947, 93-2601-68.

40-5-130. En. Sec. 29, Ch. 237, L. 1969; R.C.M. 1947, 93-2601-69.

40-5-131. En. Sec. 30, Ch. 237, L. 1969; R.C.M. 1947, 93-2601-70; amd. Sec. 4, Ch. 33, L. 1979.

40-5-132. En. Sec. 31, Ch. 237, L. 1969; R.C.M. 1947, 93-2601-71.

40-5-133. Renumbered 40-5-183 by Code Commissioner, 1993.

40-5-134. Repealed. Sec. 58, Ch. 328, L. 1993.

History: En. Sec. 33, Ch. 237, L. 1969; R.C.M. 1947, 93-2601-73.

40-5-135. Repealed. Sec. 58, Ch. 328, L. 1993.

History: En. Sec. 34, Ch. 237, L. 1969; R.C.M. 1947, 93-2601-74.

40-5-136. Repealed. Sec. 58, Ch. 328, L. 1993.

History: En. Sec. 35, Ch. 237, L. 1969; R.C.M. 1947, 93-2601-75.

40-5-137. Renumbered 40-5-184 by Code Commissioner, 1993.

40-5-138. Repealed. Sec. 58, Ch. 328, L. 1993.

History: En. Sec. 37, Ch. 237, L. 1969; R.C.M. 1947, 93-2601-77.

40-5-139. Repealed. Sec. 58, Ch. 328, L. 1993.

History: En. Sec. 38, Ch. 237, L. 1969; amd. Sec. 48, Ch. 121, L. 1974; R.C.M. 1947, 93-2601-78; amd. Sec. 29, Ch. 609, L. 1987.

40-5-140. Renumbered 40-5-185 by Code Commissioner, 1993.

40-5-141. Renumbered 40-5-186 by Code Commissioner, 1993.

40-5-142. Renumbered 40-5-197 by Code Commissioner, 1993.

40-5-143. Tribunals of this state. The district courts and the department of public health and human services are the tribunals of this state.

History: En. Sec. 3, Ch. 328, L. 1993; amd. Sec. 125, Ch. 546, L. 1995.

40-5-144. Remedies cumulative. Remedies provided in this part are cumulative and do not affect the availability of remedies under other law.

History: En. Sec. 3, Ch. 237, L. 1969; R.C.M. 1947, 93-2601-43; amd. Sec. 4, Ch. 328, L. 1993; Sec. 40-5-104, MCA 1991; redes. 40-5-144 by Code Commissioner, 1993.

Cross-References

What acts or omissions are contempts, 3-1-501.

Warnings of withholding procedures, 40-4-204.

Payment of maintenance or support to court, 40-4-206.

Assignments, 40-4-207.

Security or guaranty to secure support, 40-4-209.

Remedy when parent dies without providing for support, 40-6-213.

Nonsupport, 45-5-621.

Endangering welfare of children, 45-5-622.

40-5-145. Bases for jurisdiction over nonresident. In a proceeding to establish, enforce, or modify a support order or to determine parentage, a tribunal of this state may exercise personal jurisdiction over a nonresident individual or the individual's guardian or conservator if:

(1) the individual is personally served with notice within this state;

(2) the individual submits to the jurisdiction of this state by consent, by entering a general appearance, or by filing a responsive document having the effect of waiving any contest to personal jurisdiction;

(3) the individual resided with the child in this state;

(4) the individual resided in this state and provided prenatal expenses or support for the child;

(5) the child resides in this state as a result of the acts or directives of the individual;

(6) the individual engaged in sexual intercourse in this state and the child may have been conceived by that act of intercourse; or

(7) there is any other basis consistent with the constitutions of this state and the United States for the exercise of personal jurisdiction.

History: En. Sec. 5, Ch. 328, L. 1993.

40-5-146. Procedure when exercising jurisdiction over nonresident. A tribunal of this state exercising personal jurisdiction over a nonresident pursuant to 40-5-145 may apply 40-5-175 to receive evidence from another state and 40-5-177 to obtain discovery through a tribunal of another state. In all other respects, 40-5-158 through 40-5-166, 40-5-170 through 40-5-180, and 40-5-183 through 40-5-186 do not apply and the tribunal shall apply the procedural and substantive law of this state, including the rules on choice of law other than those established by this part.

History: En. Sec. 6, Ch. 328, L. 1993.

40-5-147. Initiating and responding tribunal of this state. Under this part, a tribunal of this state may serve as an initiating tribunal to forward proceedings to another state and as a responding tribunal for proceedings initiated in another state.

History: En. Sec. 7, Ch. 328, L. 1993.

40-5-148. Simultaneous proceedings in another state. (1) A tribunal of this state may exercise jurisdiction to establish a support order if the petition or comparable pleading is filed after a petition or comparable pleading is filed in another state only if:

(a) the petition or comparable pleading in this state is filed before the expiration of the time allowed in the other state for filing a responsive pleading challenging the exercise of jurisdiction by the other state;

(b) the contesting party timely challenges the exercise of jurisdiction in the other state; and

(c) if relevant, this state is the home state of the child.

(2) A tribunal of this state may not exercise jurisdiction to establish a support order if the petition or comparable pleading is filed before a petition or comparable pleading is filed in another state if:

(a) the petition or comparable pleading in the other state is filed before the expiration of the time allowed in this state for filing a responsive pleading challenging the exercise of jurisdiction by this state;

(b) the contesting party timely challenges the exercise of jurisdiction in this state; and

(c) if relevant, the other state is the home state of the child.

History: En. Sec. 8, Ch. 328, L. 1993.

40-5-149. Continuing, exclusive jurisdiction. (1) A tribunal of this state issuing a support order consistent with the law of this state has continuing, exclusive jurisdiction over a child support order:

(a) as long as this state remains the residence of the obligor, the individual obligee, or the child for whose benefit the support order is issued; or

(b) until all of the parties who are individuals have filed written consent with the tribunal of this state for a tribunal of another state to modify the order and assume continuing, exclusive jurisdiction.

(2) A tribunal of this state issuing a child support order consistent with the law of this state may not exercise its continuing jurisdiction to modify the order if the order has been modified by a tribunal of another state pursuant to this part or a law substantially similar to this part.

(3) If a child support order of this state is modified by a tribunal of another state pursuant to this part or a law substantially similar to this part, a tribunal of this state loses its continuing, exclusive jurisdiction with regard to prospective enforcement of the order issued in this state and may only:

(a) enforce the order that was modified as to amounts accruing before the modification;

(b) enforce nonmodifiable aspects of that order; and

(c) provide other appropriate relief for violations of that order that occurred before the effective date of the modification.

(4) A tribunal of this state shall recognize the continuing, exclusive jurisdiction of a tribunal of another state that has issued a child support order pursuant to this part or a law substantially similar to this part.

(5) A temporary support order issued ex parte or pending resolution of a jurisdictional conflict does not create continuing, exclusive jurisdiction in the issuing tribunal.

(6) A tribunal of this state issuing a support order consistent with the law of this state has continuing, exclusive jurisdiction over a spousal support order throughout the existence of the support obligation. A tribunal of this state may not modify a spousal support order issued by a tribunal of another state having continuing, exclusive jurisdiction over that order under the law of that state.

History: En. Sec. 9, Ch. 328, L. 1993; amd. Sec. 28, Ch. 552, L. 1997.

40-5-150. Enforcement and modification of support order by tribunal having continuing jurisdiction. (1) A tribunal of this state may serve as an initiating tribunal to request a tribunal of another state to enforce or modify a support order issued in that state.

(2) A tribunal of this state that has continuing, exclusive jurisdiction over a support order may act as a responding tribunal to enforce or modify the order of another state. If a party subject to the continuing, exclusive jurisdiction of the tribunal no longer resides in the issuing state, in subsequent proceedings the tribunal may apply 40-5-175 to receive evidence from another state and 40-5-177 to obtain discovery through a tribunal of another state.

(3) A tribunal of this state that lacks continuing, exclusive jurisdiction over a spousal support order may not serve as a responding tribunal to modify a spousal support order of another state.

History: En. Sec. 10, Ch. 328, L. 1993.

40-5-151. Recognition of child support orders. (1) If a proceeding is brought under this part and only one tribunal has issued a child support order, the order of that tribunal controls and must be recognized.

(2) If a proceeding is brought under this part and two or more child support orders have been issued by tribunals of this state or another state with regard to the same obligor and child, a tribunal of this state shall apply the following rules in determining which order to recognize for purposes of continuing, exclusive jurisdiction:

(a) If only one of the tribunals would have continuing, exclusive jurisdiction under this part, the order of that tribunal controls and must be recognized.

(b) If more than one of the tribunals would have continuing, exclusive jurisdiction under this part, an order issued by a tribunal in the current home state of the child controls and must be recognized. However, if an order has not been issued in the current home state of the child, the order most recently issued controls and must be recognized.

(c) If none of the tribunals would have continuing, exclusive jurisdiction under this part, the tribunal of this state having jurisdiction over the parties shall issue a child support order, which controls and must be recognized.

(3) If two or more child support orders have been issued for the same obligor and child and if the obligor or the individual obligee resides in this state, a party may request a tribunal of this state to determine which order controls and must be recognized under subsection (2). The request must be accompanied by a certified copy of each support order in effect. The requesting party shall give notice of the request to each party whose rights may be affected by the determination.

(4) The tribunal that issued the controlling order under subsections (1) through (3) is the tribunal that has continuing, exclusive jurisdiction under 40-5-149.

(5) A tribunal of this state that determines, by order, the identity of the controlling order under subsection (2)(a) or (2)(b) or that issues a new controlling child support order under subsection (2)(c) shall state in that order the basis upon which the tribunal made its determination.

(6) Within 30 days after issuance of the order determining the identity of the controlling order, the party obtaining the order shall file a certified copy of it with each tribunal that issued or registered an earlier order of child support. A party who obtains the order and fails to file a certified copy is subject to appropriate sanctions by a tribunal in which the issue of failure to file arises. The failure to file does not affect the validity or enforceability of the controlling order.

History: En. Sec. 11, Ch. 328, L. 1993; amd. Sec. 29, Ch. 552, L. 1997.

40-5-152. Multiple child support orders for two or more obligees. In responding to multiple registrations or petitions for enforcement of two or more child support orders in effect at the same time with regard to the same obligor and different individual obligees, at least one of which orders was issued by a tribunal of another state, a tribunal of this state shall enforce those orders in the same manner as if the multiple orders had been issued by a tribunal of this state.

History: En. Sec. 12, Ch. 328, L. 1993.

40-5-153. Grounds for rendition. (1) The governor of this state may:

(a) demand of the governor of another state the surrender of an individual found in the other state who is charged criminally in this state with failing to provide for the support of an obligee; or

(b) on demand by the governor of another state, surrender an individual found in this state who is charged criminally in that state with failing to provide for the support of an obligee.

(2) A provision for extradition of individuals that is not inconsistent with this part applies to the demand even if the individual whose surrender is demanded was not in the demanding state when the crime was allegedly committed and has not fled from the demanding state.

History: En. Sec. 5, Ch. 237, L. 1969; R.C.M. 1947, 93-2601-45; amd. Sec. 13, Ch. 328, L. 1993; Sec. 40-5-106, MCA 1991; redes. 40-5-153 by Code Commissioner, 1993.

Cross-References

Effect of judgment or final order — when conclusive, 26-3-201.

Effect of judicial record of another state, 26-3-203.

Nonsupport, 45-5-621.

Uniform Criminal Extradition Act, Title 46, ch. 30.

40-5-154. Conditions of rendition. (1) Before making a demand that the governor of another state surrender an individual charged criminally in this state with having failed to provide for the support of a child or to pay support to an obligee, the governor of this state may require any prosecuting attorney of this state to demonstrate:

(a) that at least 60 days previously, the obligee had initiated proceedings for support pursuant to this part; or

(b) that the proceeding would be of no avail.

(2) If, under this part or a law substantially similar to this part, the Uniform Reciprocal Enforcement of Support Act, or the Revised Uniform Reciprocal Enforcement of Support Act, the governor of another state makes a demand that the governor of this state surrender an individual charged criminally in that state with having failed to provide for the support of a child or to pay support to an obligee, the governor of this state may require a prosecuting attorney to investigate the demand and report whether a

proceeding for support has been initiated or would be effective. If it appears that a proceeding would be effective but has not been initiated, the governor of this state may delay honoring the demand for a reasonable time to permit the initiation of a proceeding.

(3) If a proceeding for support has been initiated and the individual whose rendition is demanded prevails, the governor of this state may decline to honor the demand. If the petitioner prevails and the individual whose rendition is demanded is subject to a support order, the governor of this state may decline to honor the demand if the individual is complying with the support order.

History: En. Sec. 6, Ch. 237, L. 1969; R.C.M. 1947, 93-2601-46; amd. Sec. 14, Ch. 328, L. 1993; Sec. 40-5-107, MCA 1991; redes. 40-5-154 by Code Commissioner, 1993.

Cross-References

Effect of judgment or final order — when conclusive, 26-3-201.

Effect of judicial record of another state, 26-3-203.

Nonsupport, 45-5-621.

Uniform Criminal Extradition Act, Title 46, ch. 30.

40-5-155 and 40-5-156 reserved.

40-5-157. Income-withholding orders of another state — employer compliance — employer immunity — penalties for noncompliance. (1) An income-withholding order issued in another state may be sent to the person or entity defined as the obligor's employer under the income-withholding laws of this state without first filing a petition or comparable pleading or registering the order with a tribunal of this state.

(2) (a) Upon receipt of an income-withholding order, the obligor's employer shall immediately provide a copy of the order to the obligor and, if the employer elects under subsection (3) to forward the funds to the department for distribution, to the department.

(b) The employer shall treat an income-withholding order issued in another state that appears regular on its face as if it had been issued by a tribunal of this state. An employer may contact the department of public health and human services to determine whether the withholding order was issued by the appropriate authority.

(3) Except as provided by subsections (4) and (5), the employer shall withhold the funds and either distribute the funds as directed in the income-withholding order or forward the funds to the department to be distributed by the department by complying with the terms of the order that specify:

(a) the duration and the amount of periodic payments of current child support, stated as a sum certain;

(b) the person or agency designated to receive payments and the address to which the payments are to be forwarded;

(c) medical support, whether in the form of periodic cash payment, stated as a sum certain, or by ordering the obligor to provide health insurance coverage for the child under a policy available through the obligor's employment;

(d) the amount of periodic payments of fees and costs for a support enforcement agency, the issuing tribunal, and the obligee's attorney, stated as sums certain; and

(e) the amount of periodic payments of arrears and interest on arrears, stated as sums certain.

(4) An employer shall comply with the law of the state of the obligor's principal place of employment for withholding from income with respect to:

(a) the employer's fee for processing an income-withholding order;

(b) the maximum amount permitted to be withheld from the obligor's income; and

(c) the times within which the employer must implement the income-withholding order and forward the child support payment.

(5) An obligor's employer who receives multiple income-withholding orders with respect to the earnings of the obligor satisfies the terms of the multiple orders if the employer complies with the law of the state of the obligor's principal place of employment to establish the priorities for withholding and allocating income withheld for multiple child support obligees.

(6) An employer who complies with an income-withholding order issued in another state in accordance with this section is not subject to civil liability to an individual or agency with regard to the employer's withholding of child support from the obligor's income.

(7) An employer who willfully fails to comply with an income-withholding order issued by another state and received for enforcement is subject to the same penalties that may be imposed for noncompliance with an order issued by a tribunal of this state.

(8) (a) An obligor may contest the validity or enforcement of an income-withholding order issued in another state and received directly by an employer in this state in the same manner as if the order had been issued by a tribunal of this state. Choice of law under 40-5-187 applies to the contest.

(b) The obligor shall give notice of the contest to:

(i) a support enforcement agency providing services to the obligee;

(ii) each employer that has directly received an income-withholding order; and

(iii) the person or agency designated to receive payments in the income-withholding order or, if a person or agency is not designated, to the obligee.

History: En. Sec. 13, Ch. 552, L. 1997.

40-5-158. Proceedings under this part. (1) Except as otherwise provided in this part, 40-5-158 through 40-5-166, 40-5-170 through 40-5-178, 40-5-180, and 40-5-183 apply to all proceedings under this part.

(2) This part provides for the following proceedings:

(a) establishment of an order for spousal support or child support pursuant to 40-5-179;

(b) enforcement of a support order and income-withholding order of another state without registration;

(c) registration of an order for spousal support or child support of another state for enforcement pursuant to 40-5-184 through 40-5-195;

(d) modification of an order for child support or spousal support issued by a tribunal of this state pursuant to 40-5-147 through 40-5-150;

(e) registration of an order for child support of another state for modification pursuant to 40-5-184 through 40-5-195;

(f) determination of parentage pursuant to 40-5-196; and

(g) assertion of jurisdiction over nonresidents pursuant to 40-5-145 and 40-5-146.

(3) If the tribunal is the department of public health and human services, this part includes the administrative remedies under this chapter.

(4) An individual or a support enforcement agency may commence a proceeding authorized under this part by filing a petition in an appropriate initiating tribunal for forwarding to a responding tribunal or by filing a petition or a comparable pleading directly in a tribunal of another state that has or can obtain personal jurisdiction over the respondent.

History: **En. Sec. 15, Ch. 328, L. 1993; amd. Sec. 126, Ch. 546, L. 1995.**

40-5-159. Action by a minor parent. A minor parent or the guardian or other legal representative of a minor parent may maintain a proceeding on behalf of or for the benefit of the minor's child.

History: **En. Sec. 16, Ch. 328, L. 1993.**

40-5-160. Application of law of this state. Except as otherwise provided by this part, a responding tribunal of this state:

(1) shall apply the procedural and substantive law, including the rules on choice of law, generally applicable to similar proceedings originating in this state and may exercise all powers and provide all remedies available in those proceedings; and

(2) shall determine the duty of support and the amount payable in accordance with the law and support guidelines of this state.

History: **En. Sec. 17, Ch. 328, L. 1993.**

40-5-161. Duties of initiating tribunal. (1) Upon the filing of a petition authorized by this part, an initiating tribunal shall forward three copies of the petition and its accompanying documents:

(a) to the responding tribunal or appropriate support enforcement agency in the responding state; or

(b) if the identity of the responding tribunal is unknown, to the state information agency of the responding state, with a request that they be forwarded to the appropriate tribunal and that receipt be acknowledged.

(2) The department of public health and human services is the initiating tribunal for any action or proceeding that may be brought under Title 40, chapter 5, parts 2, 4, and 6. In all other cases, the district court is the initiating tribunal.

(3) If a responding state has not enacted the Uniform Interstate Family Support Act or another law or procedure substantially similar to that act, a tribunal of this state may issue a certificate or other documents and make findings required by the law or procedure of the responding state. If the responding state is a foreign jurisdiction, the tribunal may specify the amount of support sought and provide other documents necessary to satisfy the requirements of the responding state.

History: **En. Sec. 14, Ch. 237, L. 1969; R.C.M. 1947, 93-2601-54; amd. Sec. 18, Ch. 328, L. 1993; Sec. 40-5-115, MCA 1991; redes. 40-5-161 by Code Commissioner, 1993; amd. Sec. 127, Ch. 546, L. 1995; amd. Sec. 183, Ch. 42, L. 1997; amd. Sec. 30, Ch. 552, L. 1997.**

Cross-References

Effect of judgment or final order — when conclusive, 26-3-201.

Effect of judicial record of another state, 26-3-203.

40-5-162. Duties and powers of responding tribunal. (1) When a responding tribunal of this state receives a petition or comparable pleading from an initiating tribunal or directly pursuant to 40-5-158(4), it shall cause the petition or pleading to be filed and notify the petitioner where and when it was filed.

(2) A responding tribunal of this state, to the extent otherwise authorized by law, may do one or more of the following:

(a) issue or enforce a support order, modify a child support order, or render a judgment to determine parentage;

(b) order an obligor to comply with a support order, specifying the amount and the manner of compliance;

(c) order income withholding;

(d) determine the amount of any arrearages and specify a method of payment;

(e) enforce orders by use of civil or criminal contempt, or both;

(f) set aside property for satisfaction of the support order;

(g) place liens and order execution on the obligor's property;

(h) order an obligor to keep the tribunal informed of the obligor's current residential address, telephone number, employer, address of employment, and telephone number at the place of employment;

(i) issue a bench warrant for an obligor who has failed, after proper notice, to appear at a hearing ordered by the tribunal and enter the bench warrant in any local and state computer systems for criminal warrants;

(j) order the obligor to seek appropriate employment by specified methods;

(k) award reasonable attorney fees and other fees and costs; and

(l) grant any other available remedy.

(3) A responding tribunal of this state shall include in a support order issued under this part or in the documents accompanying the order the calculations on which the support order is based.

(4) A responding tribunal of this state may not condition the payment of a support order issued under this part upon a party's compliance with visitation provisions.

(5) If a responding tribunal of this state issues an order under this part, the tribunal shall send a copy of the order to the petitioner and the respondent and to the initiating tribunal, if any.

(6) The department of public health and human services is the responding tribunal for receipt of a petition or comparable proceedings from an initiating state as provided in 40-5-263. In all other cases, the district court is the responding tribunal.

History: En. Sec. 19, Ch. 328, L. 1993; amd. Sec. 128, Ch. 546, L. 1995; amd. Sec. 31, Ch. 552, L. 1997.

40-5-163. Inappropriate tribunal. If a petition or comparable pleading is received by an inappropriate tribunal of this state, it shall forward the pleading and accompanying documents to an appropriate tribunal in this state or another state and notify the petitioner where and when the pleading was sent.

History: En. Sec. 20, Ch. 328, L. 1993; amd. Sec. 32, Ch. 552, L. 1997.

40-5-164. Duties of support enforcement agency. (1) A support enforcement agency of this state, upon application, shall provide services to a petitioner in a proceeding under this part.

(2) A support enforcement agency that is providing services to the petitioner shall, as appropriate:

(a) take all steps necessary to enable an appropriate tribunal in this state or another state to obtain jurisdiction over the respondent;

(b) request an appropriate tribunal to set a date, time, and place for a hearing;

(c) make a reasonable effort to obtain all relevant information, including information as to income and property of the parties;

(d) after receipt of a written notice from an initiating, responding, or registering tribunal, promptly send a copy of the notice to the petitioner;

(e) after receipt of a written communication from the respondent or the respondent's attorney, promptly send a copy of the communication to the petitioner; and

(f) notify the petitioner if jurisdiction over the respondent cannot be obtained.

(3) This part does not create or negate a relationship of attorney and client or other fiduciary relationship between a support enforcement agency or the attorney for the agency and the individual being assisted by the agency.

(4) For purposes of this part, the department of public health and human services is the support enforcement agency for this state as provided in Title 40, chapter 5, parts 2, 4, and 6. All the provisions of this part must be interpreted as supplemental to and cumulative with the department's powers and duties under those provisions. In all other cases, the county attorney in the county in which an action must be filed is the support enforcement agency.

History: En. Sec. 21, Ch. 328, L. 1993; amd. Sec. 129, Ch. 546, L. 1995; amd. Sec. 184, Ch. 42, L. 1997; amd. Sec. 33, Ch. 552, L. 1997.

40-5-165. Duties of state information agency. (1) The department of public health and human services is designated as the state information agency under this part.

(2) The department shall:

(a) compile and maintain a current list, including addresses, of the tribunals in this state that have jurisdiction under this part and of any support enforcement agencies in this state and transmit a copy to the state information agency of every other state;

(b) maintain a register of tribunals and support enforcement agencies of other states;

(c) forward to the appropriate tribunal in the place in this state in which the individual obligee or the obligor resides or in which the obligor's property is believed to be located all documents concerning a proceeding under this part received from an initiating tribunal or the state information agency of the initiating state; and

(d) obtain information concerning the location of the obligor and the obligor's property within this state not exempt from execution, by such means as postal verification and federal or state locator services, examination of telephone directories, requests for the obligor's address from employers, and examination of governmental records, including, to the extent not prohibited by other law, those relating to real property, vital statistics, law enforcement, taxation, motor vehicles, driver's licenses, and social security.

History: En. Sec. 17, Ch. 237, L. 1969; amd. Sec. 48, Ch. 121, L. 1974; R.C.M. 1947, 93-2601-57; amd. Sec. 22, Ch. 328, L. 1993; Sec. 40-5-118, MCA 1991; redes. 40-5-165 by Code Commissioner, 1993; amd. Sec. 130, Ch. 546, L. 1995.

Cross-References

Powers and duties of Department of Public Health and Human Services, 53-2-201.

40-5-166. Duty of attorney general. If the attorney general determines that a support enforcement agency is neglecting or refusing to provide services to an individual, the attorney general may order the agency to perform its duties under this part or may provide those services directly to the individual.

History: En. Sec. 18, Ch. 237, L. 1969; R.C.M. 1947, 93-2601-58; amd. Sec. 23, Ch. 328, L. 1993; Sec. 40-5-119, MCA 1991; redes. 40-5-166 by Code Commissioner, 1993.

Cross-References

Attorney General — general duties, 2-15-501.

Docket, 3-5-508.

Effect of judgment or final order — when conclusive, 26-3-201.

Effect of judicial record of another state, 26-3-203.

40-5-167 through 40-5-169 reserved.

40-5-170. Private counsel. An individual may employ private counsel to represent the individual in proceedings authorized by this part.

History: En. Sec. 24, Ch. 328, L. 1993.

40-5-171. Pleadings and accompanying documents. (1) A petitioner who seeks to establish or modify a support order or to determine parentage in a proceeding under this part shall verify the petition. Unless otherwise ordered under 40-5-172, the petition or accompanying documents must provide, so far as known, the name, residential address, and social security numbers of the obligor and the obligee and the name, sex, residential address, social security number, and date of birth of each child for whom support is sought. The petition must be accompanied by a certified copy of any support order in effect. The petition may include any other information that may assist in locating or identifying the respondent.

(2) The petition must specify the relief sought. The petition and accompanying documents must conform substantially with the requirements imposed by the forms mandated by federal law for use in cases filed by a support enforcement agency.

History: En. Sec. 25, Ch. 328, L. 1993.

40-5-172. Nondisclosure of information in exceptional circumstances. Upon a finding, which may be made ex parte, that the health, safety, or liberty of a party or child would be unreasonably put at risk by the disclosure of identifying information or if an existing order so provides, a tribunal shall order that the address of the child or party or other identifying information not be disclosed in a pleading or other document filed in a proceeding under this part.

History: En. Sec. 26, Ch. 328, L. 1993.

40-5-173. Costs and fees. (1) The petitioner may not be required to pay a filing fee or other costs to initiate a proceeding under this part.

(2) If an obligee prevails, a responding tribunal may assess against an obligor the filing fees, reasonable attorney fees, other costs, and necessary travel and other reasonable expenses incurred by the obligee and the obligee's

witnesses. Except as provided by other law, the tribunal may not assess fees, costs, or expenses against the obligee or the support enforcement agency of either the initiating or the responding state. Attorney fees may be taxed as costs and may be ordered paid directly to the attorney, who may enforce the order in the attorney's own name. Payment of current support owed to the obligee has priority over fees, costs, and expenses.

(3) The tribunal shall order the payment of costs and reasonable attorney fees if it determines that a hearing was requested primarily for delay. In a proceeding under 40-5-184 through 40-5-195, a hearing is presumed to have been requested primarily for delay if a registered support order is confirmed or enforced without change.

(4) The standardized schedule of fees established by the department of public health and human services under 40-5-210 is conclusive in any action under this section. Any fees or costs recoverable under subsection (2) that are not included in the standardized schedules are recoverable under subsection (2).

History: En. Sec. 27, Ch. 328, L. 1993; amd. Sec. 131, Ch. 546, L. 1995; amd. Sec. 34, Ch. 552, L. 1997.

40-5-174. Nonparentage as defense — limitation. A party whose parentage of a child has been previously determined pursuant to law may not plead nonparentage as a defense to a proceeding under this part.

History: En. Sec. 28, Ch. 328, L. 1993.

40-5-175. Special rules of evidence and procedure. (1) The physical presence of the petitioner in a responding tribunal of this state is not required for the establishment, enforcement, or modification of a support order or for the rendition of a judgment determining parentage.

(2) A verified petition, affidavit, or document substantially complying with federally mandated forms and a document incorporated by reference in any of them, not excluded under the hearsay rule if given in person, is admissible in evidence if given under oath by a party or witness residing in another state.

(3) A copy of the record of child support payments certified as a true copy of the original by the custodian of the record may be forwarded to a responding tribunal. The copy is evidence of facts asserted in it and is admissible to show whether payments were made.

(4) Copies of bills for testing for parentage and for prenatal and postnatal health care of the mother and child, furnished to the adverse party at least 10 days before trial, are admissible in evidence to prove the amount of the charges billed and that the charges were reasonable, necessary, and customary.

(5) Documentary evidence transmitted from another state to a tribunal of this state by telephone, telecopier, or other means that do not provide an original writing may not be excluded from evidence on an objection based on the means of transmission.

(6) In a proceeding under this part, a tribunal of this state may permit a party or witness residing in another state to be deposed or to testify by telephone, audiovisual means, or other electronic means at a designated tribunal or other location in that state. A tribunal of this state shall cooperate with tribunals of other states in designating an appropriate location for the deposition or testimony.

(7) If a party called to testify at a civil hearing refuses to answer on the ground that the testimony may be self-incriminating, the trier of fact may draw an adverse inference from the refusal.

(8) A privilege against disclosure of communications between spouses does not apply in a proceeding under this part.

(9) The defense of immunity based on the relationship of husband and wife or parent and child does not apply in a proceeding under this part.

History: En. Sec. 29, Ch. 328, L. 1993.

40-5-176. Communications between tribunals. A tribunal of this state may communicate, in writing or by telephone or other means, with a tribunal of another state to obtain information concerning the laws of that state; the legal effect of a judgment, decree, or order of that tribunal; and the status of a proceeding in the other state. A tribunal of this state may furnish similar information by similar means to a tribunal of another state.

History: En. Sec. 30, Ch. 328, L. 1993.

40-5-177. Assistance with discovery. A tribunal of this state may:

(1) request a tribunal of another state to assist in obtaining discovery; and

(2) upon request, compel a person over whom it has jurisdiction to respond to a discovery order issued by a tribunal of another state.

History: En. Sec. 31, Ch. 328, L. 1993.

40-5-178. Receipt and disbursement of payments. A support enforcement agency or tribunal of this state shall disburse promptly any amounts received pursuant to a support order as directed under this part. The agency or tribunal shall furnish to a requesting party or tribunal of another state a certified statement by the custodian of the record of the amounts and dates of all payments received.

History: En. Sec. 32, Ch. 328, L. 1993.

40-5-179. Petition to establish support order. (1) If a support order entitled to recognition under this part has not been issued, an appropriate responding tribunal of this state may issue a support order if:

(a) the individual seeking the order resides in another state; or

(b) the support enforcement agency seeking the order is located in another state.

(2) The tribunal may issue a temporary child support order if:

(a) the respondent has signed a verified statement acknowledging parentage;

(b) the respondent has been determined by or pursuant to law to be the parent; or

(c) there is other clear and convincing evidence that the respondent is the child's parent.

(3) Upon finding, after notice and opportunity to be heard, that an obligor owes a duty of support, the tribunal shall issue a support order directed to the obligor and may issue other orders pursuant to 40-5-162.

History: En. Sec. 33, Ch. 328, L. 1993.

40-5-180. Administrative enforcement of orders. (1) A party seeking to enforce a support order or an income-withholding order, or both, issued by a tribunal of another state may send the documents required for registering the order to a support enforcement agency of this state.

(2) Upon receipt of the documents, the support enforcement agency, without initially seeking to register the order, shall consider and, if appropriate, use any administrative procedure authorized by the law of this state to enforce a support order or an income-withholding order, or both. If the obligor does not contest administrative enforcement, the order need not be registered. If the obligor contests the validity or administrative enforcement of the order, the support enforcement agency shall register the order pursuant to this part.

History: En. Sec. 34, Ch. 328, L. 1993.

40-5-181. Credit for payments. An amount collected and credited for a particular period pursuant to a support order issued by a tribunal of another state must be credited against the amount accruing or accrued for the same period under a support order issued for the same obligation by a tribunal of this state.

History: En. Sec. 15, Ch. 60, L. 1995.

40-5-182 reserved.

40-5-183. Limited immunity of petitioner. (1) Participation by a petitioner in a proceeding before a responding tribunal, whether in person, by private attorney, or through services provided by a support enforcement agency, does not confer jurisdiction over the petitioner in another proceeding.

(2) A petitioner is not amenable to service of civil process while physically present in this state to participate in a proceeding under this part.

(3) The immunity granted by this section does not extend to civil litigation based on acts that are unrelated to a proceeding under this part and that are committed by a party while present in this state to participate in the proceeding.

History: En. Sec. 32, Ch. 237, L. 1969; R.C.M. 1947, 93-2601-72; amd. Sec. 35, Ch. 328, L. 1993; Sec. 40-5-133, MCA 1991; redes. 40-5-183 by Code Commissioner, 1993.

Cross-References

Jurisdiction of persons, Rule 4B, M.R.Civ.P. (see Title 25, ch. 20).

40-5-184. Registration of order for enforcement. A support order or an income-withholding order issued by a tribunal of another state may be registered in this state for enforcement.

History: En. Sec. 36, Ch. 237, L. 1969; R.C.M. 1947, 93-2601-76; amd. Sec. 36, Ch. 328, L. 1993; Sec. 40-5-137, MCA 1991; redes. 40-5-184 by Code Commissioner, 1993.

Cross-References

Register of actions, 3-5-504.

40-5-185. Procedure to register order for enforcement. (1) A support order or income-withholding order of another state may be registered in this state by sending the following documents and information to the department of public health and human services pursuant to 40-5-263 or to the district court:

(a) a letter of transmittal to the tribunal to request registration and enforcement;

(b) two copies, including one certified copy, of all orders to be registered, including any modification of an order;

(c) a sworn statement by the party seeking registration or a certified statement by the custodian of the records, showing the amount of any arrearages;

(d) the name of the obligor and, if known:

(i) the obligor's address and social security number;

(ii) the name and address of the obligor's employer and any other source of income of the obligor; and

(iii) a description and the location of property of the obligor in this state that is not exempt from execution; and

(e) the name and address of the obligee and, if applicable, the agency or person to whom support payments are to be remitted.

(2) On receipt of a request for registration, the registering tribunal shall cause the order to be filed, together with one copy of the documents and information, regardless of their form.

(3) A petition or comparable pleading seeking a remedy that must be affirmatively sought under other law of this state may be filed either at the same time as the request for registration or later. The pleading must specify the grounds for the remedy sought.

History: En. Sec. 39, Ch. 237, L. 1969; R.C.M. 1947, 93-2601-79; amd. Sec. 37, Ch. 328, L. 1993; Sec. 40-5-140, MCA 1991; redes. 40-5-185 by Code Commissioner, 1993; amd. Sec. 132, Ch. 546, L. 1995.

Cross-References

General duties of Clerk of District Court, 3-5-501.

Register of actions, 3-5-504.

Docket, 3-5-508.

Fees of Clerk of District Court, 25-1-201.

40-5-186. Effect of registration enforcement. (1) A support order or income-withholding order issued in another state is registered when the order is filed in a registering tribunal of this state.

(2) A registered order issued in another state is enforceable in the same manner and is subject to the same procedures as an order issued by a tribunal of this state.

(3) Except as otherwise provided in 40-5-184 through 40-5-195, a tribunal of this state shall recognize and enforce, but may not modify, a registered order if the issuing tribunal had jurisdiction.

History: En. Sec. 40, Ch. 237, L. 1969; R.C.M. 1947, 93-2601-80; amd. Sec. 38, Ch. 328, L. 1993; Sec. 40-5-141, MCA 1991; redes. 40-5-186 by Code Commissioner, 1993.

Cross-References

Register of actions, 3-5-504.

Effect of judicial record of another state, 26-3-203.

Effect of foreign judgment, 26-3-205.

40-5-187. Choice of law. (1) The law of the issuing state governs the nature, extent, amount, and duration of current payments and other obligations of support and the payment of arrearages under the order.

(2) In a proceeding for arrearages, the statute of limitations under the laws of this state or of the issuing state, whichever is longer, applies.

History: En. Sec. 39, Ch. 328, L. 1993.

40-5-188. Notice of registration of order. (1) When a support order or income-withholding order issued in another state is registered, the registering tribunal shall notify the nonregistering party. The notice must be accompanied by a copy of the registered order and the documents and relevant information accompanying the order.

(2) The notice must inform the nonregistering party:

(a) that a registered order is enforceable as of the date of registration in the same manner as an order issued by a tribunal of this state;

(b) that a hearing to contest the validity or enforcement of the registered order must be requested within 20 days after the date of mailing or personal service of the notice;

(c) that failure to contest the validity or enforcement of the registered order in a timely manner:

(i) will result in confirmation of the order and enforcement of the order and the alleged arrearages; and

(ii) precludes further contest of that order with respect to any matter that could have been asserted; and

(d) of the amount of any alleged arrearages.

(3) Upon registration of an income-withholding order for enforcement, the registering tribunal shall notify the obligor's employer pursuant to the income-withholding laws of this state.

History: En. Sec. 40, Ch. 328, L. 1993; amd. Sec. 35, Ch. 552, L. 1997.

40-5-189. Procedure to contest validity or enforcement of registered order. (1) A nonregistering party seeking to contest the validity or enforcement of a registered order in this state shall request a hearing within 20 days after the date of mailing or personal service of notice of the registration. A court hearing may be conducted by teleconferencing methods. A department hearing must initially be conducted by teleconferencing methods and is subject to the Montana Administrative Procedure Act. The nonregistering party may, pursuant to 40-5-190, seek to vacate the registration, to assert any defense to an allegation of noncompliance with the registered order, or to contest the remedies being sought or the amount of any alleged arrearages.

(2) If the nonregistering party fails to contest the validity or enforcement of the registered order in a timely manner, the order is confirmed by operation of law.

(3) If a nonregistering party requests a hearing to contest the validity or enforcement of the registered order, the registering tribunal shall schedule the matter for hearing and give notice to the parties of the date, time, and place of the hearing.

History: En. Sec. 41, Ch. 328, L. 1993; amd. Sec. 2, Ch. 482, L. 1997; amd. Secs. 36, 100, Ch. 552, L. 1997.

40-5-190. Contest of registration or enforcement. (1) A party contesting the validity or enforcement of a registered order or seeking to vacate the registration has the burden of proving one or more of the following defenses:

(a) the issuing tribunal lacked personal jurisdiction over the contesting party;

(b) the order was obtained by fraud;

(c) the order has been vacated, suspended, or modified by a later order;

(d) the issuing tribunal has stayed the order pending appeal;

(e) there is a defense under the law of this state to the remedy sought;

(f) full or partial payment has been made; or

(g) the statute of limitations under 40-5-187 precludes enforcement of some or all of the arrearages.

(2) If a party presents evidence establishing a full or partial defense under subsection (1), the registering tribunal may stay enforcement of the registered order, continue the proceeding to permit production of additional relevant evidence, and issue other appropriate orders. An uncontested portion of the registered order may be enforced by all remedies available under the law of this state.

(3) If the contesting party does not establish a defense under subsection (1) to the validity or enforcement of the order, the registering tribunal shall issue an order confirming the order.

History: **En. Sec. 42, Ch. 328, L. 1993.**

40-5-191. Confirmed order. Confirmation of a registered order, whether by operation of law or after notice and hearing, precludes further contest of the order with respect to any matter that could have been asserted at the time of registration.

History: **En. Sec. 43, Ch. 328, L. 1993.**

40-5-192. Procedure to register child support order of another state for modification. A party or support enforcement agency seeking to modify or to modify and enforce a child support order issued in another state shall register that order in this state in the same manner provided in 40-5-184 through 40-5-186, 40-5-188, and 40-5-271 if the order has not been registered. A petition for modification may be filed either at the same time as a request for registration or later. The pleading must specify the grounds for modification.

History: **En. Sec. 44, Ch. 328, L. 1993.**

40-5-193. Effect of registration for modification. A tribunal of this state may enforce a child support order of another state, registered for purposes of modification, in the same manner as if the order had been issued by a tribunal of this state. However, the registered order may be modified only if the requirements of 40-5-194 have been met.

History: **En. Sec. 45, Ch. 328, L. 1993.**

40-5-194. Modification of child support order of another state. (1) After a child support order issued in another state has been registered in this state, the responding tribunal of this state may modify that order only if subsection (5) does not apply, and after notice and hearing, it finds that:

(a) the following requirements are met:

(i) the child, the individual obligee, and the obligor do not reside in the issuing state;

(ii) a petitioner who is a nonresident of this state seeks modification; and

(iii) the respondent is subject to the personal jurisdiction of the tribunal of this state; or

(b) the child or a party who is an individual is subject to the personal jurisdiction of the tribunal of this state and all of the parties who are individuals have filed written consents in the issuing tribunal for a tribunal of this state to modify the support order and assume continuing, exclusive jurisdiction over the order. However, if the issuing state is a foreign jurisdiction that has not enacted a law or established procedures substantially similar to the procedures under this part, the consent otherwise required of an individual residing in this state is not required for the tribunal to assume jurisdiction to modify the child support order.

(2) Modification of a registered child support order is subject to the same requirements, procedures, and defenses that apply to the modification of an order issued by a tribunal of this state, and the order may be enforced and satisfied in the same manner.

(3) A tribunal of this state may not modify any aspect of a child support order that may not be modified under the laws of the issuing state. If two or more tribunals have issued child support orders for the same obligor and child, the order that controls and must be recognized under 40-5-151 establishes the aspects of the support order that are nonmodifiable.

(4) On issuance of an order modifying a child support order issued in another state, a tribunal of this state has continuing, exclusive jurisdiction.

(5) (a) If all of the parties who are individuals reside in this state and the child does not reside in the issuing state, a tribunal of this state has jurisdiction to enforce and modify the issuing state's child support order in a proceeding to register that order.

(b) A tribunal of this state exercising jurisdiction under subsection (5)(a) shall apply the provisions of 40-5-103, 40-5-143 through 40-5-152, 40-5-181, and 40-5-184 through 40-5-195 to the enforcement or modification proceeding. The remaining sections of this part do not apply.

(6) Within 30 days after issuance of a modified child support order, the party obtaining the modification shall file a certified copy of the order:

(a) with the issuing tribunal that had continuing, exclusive jurisdiction over the earlier order; and

(b) in each tribunal in which the party knows that the earlier order has been registered.

(7) A party who obtains the order and fails to file a certified copy is subject to appropriate sanctions by a tribunal in which the issue of failure to file arises. The failure to file does not affect the validity or enforceability of the modified order of the new tribunal of continuing, exclusive jurisdiction.

History: En. Sec. 46, Ch. 328, L. 1993; amd. Sec. 37, Ch. 552, L. 1997.

40-5-195. Recognition of order modified in another state. A tribunal of this state shall recognize a modification of its earlier child support order by a tribunal of another state that assumed jurisdiction pursuant to this part or a law substantially similar to this part. Except as otherwise provided in this part, the tribunal of this state shall, upon request:

(1) enforce the order that was modified only as to amounts accruing before the modification;

(2) enforce only nonmodifiable aspects of that order;

(3) provide other appropriate relief only for violations of the order that occurred before the effective date of the modification; and

(4) recognize the modifying order of the other state, upon registration, for the purpose of enforcement.

History: En. Sec. 47, Ch. 328, L. 1993; amd. Sec. 38, Ch. 552, L. 1997.

40-5-196. Proceeding to determine parentage. (1) A tribunal of this state may serve as an initiating or responding tribunal in a proceeding brought under this part or a law or procedure substantially similar to this part, the Uniform Reciprocal Enforcement of Support Act, the Revised Uniform Reciprocal Enforcement of Support Act, or a law or procedure substantially similar to either of those acts to determine whether the petitioner is a parent of a particular child or to determine whether a respondent is a parent of that child.

(2) In a proceeding to determine parentage, a responding tribunal of this state shall apply the rules of this state on choice of law.

(3) A proceeding to determine parentage directed to:

(a) the department of public health and human services from an initiating state pursuant to 40-5-263 and this part is subject to the provisions of 40-5-231 through 40-5-237 or Title 40, chapter 6, part 1, as applicable; and

(b) a district court from an initiating state is subject to the provisions of Title 40, chapter 6, part 1.

History: En. Sec. 48, Ch. 328, L. 1993; amd. Sec. 133, Ch. 546, L. 1995; amd. Sec. 39, Ch. 552, L. 1997.

40-5-197. Uniformity of interpretation. This part must be so construed as to effectuate its general purpose to make uniform the law with respect to the subject of this part among states enacting it.

History: En. Sec. 41, Ch. 237, L. 1969; R.C.M. 1947, 93-2601-81; amd. Sec. 49, Ch. 328, L. 1993; Sec. 40-5-142, MCA 1991; redes. 40-5-197 by Code Commissioner, 1993.

40-5-198 and 40-5-199 reserved.

Part 2
Administrative Enforcement of Support

Part Cross-References

The Reciprocal Agreement for Collection of Wages Act of 1977, Title 39, ch. 3, part 3.

Child Support Income Deduction Act of 1981, Title 40, ch. 5, part 3.

Child Support Enforcement Act, Title 40, ch. 5, part 4.

40-5-201. Definitions. As used in this part, the following definitions apply:

(1) “Alleged father” means a person who is alleged to have engaged in sexual intercourse with a child’s mother during a possible time of conception of the child or a person who is presumed to be a child’s father under the provisions of 40-6-105.

(2) (a) “Child” means:

(i) a person under 18 years of age who is not otherwise emancipated, self-supporting, married, or a member of the armed forces of the United States;

(ii) a person under 19 years of age and still in high school;

(iii) a person who is mentally or physically incapacitated if the incapacity began prior to the person’s 18th birthday; or

(iv) in a IV-D case, a person for whom:

(A) support rights are assigned under 53-2-613;

(B) a public assistance payment has been made;

(C) the department is providing support enforcement services under 40-5-203; or

(D) the department has received a referral for interstate services from an agency of another state under the provisions of the Uniform Interstate Family Support Act, the Revised Uniform Reciprocal Enforcement of Support Act, the Uniform Reciprocal Enforcement of Support Act, or Title IV-D of the Social Security Act.

(b) The term may not be construed to limit the ability of the department to enforce a support order according to its terms when the order provides for support to extend beyond the child's 18th birthday.

(3) "Department" means the department of public health and human services.

(4) "Director" means the director of the department of public health and human services or the director's authorized representative.

(5) "Guidelines" means the child support guidelines adopted pursuant to 40-5-209.

(6) "Hearings officer" or "hearings examiner" means the hearings officer appointed by the department for the purposes of this chapter.

(7) "Need" means the necessary costs of food, clothing, shelter, and medical care for the support of a child or children.

(8) "Obligee" means:

(a) a person to whom a duty of support is owed and who is receiving support enforcement services under this part; or

(b) a public agency of this or another state having the right to receive current or accrued support payments.

(9) "Obligor" means a person, including an alleged father, who owes a duty of support.

(10) "Parent" means the natural or adoptive parent of a child.

(11) "Paternity blood test" means a test that demonstrates through examination of genetic markers either that an alleged father is not the natural father of a child or that there is a probability that an alleged father is the natural father of a child. The genetic markers may be identified from a person's blood or tissue sample. The blood or tissue sample may be taken by blood drawing, buccal swab, or any other method approved by the American association of blood banks. Paternity blood tests may include but are not limited to the human leukocyte antigen test and DNA probe technology.

(12) "Public assistance" means any type of monetary or other assistance for a child, including medical and foster care benefits. The term includes payments to meet the needs of a relative with whom the child is living, if assistance has been furnished with respect to the child by a state or county agency of this state or any other state.

(13) "Support debt" or "support obligation" means the amount created by:

(a) the failure to provide for the medical, health, and support needs of a child under the laws of this or any other state or under a support order;

(b) a support order for spousal maintenance of the custodial parent; or

(c) fines, fees, penalties, interest, and other funds and costs that the department is authorized under this chapter to collect by the use of any procedure available for the payment, enforcement, and collection of child support or spousal maintenance or support.

(14) "Support order" means an order, whether temporary or final, that:

(a) provides for the payment of a specific amount of money, expressed in periodic increments or as a lump-sum amount, for the support of the child, including an amount expressed in dollars for medical and health needs, child care, education, recreation, clothing, transportation, and other related expenses and costs specific to the needs of the child;

(b) is issued by:

(i) a district court of this state;

(ii) a court of appropriate jurisdiction of another state, Indian tribe, or foreign country;

(iii) an administrative agency pursuant to proceedings under this part; or

(iv) an administrative agency of another state, Indian tribe, or foreign country with a hearing function and process similar to those of the department under this part; and

(c) when the context requires, includes:

(i) judgments and orders providing periodic payments for the maintenance or support of the custodial parent of a child receiving services under this chapter; and

(ii) amounts for the recovery of fines, fees, penalties, interest, and other funds and costs that the department is authorized under this chapter to collect by the use of any procedure available for the payment, enforcement, and collection of child support or spousal maintenance or support.

(15) "IV-D" means the provisions of Title IV-D of the Social Security Act and the regulations promulgated under the act.

History: En. Sec. 1, Ch. 612, L. 1979; amd. Sec. 1, Ch. 561, L. 1985; amd. Sec. 1, Ch. 119, L. 1989; amd. Sec. 1, Ch. 287, L. 1989; amd. Sec. 1, Ch. 549, L. 1989; amd. Sec. 28, Ch. 702, L. 1989; amd. Sec. 5, Ch. 266, L. 1991; amd. Sec. 8, Ch. 631, L. 1993; amd. Sec. 8, Ch. 60, L. 1995; amd. Sec. 29, Ch. 504, L. 1995; amd. Sec. 134, Ch. 546, L. 1995; amd. Sec. 185, Ch. 42, L. 1997; amd. Sec. 3, Ch. 482, L. 1997; amd. Sec. 40, Ch. 552, L. 1997; amd. Sec. 2, Ch. 579, L. 1999.

Compiler's Comments

1999 Amendment: Chapter 579 in definition of child in (a)(iv) inserted reference to IV-D case; in definition of support debt inserted (c) to include amount created by fines, fees, penalties, interest, and other funds and costs collected by department; in definition of support order inserted (c) to include, when context requires, judgments and orders providing periodic payments and amounts for recovery of fines, fees, penalties, interest, and other funds and costs collected by department; and made minor changes in style. Amendment effective October 1, 1999.

Cross-References

Maintenance, 40-4-203.
Child support, 40-4-204.

40-5-202. Department of public health and human services — powers and duties regarding collection of support debt. (1) The department may take action under the provisions of this chapter, the abandonment or nonsupport statutes, the Uniform Parentage Act established in Title 40, chapter 6, part 1, and other appropriate state and federal statutes to provide IV-D services if the department:

(a) receives a referral on behalf of the child from an agency providing services to the child under the provisions of Title 41, Title 52, or Title 53;

(b) is providing services under 40-5-203; or

(c) receives an interstate referral, whether under the Revised Uniform Reciprocal Enforcement of Support Act, the Uniform Interstate Family Support Act, or an interstate action by a Title IV-D agency of another state.

(2) A verified statement, filed by the department, that it is providing services is prima facie evidence of its authority to act. Upon filing, the department may, on behalf of itself or on behalf of the obligee, obligor, or child, initiate, participate in, intervene in, or exercise any remedy available in a judicial or an administrative action on the same basis as any other party.

(3) Whether acting on its own behalf or on behalf of the obligee, obligor, or child, the department and its attorneys serve the public interest in ensuring

that children are supported by their parents, rather than maintained by public assistance. The department does not represent the interests of any individual person, and its attorneys represent only the department. An attorney-client relationship is not created between department attorneys and any person or entity other than the department. The obligee, obligor, and child may obtain the services of a private attorney to represent their interests. The existence or appearance of a private attorney as counsel of record for the obligee, obligor, or child does not affect the department's right to act or provide services under this chapter. This chapter does not require the department to provide a private attorney for, or to pay for a private attorney for, an obligee, obligor, or child.

(4) The department has the power of attorney to act in the name of any obligee to endorse and cash any drafts, checks, money orders, or other negotiable instruments received by the department on behalf of a child.

(5) (a) If the department is providing IV-D services, the department must be afforded notice and an opportunity to participate as an independent party in any proceeding relating to paternity, to termination of parental rights, or to the establishment, enforcement, or modification of a support obligation, whether initiated by the obligee, the obligor, or the child.

(b) The notice must reasonably inform the department of the issues to be determined in the proceeding, the names of the parties and the child, and the identity and location of the tribunal in which the issues will be determined. The notice is for informational purposes only and is not intended as a substitute for procedures necessary under the Montana Rules of Civil Procedure to establish personal jurisdiction over the department. Whether or not the department is given notice, an agreement, judgment, decree, or order is void as to any interest of the department that is or may be affected by the agreement, judgment, decree, or order if the department was not joined as a party in the manner provided in the Montana Rules of Civil Procedure.

(c) The notice must be personally served on the department. Within 20 days after service of the notice, the department may:

(i) decline to enter the proceeding as a party, in which case the proceeding may continue without the department's participation;

(ii) inform the tribunal that a substantial interest of the department could be adversely affected by the proceeding, in which case the proceeding may not continue without joining the department as a necessary party in the manner provided in the Montana Rules of Civil Procedure; or

(iii) inform the tribunal that prior to the filing of the proceeding, the department initiated an administrative proceeding under this chapter in which the parties and some or all of the issues are the same as those in the proceeding before the tribunal. The tribunal shall then discontinue the proceeding as to the common issues until administrative remedies have been exhausted.

(6) (a) When the department is providing services, a recipient or former recipient of public assistance who assigned support rights under 42 U.S.C. 602(a)(26) or 42 U.S.C. 608(a)(3) or a collection agency acting on behalf of the recipient or former recipient may collect only that part of a delinquent support amount that accrued after termination of public assistance. The recipient, former recipient, or collection agency may not commence or maintain an action against or make an agreement with the obligor to recover an assigned delinquent support amount unless the department, in writing:

(i) releases or relinquishes its assigned interest;

(ii) declares the support debt owed the department to be satisfied, in which case the balance of the delinquent amount is released; or

(iii) consents to the action or agreement.

(b) If a recipient, former recipient, or collection agency collects or receives value for any part of an assigned delinquent support amount and the department has not given its consent or released or relinquished its assigned interest, the recipient, former recipient, or collection agency shall make prompt and full restitution to the department. If prompt and full restitution is not made, the department may send a written demand to the recipient, former recipient, or collection agency, and if prompt and full restitution is not made within 20 days of the date of the written demand, the recipient, former recipient, or collection agency is liable for damages equal to double the amount collected or value received. The amount of damages may be determined and assessed by the department under the contested case provisions of the Montana Administrative Procedure Act. The damages may be collected by the department by any method or remedy available for the enforcement of child support owed by an obligor parent.

(c) This subsection (6) does not limit the right of a person to recover money not assigned. If there are competing proceedings against an obligor for collection of delinquent support, the collection of support assigned to the department takes priority over the obligor's income and assets.

(7) An applicant for or recipient of services may not act to the prejudice of the department's rights while the services are being provided.

(8) Unless the department has consented to the agreement in writing, if public assistance is being or has been paid for a child, an agreement between an obligee and an obligor or a judgment, decree, or order adopting the agreement does not act to reduce or terminate any rights of the department to establish a support order or to recover a support debt from the obligor, even if the agreement, judgment, decree, or order purports to:

(a) relieve or terminate the obligor's support duty;

(b) waive, modify, compromise, or discharge the support debt;

(c) prepay future support obligations or settle past, present, or future support obligations; or

(d) permit the obligor to pay past, present, or future support obligations:

(i) with noncash contributions;

(ii) by the payment of other debts or obligations, such as vehicle, rent, and mortgage payments; or

(iii) by making contributions to a trust or other account or payments toward an asset if the contributed amounts are unavailable to the department.

(9) The department may petition a court or an administrative agency for modification of any order on the same basis as a party to that action is entitled to do.

(10) The department is subrogated to the right of the child or obligee to maintain any civil action or execute any administrative remedy available under the laws of this or any other state to collect a support debt. This right of subrogation is in addition to and independent of the assignment under 42 U.S.C. 602(a)(26) and the support debt created by 40-5-221.

(11) If public assistance is being or has been paid, the department is subrogated to the debt created by a support order and any money judgment is considered to be in favor of the department. This subrogation is an addition to any assignment made under 42 U.S.C. 602(a)(26) and applies to the lesser of:

(a) the amount of public assistance paid; or

(b) the amount due under the support order.

(12) The department may adopt and enforce the rules necessary to carry out the provisions of this part.

(13) While providing services under this chapter and in order to carry out the purposes mentioned in this chapter, the department, through its director or the director's authorized representatives, may:

(a) administer oaths;

(b) certify official acts and records;

(c) issue investigative and hearing subpoenas;

(d) order discovery before and after a hearing;

(e) hold prehearing and settlement conferences;

(f) compel the attendance of witnesses and the production of books, accounts, documents, and evidence;

(g) conduct proceedings supplementary to and in aid of a writ of execution or warrant for distraint, including a hearing on a claim that property is exempt from execution and the examination of an obligor or other person in the manner provided for the taking of a deposition in a civil action; and

(h) perfect service of investigative and hearing subpoenas by certified mail or in the manner prescribed for service of a summons in a civil action in accordance with the Montana Rules of Civil Procedure.

(14) In addition to any other requirement for service provided by the Montana Rules of Civil Procedure, if a person is required to give notice to, serve, or provide a written response to the department under this chapter, the notice, service, or response must be made to the department's child support enforcement division.

(15) The department may collect any funds received under this chapter, and wrongfully retained, by the obligor through any remedy available for collection of child support.

(16) A hearing on a claim that property is exempt from execution must initially be conducted by teleconference methods and is subject to the Montana Administrative Procedure Act. At the request of a party or upon a showing that a party's case is substantially prejudiced by the lack of an in-person hearing, the hearings officer shall grant a de novo in-person hearing.

History: En. Sec. 2, Ch. 612, L. 1979; amd. Sec. 1, Ch. 188, L. 1981; amd. Sec. 2, Ch. 561, L. 1985; amd. Sec. 30, Ch. 609, L. 1987; amd. Sec. 2, Ch. 549, L. 1989; amd. Sec. 22, Ch. 702, L. 1989; amd. Sec. 53, Ch. 328, L. 1993; amd. Sec. 9, Ch. 631, L. 1993; amd. Sec. 1, Ch. 264, L. 1995; amd. Sec. 135, Ch. 546, L. 1995; amd. Sec. 4, Ch. 482, L. 1997; amd. Sec. 3, Ch. 579, L. 1999.

Compiler's Comments

1999 Amendment: Chapter 579 in (6)(a) inserted reference to 42 U.S.C. 608(a)(3); in (13)(g) after "including" inserted "a hearing on a claim that property is exempt from execution and"; and inserted (16) requiring hearing on exemption claim to be initially conducted by teleconference methods subject to Montana Administrative Procedure Act and requiring hearings officer to grant de novo in-person hearing upon request of party or showing that party's case is substantially prejudiced by lack of in-person hearing. Amendment effective May 10, 1999.

Cross-References

Officers who may administer oaths, 1-6-101.

Issuance of subpoena, 26-2-102.

Modification of support, 40-4-208.

Obligations of parents, Title 40, ch. 6, part 2.

How evidence of abandonment established, 41-5-1404.

Endangering welfare of children, 45-5-622.

Parents liable to Department for public assistance payments, 53-4-248.

40-5-203. Child support enforcement services. (1) The department may accept applications for child support enforcement services on behalf of persons who are not recipients of public assistance and may take appropriate action to establish or enforce support obligations against persons owing a duty to pay support.

(2) The department may establish by rule the terms and conditions by which services are provided under this section.

(3) If child support enforcement services are provided under this part to or for a child as a result of the payment of public assistance, the department shall continue to provide services after public assistance is no longer being paid, subject to the same conditions and on the same basis as in the case of other individuals to whom services are furnished under this section, without requiring an application, application fee, or other request for services. Acceptance of continued services constitutes agreement to the terms and conditions set for applicants by the department under this section.

(4) Services under this section, including information requests, are available to obligors, obligees, and residents of other states on the same terms as residents of this state.

(5) The department may terminate services under this section if it:

(a) receives a written request for termination of services from the person to whom services are being provided;

(b) receives notice that the child is receiving public assistance; or

(c) determines that the person receiving services has violated any term or condition set by the department for an applicant under this section.

(6) For purposes of credit rating reports by the department, the department shall indicate if the withholding is for delinquent support or for regular monthly support obligations.

History: En. Sec. 3, Ch. 612, L. 1979; amd. Sec. 1, Ch. 672, L. 1985; amd. Sec. 3, Ch. 549, L. 1989; amd. Sec. 15, Ch. 702, L. 1989; amd. Sec. 41, Ch. 552, L. 1997.

Cross-References

Adoption and publication of rules, Title 2, ch. 4, part 3.

Standardized fee schedule, 40-5-210.

Delinquency income withholding, 40-5-412.

Immediate income withholding, 40-5-411.

Department of Public Health and Human Services to monitor and enforce child support payments, 40-5-412.

40-5-204. Cooperation by obligee. An obligee shall cooperate with the department in:

(1) identifying and locating the obligor;

(2) establishing the paternity of a child;

(3) obtaining support or any other payments due the obligee and child; and

(4) obtaining reimbursement for previously paid public assistance, if any.

History: En. Sec. 4, Ch. 612, L. 1979; amd. Sec. 4, Ch. 549, L. 1989.

Cross-References

How parent and child relationship established, 40-6-104.

40-5-205. Payment of support money collected to department — notice. If the department gives written notice to the obligor, to the clerk of the court, or to an administrative agency that issued a support order, that the child for whom a support order exists is receiving services from the department, then any support money must be paid to the department.

History: En. Sec. 5, Ch. 612, L. 1979; amd. Sec. 5, Ch. 549, L. 1989.

Cross-References

Parents liable to Department for public assistance payments, 53-4-248.

40-5-206. Central unit for information and administration — cooperation enjoined — availability of records. (1) The department shall establish a central unit to serve as a registry for the receipt of information, for answering interstate inquiries concerning deserting parents, for receiving and answering requests for information made by consumer reporting agencies under 40-5-261, to coordinate and supervise departmental activities in relation to deserting parents, and to ensure effective cooperation with law enforcement agencies.

(2) During or in anticipation of a delinquency, enforcement, or modification proceeding, a proceeding to establish child or medical support or paternity, an attempt to locate an obligor, or a contested case, the department or other IV-D agency may request and, notwithstanding any statute making the information confidential, all state, county, and city agencies, officers, and employees shall provide on request information, if known, concerning an obligor or obligee, including:

(a) name;

(b) residential and mailing addresses;

(c) date of birth;

(d) social security number;

(e) wages or other income;

(f) number of dependents claimed for state and federal income tax withholding purposes;

(g) name and address of employer;

(h) state and local tax and revenue records;

(i) penal corrections records;

(j) address, location, and description of any real property or titled personal property; and

(k) any other asset in which the obligor or obligee may have an interest, including its location and the extent, nature, and value of the interest.

(3) Upon service of an administrative subpoena from the department or another IV-D agency during or in anticipation of a delinquency, enforcement, or modification proceeding, a proceeding to establish child or medical support or paternity, an attempt to locate an obligor, or a contested case, public utilities, cable television companies, and financial institutions shall, with regard to an obligor or obligee, provide the department or the requesting IV-D agency with the name and address of the obligor or obligee, the name and address of the

obligor's or obligee's employer, and any information on the obligor's or obligee's assets and liabilities contained in customer records.

(4) Any information obtained by the department during the course of a child support investigation that is confidential at the source must be treated by the department as confidential and must be safeguarded accordingly. Absent a specific statutory prohibition to the contrary and subject to subsection (6), the department may release information obtained from nonconfidential public and private sources, including information regarding support orders, judgments, and payment records.

(5) Absent a specific statutory prohibition or rule to the contrary and subject to subsection (6), use or disclosure of information obtained by the department from confidential sources or any information maintained by the department in its records, including the names, addresses, and social security numbers of obligors and obligees, is limited to:

(a) purposes directly related to the provision of services under this chapter;

(b) county attorneys and courts having jurisdiction in support and abandonment proceedings and agencies in other states engaged in the enforcement of support of minor children under the federal Social Security Act; and

(c) any other use permitted or required by the federal Social Security Act.

(6) The department may not disclose information regarding the whereabouts of a party to another party if:

(a) the department received notice that a protective order with respect to the party has been entered against the other party; or

(b) the department has reason to believe that the release of information may result in physical or emotional harm to the party.

(7) A person or private entity that discloses information to the department in compliance with this section is not liable to the obligor or obligee for negligent disclosure.

(8) An entity failing to comply with this section is subject to the contempt authority of the department under 40-5-226.

History: En. Sec. 10, Ch. 612, L. 1979; amd. Sec. 3, Ch. 543, L. 1985; amd. Sec. 4, Ch. 418, L. 1989; amd. Sec. 6, Ch. 549, L. 1989; amd. Sec. 10, Ch. 631, L. 1993; amd. Sec. 2, Ch. 264, L. 1995; amd. Sec. 42, Ch. 552, L. 1997.

Cross-References

Right to know, Art. II, sec. 9, Mont. Const.

Right of privacy, Art. II, sec. 10, Mont. Const.

40-5-207. Department authorized to enforce maintenance awards. If the department is providing child support enforcement services, the department may also, using any remedy available to it, collect and enforce any judgment or order for the maintenance or support of the child's custodial parent.

History: En. Sec. 4, Ch. 561, L. 1985; amd. Sec. 7, Ch. 549, L. 1989; amd. Sec. 4, Ch. 579, L. 1999.

Compiler's Comments

1999 Amendment: Chapter 579 substituted language authorizing department to use available remedies to collect and enforce judgment or order for maintenance or support of custodial parent if department providing child support for former language that read: "If a judgment or order creating a child support obligation also contains a judgment or order for the support of a spouse or former spouse who is the custodial parent of the child, the department may collect and enforce spousal support under this part." Amendment effective October 1, 1999.

Cross-References

Duties of husband and wife as to support, 40-2-102.

Liability of married person when abandoned by spouse, 40-2-104.

Maintenance, 40-4-203.

Child support, 40-4-204.

40-5-208. Medical support — obligation enforcement. (1) In any proceeding initiated pursuant to this part to establish a child support order, whether final or temporary, and in each modification of an existing order, the support order must include a medical support order as defined in 40-5-804.

(2) If the department is providing IV-D services for a child, the department shall also enforce any order issued by a court or administrative agency of competent jurisdiction that:

(a) requires the obligor to make payments for the health or medical needs of the child, whether expressed in monthly dollar amounts or in a lump-sum dollar amount. The department shall apply the same enforcement remedies as are available for the enforcement of child support as if those remedies expressly applied to medical or health obligations.

(b) requires the obligor to enroll a child in a health benefit plan or individual insurance as defined in 40-5-804. The department may take action to enforce the order under the provisions of part 8 or may impose any other appropriate remedy.

(3) (a) To permit the department to determine whether enforcement action is necessary, if the obligor is required to enroll the child in a health benefit plan or individual insurance, upon written request by the department, the obligor shall provide the name of the individual insurance carrier or health benefit plan, the policy identification name and number, the names of the persons covered, and any other pertinent information regarding coverage.

(b) Failure of the obligor to provide the requisite information to the department may be punished as a contempt under 40-5-226.

(4) If the department is providing services for a child and a child support order or modification of a child support order does not include a medical support order as defined in 40-5-804 or fails to include any other provision for the health and medical needs of the child:

(a) upon notice to the obligor, the obligor shall enroll the child in a health or medical insurance plan available to the obligor through an employer or other group for which the premium is partially or entirely paid by the employer or other group; and

(b) the obligor shall continue enrollment of the child in the plan until:

(i) a medical support order is entered;

(ii) the obligor can demonstrate to the department that the cost of providing coverage is not reasonable;

(iii) the obligor's employment or membership in the group has terminated and the plan is no longer available to the obligor;

(iv) the employer or group eliminates coverage for all employees or members; or

(v) the department ceases to provide services for the child.

(5) If the obligor fails to enroll a child in a health or medical insurance plan under subsection (4) or lets coverage lapse, the failure or lapse may be punished as a contempt under 40-5-226. A contempt may not be found if the obligor shows that the cost of providing coverage for the child is not reasonable.

History: En. Sec. 1, Ch. 130, L. 1987; amd. Sec. 8, Ch. 549, L. 1989; amd. Sec. 17, Ch. 702, L. 1989; amd. Sec. 11, Ch. 631, L. 1993; amd. Sec. 30, Ch. 504, L. 1995.

Cross-References

Obligations of parents for support of their children, 40-6-211.

40-5-209. Child support guidelines — periodic review. (1) The department shall adopt uniform child support guidelines to be used to determine minimum child support amounts. In addition to giving notice and publicizing the rules as provided in the Montana Administrative Procedure Act, the department shall give notice to the supreme court, the district courts, and the state bar of Montana prior to adopting the guidelines.

(2) The guidelines must consider the factors set forth in 40-4-204(2) and 40-6-116(5).

(3) At least once every 4 years, the department shall:

(a) review the uniform child support guidelines employed to determine child support obligations to ensure that their application results in the determination of appropriate child support award amounts; and

(b) propose any appropriate modification to the legislature.

History: En. Sec. 3, Ch. 702, L. 1989.

Cross-References

Adoption and publication of rules, Title 2, ch. 4, part 3.

40-5-210. Standardized fee schedule — rules. (1) The department may charge an application fee to each person applying for services under 40-5-203, except that the fee may not be charged to persons who receive continuing services under 40-5-203(3). The application fee may be:

(a) a flat dollar amount; or

(b) an amount based on a sliding fee schedule that is based on the applicant's income level.

(2) If paternity is established or presumed under 40-5-234 for the alleged father, the fees for paternity blood testing may be recovered from the parent, whether the alleged father or the mother, denying paternity of the alleged father. The total amount of the paternity blood testing fee may not exceed the actual costs of the paternity blood tests. A bill for a paternity blood test is admissible in evidence without third-party foundation testimony.

(3) The department may not charge a handling fee for payment of support collected and distributed to an obligee who is not a recipient of public assistance.

(4) The department may charge an obligor a late payment fee for each late payment of support collected on behalf of any obligee.

(5) The department may establish a fee schedule in order to recover costs and expenses in excess of the application, handling, and late fees. The fees must be commensurate with costs or an average of the expenditures related to specific or routine activities.

(a) The department shall develop procedures for determining whether it is appropriate for either the obligor or the obligee to be responsible for payment of the fee. In developing the procedures, the department shall consider federal regulations promulgated under Title IV-D of the Social Security Act.

(b) In an action to establish paternity or to establish or enforce a child support obligation, whether in district court or by administrative process, the department must be awarded costs in the amount established in the fee schedule as part of any judgment, decree, or order whenever the department:

(i) is a prevailing party in the action; or

(ii) is not a party but incurs expenses and costs related to the action.

(6) The department may collect the fees awarded under this section by one of the following means:

(a) if the fee is owed by an obligor, the fee may be:

(i) collected through any remedy available to the department for the collection of child support arrearages; or

(ii) deducted from any payments made by the obligor before the payment is distributed to the obligee. Credit for the payment must be reduced by the amount of the deduction for the fee. The deduction for fees may not reduce any current support due to the obligee. The deduction for a late payment fee may not reduce any current or past-due support due to the obligee.

(b) if the fee is owed by the obligee, the fee may be collected separately through any remedy available to the department for the collection of child support or, if the fee has been assessed and deducted from the collection by an entity other than the department, the department may withhold the fee amount out of any payment collected on behalf of the obligee. The obligor must receive full credit for the payment as if the withholding of fees did not occur.

(7) The department, upon a showing of necessity, may waive or defer any fee assessed under this section.

(8) The department may adopt rules necessary to implement fee schedules under this section.

(9) The fees and costs charged and collected under this section must be paid monthly into the state treasury to the credit of the child support enforcement division special revenue fund and must be accompanied by a detailed statement of the amounts collected.

(10) A district court may not order the department to charge or collect fees, except as authorized under this section and rules implementing this section.

History: En. Sec. 16, Ch. 702, L. 1989; amd. Sec. 2, Ch. 294, L. 1993; amd. Sec. 12, Ch. 631, L. 1993; amd. Sec. 43, Ch. 552, L. 1997; amd. Sec. 5, Ch. 579, L. 1999.

Compiler's Comments

1999 Amendment: Chapter 579 in (3) near beginning of first sentence substituted "may not charge" for "may charge" and after "collected" substituted "and distributed to an obligee" for "on behalf of any obligee" and deleted former second sentence that read: "The department may withhold the fee from the support payment before distribution to the obligee"; in (6)(b) after "support" inserted "or if the fee has been assessed and deducted from the collection by an entity other than the department"; inserted (10) prohibiting district court from ordering department to charge or collect fees, except as authorized; and made minor changes in style. Amendment effective October 1, 1999.

Cross-References

Adoption and publication of rules, Title 2, ch. 4, part 3.

40-5-211. Repealed. Sec. 17, Ch. 579, L. 1999.

History: En. Sec. 6, Ch. 612, L. 1979.

40-5-212. Repealed. Sec. 17, Ch. 579, L. 1999.

History: En. Sec. 7, Ch. 612, L. 1979.

40-5-213. Financial statements by obligor — penalty. (1) If the department is providing child support enforcement services under this part and has reasonable cause to believe that a support obligation is owed, an obligor, upon written request, shall complete a statement, under oath, stating the obligor's:

(a) current monthly income;

(b) total income over the past 36 months;

(c) the number of dependents for whom the obligor is providing support;

(d) the amount the obligor is contributing toward the support of a child for whom the department is providing services;

(e) current monthly living expenses; and

(f) all other information pertinent to the obligor's financial condition.

(2) The department may require additional financial statements from the obligor during the period the department is providing services to the child.

(3) Failure to comply with this section is a misdemeanor.

History: En. Sec. 8, Ch. 612, L. 1979; amd. Sec. 9, Ch. 549, L. 1989.

Cross-References

Misdemeanor defined, 45-2-101.

Misdemeanor — no penalty specified, 46-18-212.

40-5-214. Scale of suggested minimum contributions. (1) The department shall establish a scale of suggested minimum contributions to assist counties and courts in determining the amount that a parent should be expected to contribute toward the support of his child under this part. The scale must be based on the uniform child support guidelines adopted by the department under 40-5-209.

(2) Copies of the scale must be made available to courts, county offices, county attorneys, and upon request, to any other state or county officer or agency engaged in the administration or enforcement of this part. Attorneys admitted to practice in Montana may have access to the scale.

History: En. Sec. 9, Ch. 612, L. 1979; amd. Sec. 4, Ch. 702, L. 1989.

Cross-References

Child support, 40-4-204.

Judgment or order concerning parentage, 40-6-116.

40-5-215 through 40-5-220 reserved.

40-5-221. Debt to state by obligor — limitations. (1) Except as provided in subsection (2), any payment of public assistance money made to or for the benefit of a child creates a debt due and owing the state of Montana by the obligor in an amount equal to the amount of public assistance money paid. In the case of an obligor who is an adoptive parent, a debt for public assistance paid may not accrue prior to the date of adoption.

(2) If a support order has been entered, the support debt created by this section may not exceed the amount of the order.

(3) If a child has been placed in foster care and a written agreement for payment of support exists between the obligor and any state agency, the support debt is limited to the amount provided for in the agreement. However, if a support order is or has been entered, the provisions of the order prevail over the agreement.

(4) The department shall adopt rules based on ability to pay, with respect to the level of support to be provided for in the agreements or modifications of the agreements based on changed circumstances.

(5) The department may establish and collect a debt created under this section in a proceeding that is in addition to and independent of the subrogation created by 40-5-202 and the assignment under 53-2-613.

History: En. Sec. 11, Ch. 612, L. 1979; amd. Sec. 10, Ch. 549, L. 1989; amd. Sec. 4, Ch. 264, L. 1995.

Cross-References

Adoption and publication of rules, Title 2, ch. 4, part 3.

Modification of support, 40-4-208.

Parents liable to Department for public assistance payments, 53-4-248.

40-5-222. Support debt based upon support order — notice — contents — action to collect. (1) The department may issue a notice of a support debt accrued or accruing based upon a support order. The notice may be served upon the obligor in the manner prescribed for the service of a summons in a civil action in accordance with the provisions of the Montana Rules of Civil Procedure, demanding payment within 20 days of the date of receipt.

(2) The notice of debt shall include:

(a) a statement of the support debt accrued or accruing, computable on the amount required to be paid under any support order;

(b) a statement that the property of the debtor is subject to collection action;

(c) a statement that the property is subject to distraint and seizure and sale;

(d) a statement that the net proceeds will be applied to the satisfaction of the support debt; and

(e) a statement that the obligor is entitled to a fair hearing.

(3) Action to collect the support debt by distraint and seizure and sale is lawful after 20 days from the date of service upon the obligor or 20 days from the receipt or refusal by the debtor of the notice of debt.

(4) Within 20 days of the date of service of notice of support debt, the obligor may request a fair hearing as provided in 40-5-226.

History: En. Sec. 12, Ch. 612, L. 1979; amd. Sec. 2, Ch. 188, L. 1981; amd. Sec. 41, Ch. 439, L. 1981; amd. Sec. 11, Ch. 549, L. 1989.

Cross-References

Process — summons, Rule 4C, M.R.Civ.P. (see Title 25, ch. 20).

Service, Rule 4D, M.R.Civ.P. (see Title 25, ch. 20).

Seizure of person or property, Rule 64, M.R.Civ.P. (see Title 25, ch. 20).

Parents liable to Department for public assistance payments, 53-4-248.

40-5-223. Repealed. Sec. 17, Ch. 579, L. 1999.

History: En. Sec. 13, Ch. 612, L. 1979; amd. Sec. 42, Ch. 439, L. 1981; amd. Sec. 12, Ch. 549, L. 1989.

40-5-224. Finding of support liability based upon payment of public assistance — support lien — bond to release warrant — action to collect. (1) If the department reasonably believes that the obligor is not a resident of this state or is about to move from this state or has hidden, absconded, or left or has removed or is about to remove, secrete, waste, or otherwise dispose of property that could be made subject to collection action to satisfy the support debt, the department may issue a support lien pursuant to 40-5-248 during the pendency of a collection action initiated by a notice under this chapter. Further action may not be taken on the lien until final determination of the collection action. The department shall make and file in the record of the pending collection action an affidavit stating the reasons upon which the belief is founded. The obligor may furnish a bond, not to exceed the amount of the support debt, during pendency of the collection action, and in that case, liens issued must be released. If the collection action is resolved in favor of the obligor, any lien issued under this section must be amended or released.

(2) The department may commence action under the provisions of this part to collect the support debt on the date of issuance of the decision resulting from a collection action or upon the obligor's failure to timely request a hearing in a pending collection action.

History: En. Sec. 14, Ch. 612, L. 1979; amd. Sec. 43, Ch. 439, L. 1981; amd. Sec. 13, Ch. 549, L. 1989; amd. Sec. 13, Ch. 631, L. 1993; amd. Sec. 6, Ch. 579, L. 1999.

Compiler's Comments

1999 Amendment: Chapter 579 in first sentence in (1) after "may issue" substituted "a support lien pursuant to 40-5-248" for "a warrant for distraint pursuant to 40-5-247" and after "pendency" substituted "of a collection action initiated by a notice under this chapter" for "the fair hearing or after the hearing, whether or not appealed", in second sentence substituted "lien" for "warrant" and after "determination" substituted "of the collection action" for "after fair hearing or appeal", in third sentence substituted "pending collection action" for "fair hearing", in fourth sentence substituted "the collection action" for "the hearing or after the hearing" and substituted "liens" for "warrants", and in fifth sentence substituted "collection action is resolved" for "decision resulting from the hearing is" and after "obligor" substituted "any lien issued under this section must be amended or released" for "all warrants issued must be released"; at end of (2) substituted "a collection action or upon the obligor's failure to timely request a hearing in a pending collection action" for "the hearing"; and made minor changes in style. Amendment effective October 1, 1999.

Cross-References

Plaintiff's affidavit for obtaining writ, 27-18-202.

Defendant's undertaking to prevent levy, 27-18-301.

40-5-225. Notice of financial responsibility — temporary and final support obligations — administrative procedure. (1) In the absence of an existing support order, when the requirements of this section are met, the department may enter an order requiring a child's parent or parents to pay an amount each month for the support of the child. The support order must include a medical support order as required by 40-5-208.

(2) An action to establish a support order must be commenced by serving a notice of financial responsibility on the parent or parents. The notice must include a statement:

(a) of the names of the child, the obligee, and, if different than the obligee, the child's guardian or caretaker relative;

(b) of the dollar amount of the support obligation to be paid each month for the child;

(c) that in addition to child support, the parent or parents may be ordered to provide for the child's medical support needs;

(d) that any party may request a hearing to contest the amount of child support shown in the notice or to contest the establishment of a medical support order;

(e) that if a party does not timely file a request for hearing, support, including medical support, will be ordered as declared in the notice or in accordance with the child support guidelines adopted under 40-5-209;

(f) that if a party does request a hearing, the other parties may refuse to participate in the proceedings and that the child support and medical support order will be determined using the information available to the department or provided at the hearing;

(g) that a party's refusal to participate is a consent to entry of a child support and medical support order consistent with the department's determination; and

(h) that the parties are entitled to a fair hearing under 40-5-226.

(3) If a support action is pending in district court and a temporary or permanent support obligation has not been ordered or if a paternity action is pending and there is clear and convincing evidence of paternity based on paternity blood tests or other evidence, the department may enter an order requiring a child's parent or parents to pay an amount each month for the temporary support of the child pending entry of a support order by the district court. The temporary support order must include a medical support order as required by 40-5-208.

(4) An action to establish a temporary support order must be commenced by serving a notice of temporary support obligation on the parent or parents. In addition to the statements required in subsection (2), the notice must include a statement that:

(a) a party may request a hearing to show that a temporary support obligation is inappropriate under the circumstances; and

(b) the temporary support order will terminate upon the entry of a final support order or an order of nonpaternity. If the final order is retroactive, any amount paid for a particular period under the temporary support order must be credited against the amounts due under the final order for the same period, but excess amounts may not be refunded. If an order of nonpaternity is issued or if the final support order states that periodic support obligation is not proper, the obligee shall refund to the obligor any improper amounts paid under the temporary support order, plus any costs that the obligor incurs in recovering the amount to be refunded.

(5) (a) If a temporary support order is entered or if proceedings are commenced under this section for a married obligor, the department shall vacate any support order or dismiss any proceeding under this part if it finds that the parties to the marriage have:

(i) reconciled without the marriage having been dissolved;

(ii) made joint application to the department to vacate the order or dismiss the proceeding; and

(iii) provided proof that the marriage has been resumed.

(b) The department may not vacate a support order or dismiss a proceeding under this subsection (5) if it determines that the rights of a third person or the child are affected. The department may issue a new notice of temporary support obligation under this section if the parties subsequently separate.

(6) A notice of financial responsibility and the notice of temporary support obligation may be served either by certified mail or in the manner prescribed for the service of a summons in a civil action in accordance with the Montana Rules of Civil Procedure.

(7) If prior to service of a notice under this section the department has sufficient financial information, the department's allegation of the obligor's monthly support responsibility, whether temporary or final, must be based on the child support guidelines established under 40-5-214. If the information is unknown to the department, the allegations of the parent's or parents' monthly support responsibility must be based on the greater of:

(a) the maximum amount of public assistance that could be payable to the child under Title 53 if the child was otherwise eligible for assistance; or

(b) the child's actual need as alleged by the custodial parent, guardian, or caretaker of the child.

(8) (a) A party who objects to a notice of financial responsibility or notice of temporary support obligation may file a written request for a hearing with the department:

(i) within 20 days from the date of service of a notice of financial responsibility; and

(ii) within 10 days from the date of service of a notice of temporary support obligation.

(b) If the department receives a timely request for a hearing, it shall conduct one under 40-5-226.

(c) If the department does not receive a timely request for a hearing, it shall order the parent or parents to pay child support and to provide for the child's medical needs as stated in the notice. The child support obligation must be the amount stated in the notice or determined in accordance with the child support guidelines adopted under 40-5-209.

(9) If the department is unable to enter an obligation in accordance with the child support guidelines because of default of a party, the department may, upon notice to the parties to the original order, substitute a support order made in accordance with the guidelines for the defaulted order.

(10) After establishment of an order under this section, the department may initiate a subsequent action on the original order to establish a support obligation for another child of the same parents.

(11) A child support and medical support order under subsection (1) continues until the child reaches 18 years of age or until the child's graduation from high school, whichever occurs later, but not later than the child's 19th birthday, unless the child is sooner emancipated by court order. A temporary support obligation established under subsection (3) continues until terminated as provided in subsection (5) or until the temporary order is superseded by a final order, judgment, or decree.

History: En. Sec. 15, Ch. 612, L. 1979; amd. Sec. 44, Ch. 439, L. 1981; amd. Sec. 14, Ch. 549, L. 1989; amd. Sec. 5, Ch. 482, L. 1997; amd. Sec. 44, Ch. 552, L. 1997; amd. Sec. 73, Ch. 51, L. 1999; amd. Sec. 7, Ch. 579, L. 1999.

Compiler's Comments

1999 Amendments — Composite Section: Chapter 51 in (4)(b) near end of third sentence after "costs the" substituted "obligor" for "obligee [obligor]"; and made minor changes in style. Amendment effective March 15, 1999.

Chapter 579 in (4)(b) near end of third sentence after "costs" substituted "that the obligor" for "the obligee [obligor]"; inserted (9) authorizing department if unable to enter obligation pursuant to support guidelines because of default to notify parties and substitute a support order made with guidelines for the defaulted order; inserted (10) authorizing department, after order established, to initiate action for support obligation for another child of same parents; and made minor changes in style. Amendment effective October 1, 1999.

Cross-References

Hearing — rules of evidence, cross-examination, and judicial notice, 2-4-612.

Service, Rule 4D, M.R.Civ.P. (see Title 25, ch. 20).

Seizure of person or property, Rule 64, M.R.Civ.P. (see Title 25, ch. 20).

Parents liable to Department for public assistance payments, 53-4-248.

40-5-226. Administrative hearing — nature — place — time — determinations — failure to appear — entry of final decision and order. (1) The administrative hearing is defined as a "contested case".

(2) If a hearing is requested, it must initially be conducted by teleconference methods and is subject to the Montana Administrative Procedure Act. At the request of a party or upon a showing that the party's case was substantially prejudiced by the lack of an in-person hearing, the hearings officer shall grant a de novo in-person hearing.

(3) The hearings officer shall determine the liability and responsibility, if any, of the parent or parents under the notice and shall enter a final decision and order in accordance with the determination. The order may award support from the date of:

(a) the child's birth if paternity was established under 40-5-231 through 40-5-238 or under Title 40, chapter 6, part 1, subject to the limitation in 40-6-108(3)(b);

(b) the parties' separation if support is initially established under 40-5-225; or

(c) notice to the parties of a support modification request under 40-5-273.

(4) (a) Except as provided in subsection (4)(b), if the parent or parents fail to appear at the hearing or to timely file a request for a hearing, the hearings officer, upon a showing of valid service, shall enter a default decision and order declaring the amount stated in the notice to be final.

(b) In a multiple party proceeding under 40-5-225, if one party files a timely request for hearing, the matter must be set for hearing. Notice of the hearing must be served on the parties. If a party refuses to appear for the hearing or participate in the proceedings, the hearings officer shall determine child support and medical support orders based on the notice, information available to the department, and evidence provided at the hearing by the appearing parties. A party's refusal to appear is a consent to entry of child and medical support orders consistent with the hearings officer's determination. However, the default order may not be for more than the support requested in the notice unless the hearings officer finds that the evidence requires a larger amount.

(5) In a hearing to determine financial responsibility, whether temporary or final, and in any proceeding to modify support under 40-5-273, the monthly support responsibility must be determined in accordance with the evidence presented and with reference to the uniform child support guidelines adopted by the department under 40-5-209. The hearings officer is not limited to the amounts stated in the notice. The guidelines must be used in all cases, including cases in which the order is entered upon the default of a party and those in which the order is entered upon the parties' consent. A verified representation of a defaulting parent's income, based on the best information available, may be used when a parent fails to provide financial information for use in applying the guidelines. The amount determined under the guidelines is presumed to be

an adequate and reasonable support award, unless the hearings officer finds by clear and convincing evidence that the application of the guidelines is unjust to the child or to any of the parties or is inappropriate in a particular case. If the hearings officer finds that the guideline amount is unjust or inappropriate in a particular case, the hearings officer shall state the reasons for finding that the application of the guidelines is unjust to the child or a party or is inappropriate in that particular case. Similar findings must also be made in a case in which the parties have agreed to a support amount that varies from the guideline amount. The hearings officer may vary the application of the guidelines to limit the obligor's liability for past support to the proportion of expenses already incurred that the hearings officer considers just. Findings that rebut and vary the guideline amount must include a statement of the amount of support that would have ordinarily been ordered under the guidelines.

(6) In a hearing to enforce a support order or to establish paternity under this chapter, the department shall send a copy of the notice of hearing to the obligee by regular mail addressed to the obligee's last-known address. The obligee may attend and observe the hearing as a nonparty. This subsection does not limit participation of an obligee who is a party to the proceedings or who is called as a witness to testify.

(7) (a) Within 60 days after the hearing has been concluded, any posthearing briefs are received, and all the evidence submitted, except for good cause, the hearings officer shall enter a final decision and order. The determination of the hearings officer constitutes a final agency decision, subject to judicial review under 40-5-253 and the provisions of the Montana Administrative Procedure Act. A copy of the final decision must be delivered or mailed to each party, each party's attorney, and the obligee if the obligee is not a party.

(b) A child support obligation established under this section is subject to the registration and processing provisions of part 9 of this chapter.

(8) A support order entered under this part must contain a statement that the order is subject to review and modification by the department upon the request of the department or a party under 40-5-271 through 40-5-273 when the department is providing services under IV-D for the enforcement of the order.

(9) A support debt determined pursuant to this section is subject to collection action without further necessity of action by the hearings officer.

(10) A child support obligation determined under this part by reason of the obligor's failure to request a hearing under this part or failure to appear at a scheduled hearing may be vacated, upon the motion of an obligor, by the hearings officer within the time provided and upon a showing of any of the grounds enumerated in the Montana Rules of Civil Procedure. When issuing a support order, the department shall consider whether any of the exceptions to immediate income withholding found at 40-5-411 apply, and, if an exception is applicable, the department shall include the exception in the support order.

(11) (a) Unless the hearings officer makes a written exception under 40-5-315 or 40-5-411 and the exception is included in the support order, each order establishing a child support obligation, whether temporary or final, and each modification of an existing child support order under this part is

enforceable by immediate or delinquency income withholding, or both, under Title 40, chapter 5, part 4. A support order that omits that provision or that provides for a payment arrangement inconsistent with this section is nevertheless subject to withholding for the payment of support without need for an amendment of the support order or for any further action by the hearings officer.

(b) If an obligor is excepted from paying support through income withholding, the support order must include a requirement that whenever a party to the case is receiving IV-D services, support payments must be paid through the department as provided in 40-5-909.

(12) (a) If the department establishes paternity or establishes or modifies a child support obligation, the department's order must include a provision requiring each party other than the department to promptly file with the department and to update, as necessary, information on:

(i) identity of the party;

[(ii) social security number;]

(iii) residential and mailing addresses;

(iv) telephone number;

(v) driver's license number;

(vi) name, address, and telephone number of employer; and

(vii) if the child is covered by a health or medical insurance plan, the name of the insurance carrier or health benefit plan, the policy identification number, the name of the persons covered, and any other pertinent information regarding coverage or, if the child is not covered, information as to the availability of coverage for the child through the obligor's and obligee's employer.

(b) The order must further direct that in a subsequent child support enforcement action, upon sufficient showing that diligent effort has been made to ascertain the location of the party, the department's due process requirements for notice and service of process are met with respect to the party upon delivery of written notice by regular mail to the most recent address of the party or the party's employer's address reported to the department.

(c) The department shall keep the information provided under subsection (12)(a) confidential except as necessary for purposes of Title IV-D of the Social Security Act.

(13) The hearings officer may:

(a) compel obedience to the hearings officer's orders, judgments, and process and to subpoenas and orders issued by the department, including income-withholding orders issued pursuant to 40-5-415;

(b) compel the attendance of witnesses at administrative hearings;

(c) compel obedience of subpoenas for paternity blood tests;

(d) compel the production of accounts, books, documents, and other evidence;

(e) punish for civil contempt. Contempt authority does not prevent the department from proceeding in accordance with the provisions of 2-4-104.

(f) compel the production of information requested by the department or IV-D agency of another state under 40-5-443.

(14) A contempt occurs whenever:

(a) a person acts in disobedience of any lawful order, judgment, or process of the hearings officer or of the department;

(b) a person compelled by subpoena to appear and testify at an administrative hearing or to appear for genetic paternity tests fails to do so;

(c) a person compelled by subpoena duces tecum to produce evidence at an administrative hearing fails to do so;

(d) an obligor or obligee subject to a discovery order issued by the hearings officer fails to comply with discovery requests;

(e) a person or entity compelled by administrative subpoena from the department or another IV-D agency to produce financial information or other information needed to establish paternity or to establish, modify, or enforce a support order fails to do so;

(f) a payor under an order to withhold issued pursuant to 40-5-415 fails to comply with the provisions of the order. In the case of a payor under an income-withholding order, a separate contempt occurs each time that income is required to be withheld and paid to the department and the payor fails to take the required action.

(g) a payor or labor union fails to provide information to the department or another IV-D agency when requested under 40-5-443[; or]

[(h) a financial institution uses information provided by the department pursuant to 40-5-924 for any other purpose without the authorization of the department].

(15) Before initiating a contempt proceeding, the department shall give the alleged contemnor notice by personal service or certified mail of the alleged infraction and a reasonable opportunity to comply with the law and to cure the alleged infraction. In order to initiate a contempt proceeding, an affidavit of the facts constituting a contempt must be submitted to the hearings officer, who shall review it to determine whether there is cause to believe that a contempt has been committed. If cause is found, the hearings officer shall issue a citation requiring the alleged contemnor to appear and show cause why the alleged contemnor should not be determined to be in contempt and required to pay a penalty of not more than $500 for each count of contempt. The citation, along with a copy of the affidavit, must be served upon the alleged contemnor either by personal service or by certified mail. All other interested persons may be served a copy of the citation by first-class mail.

(16) At the time and date set for hearing, the hearings officer shall proceed to hear witnesses and take evidence regarding the alleged contempt and any defenses to the contempt. If the alleged contemnor fails to appear for the hearing, the hearing may proceed in the alleged contemnor's absence. If the hearings officer finds the alleged contemnor in contempt, the hearings officer may impose a penalty of not more than $500 for each count found. The hearings officer's decision constitutes a final agency decision, subject to judicial review under 40-5-253 and subject to the provisions of Title 2, chapter 4.

(17) An amount imposed as a penalty may be collected by any remedy available to the department for the enforcement of child support obligations, including warrant for distraint pursuant to 40-5-247, income withholding pursuant to Title 40, chapter 5, part 4, and state debt offset, pursuant to Title 17, chapter 4, part 1. The department may retain any penalties collected under

this section to offset the costs of administrative hearings conducted under this chapter.

(18) The penalties charged and collected under this section must be paid into the state treasury to the credit of the child support enforcement division special revenue fund and must be accompanied by a detailed statement of the amounts collected. *(Bracketed language terminates on occurrence of contingency—sec. 1, Ch. 27, L. 1999.)*

History: **En. Sec. 16, Ch. 612, L. 1979; amd. Sec. 45, Ch. 439, L. 1981; amd. Sec. 15, Ch. 549, L. 1989; amd. Sec. 6, Ch. 266, L. 1991; amd. Sec. 3, Ch. 635, L. 1991; amd. Sec. 3, Ch. 294, L. 1993; amd. Sec. 54, Ch. 328, L. 1993; amd. Sec. 14, Ch. 631, L. 1993; amd. Sec. 5, Ch. 264, L. 1995; amd. Sec. 6, Ch. 482, L. 1997; amd. Secs. 45, 100, Ch. 552, L. 1997.**

Compiler's Comments

Contingent Termination — Request for Federal Exemptions: Section 1, Ch. 27, L. 1999, revised sec. 104, Ch. 552, L. 1997, to contain the following contingent termination provisions and order that the department of public health and human services seek federal exemptions: "(1) [Sections 9, 11, 22 through 24, and 95] [37-1-307, 40-1-107, 40-4-105, 40-5-922, 40-5-924, and 61-5-107] and the bracketed language in [sections 1 through 3, 10, 25, 45, and 89] [40-4-204, 40-5-226, 40-5-901, 40-5-906, 40-5-907, 40-5-923, and 40-6-116] terminate on the date of the suspension if the federal government suspends federal payments to this state for this state's child support enforcement program and for this state's program relating to temporary assistance to needy families because of this state's failure to enact law as required by the federal Personal Responsibility and Work Opportunity Reconciliation Act of 1996.

(2) [Sections 9, 11, 22 through 24, and 95] [37-1-307, 40-1-107, 40-4-105, 40-5-922, 40-5-924, and 61-5-107] and the bracketed language in [sections 1 through 3, 10, 25, 45, and 89] [40-4-204, 40-5-226, 40-5-901, 40-5-906, 40-5-907, 40-5-923, and 40-6-116] terminate on the date that a final decision is rendered in federal court invalidating the child support provisions of the federal Personal Responsibility and Work Opportunity Reconciliation Act of 1996.

(3) If the director of the department of public health and human services certifies to the governor and the secretary of state in writing that one of the following provisions is no longer required by federal law because of repeal of or amendment to federal statutes that require that provision, the provision terminates on the date the certification takes effect:

(a) [section 9] [40-5-922];

(b) [section 11] [40-5-924];

(c) [sections 22 through 24] [37-1-307, 40-1-107, and 40-4-105];

(d) [section 95] [61-5-107];

(e) the bracketed provisions in [sections 1 through 3, 10, 25, 45, and 89] [40-4-204, 40-5-226, 40-5-901, 40-5-906, 40-5-907, 40-5-923, and 40-6-116].

(4) If the bracketed language in [sections 1 through 3, 10, 25, 45, and 89] [40-4-204, 40-5-226, 40-5-901, 40-5-906, 40-5-907, 40-5-923, and 40-6-116] terminates, the code commissioner is instructed to renumber subsections, adjust internal references, and correct grammar and arrangement." Amendment effective February 18, 1999.

Cross-References

Rules for determining residence, 1-1-215.

Contested cases, Title 2, ch. 4, part 6.

Service of process, Rule 4D, M.R.Civ.P. (see Title 25, ch. 20).

Relief from judgment or order, Rule 60, M.R.Civ.P. (see Title 25, ch. 20).

Child support, 40-4-204.

Modification of support, 40-4-208.

40-5-227. Filing and docketing of final orders — orders effective as district court decrees. (1) An abstract of any final administrative order under this chapter may be filed in the office of the clerk of the district court of any county of Montana. Upon the request of the department, the order must be docketed in the judgment docket of the district court. The properly filed and docketed order has all the force, effect, and attributes of a docketed order or decree of the district court, including but not limited to lien effect and enforceability by supplemental proceedings, writs of execution, and contempt of court proceedings. A final administrative order of the department is effective and enforceable without filing and docketing the order in the district court.

Contempt of court proceedings and writs of execution based on the administrative order may not be requested from the district court unless the administrative order is first docketed with the district court. The administrative order may not operate as a judgment lien, unless the order is first docketed with the district court or a lien is otherwise perfected under the laws of this state, including 40-5-248.

(2) A final administrative order that determines and sets periodic support payments in the absence of a district court order, when filed and docketed under this section, may be modified by a district court order only as to installments accruing after actual notice to the parties of any motion for modification. The standard for a modification is that set forth in 40-4-208.

(3) The department may issue a warrant for distraint based upon a properly filed and docketed order pursuant to 40-5-247.

History: En. Sec. 1, Ch. 544, L. 1985; amd. Sec. 2, Ch. 212, L. 1987; amd. Sec. 15, Ch. 631, L. 1993; amd. Sec. 46, Ch. 552, L. 1997.

Cross-References

Contempts, Title 3, ch. 1, part 5.

Duties of Clerk of District Court, Title 3, ch. 5, part 5.

Judgment, Title 25, ch. 9.

Entry of judgment and satisfaction — lien, Title 25, ch. 9, part 3.

Execution of judgment, Title 25, ch. 13.

Proceedings in aid of execution, Title 25, ch. 14.

Execution, Rule 69, M.R.Civ.P. (see Title 25, ch. 20).

40-5-228 through 40-5-230 reserved.

40-5-231. Jurisdiction and venue. (1) For purposes of an administrative action brought under this part, personal jurisdiction is established in the department over any individual or the individual's guardian or conservator if:

(a) the individual is personally or by certified mail served with notice within this state;

(b) the individual submits to the jurisdiction of this state by consent, by entering a general appearance, or by filing a responsive document that has the effect of waiving any contest to personal jurisdiction;

(c) the individual resided with the child in this state;

(d) the individual resided in this state and provided prenatal expenses or support for the child;

(e) the child resides in this state as a result of the acts or directives of the individual;

(f) the individual engaged in sexual intercourse in this state and the child may have been conceived by the act of intercourse; or

(g) there is any other basis consistent with the constitutions of this state and the United States for the exercise of personal jurisdiction.

(2) Personal jurisdiction over the individuals described in subsection (1) may be acquired by personal service or by service of notice by certified mail.

(3) If the child or either parent resides in this state, a hearing under this part may be held in the county where:

(a) the child resides;

(b) either parent resides; or

(c) the department or any of its regional offices is located.

History: **En. Sec. 2, Ch. 119, L. 1989; amd. Sec. 55, Ch. 328, L. 1993; amd. Sec. 7, Ch. 482, L. 1997.**

Cross-References

Residence — rules for determining, 1-1-215.

Paternity acknowledgment, 50-15-210.

40-5-232. Establishment of paternity — notice of parental responsibility — contents. (1) When the paternity of a child has not been legally established under the provisions of Title 40, chapter 6, part 1, or otherwise, the department may proceed to establish paternity under the provisions of 40-5-231 through 40-5-237. An administrative hearing held under the provisions of 40-5-231 through 40-5-237 is a contested case within the meaning of 2-4-102 and is subject to the provisions of Title 2, chapter 4, except as otherwise provided in 40-5-231 through 40-5-237.

(2) It is presumed to be in the best interest of a child to legally determine and establish paternity. A presumption under this subsection may be rebutted by a preponderance of the evidence.

(3) In a proceeding under 40-5-231 through 40-5-237, if an alleged father consents in writing to entry of an order declaring the alleged father to be the legal father of a child, the department may enter an order establishing legal paternity. As a part of a consent to entry of an order declaring paternity, the department shall provide information to the parents regarding the rights and responsibilities of an alleged father consenting to entry of an order declaring paternity. A consent to entry of an order declaring paternity is binding on a parent who executes it, whether or not the parent is a minor.

(4) Full faith and credit must be given to a determination of paternity made by any other state, whether presumed by law, established through voluntary acknowledgment, or established by administrative or judicial processes.

(5) The department shall commence proceedings to establish paternity by serving on an alleged father a notice of parental responsibility. The department may not serve the notice unless it has:

(a) a sworn statement claiming that the alleged father is the child's natural father;

(b) evidence of the existence of a presumption of paternity under 40-6-105; or

(c) any other reasonable cause to believe that the alleged father is the child's natural father.

(6) Regardless of whether the department has grounds to or intends to commence a paternity proceeding against the alleged father, when the child support enforcement division in a case under Title IV-D of the Social Security Act receives a written claim from a child's mother that names a person as the alleged natural father of the child, the department shall promptly take reasonable steps to locate and notify the alleged father of the existence of the claim. The notification must be given to the alleged father in a manner that places the demands of individual privacy above the merits of public disclosure. The notification must include the name of the mother and the date of birth or the projected date of birth if the child has not yet been born.

(7) Service on the alleged father of the notice of parental responsibility must be made as provided in 40-5-231(2). The notice must include:

(a) an allegation that the alleged father is the natural father of the child involved;

(b) the child's name and place and date of birth;

(c) the name of the child's mother and the name of the person or agency having custody of the child, if other than the mother;

(d) the probable time or period of time during which conception took place;

(e) a statement that if the alleged father fails to timely deny the allegation of paternity, the question of paternity may be resolved against the alleged father without further notice;

(f) a statement that if the alleged father timely denies the allegation of paternity:

(i) the alleged father is subject to compulsory paternity blood testing;

(ii) a paternity blood test may result in a presumption of paternity; and

(iii) upon receipt of the paternity blood test results, if the alleged father continues to deny paternity, the alleged father may request the department to refer the matter to district court for a determination of paternity.

(8) The alleged father may file a written denial of paternity with the department within 20 days after service of the notice of parental responsibility.

(9) When there is more than one alleged father of a child, the department may serve a notice of parental responsibility on each alleged father in the same consolidated proceeding or in separate proceedings. Failure to serve notice on an alleged father does not prevent the department from serving notice on any other alleged father of the same child.

History: En. Sec. 3, Ch. 119, L. 1989; amd. Sec. 16, Ch. 631, L. 1993; amd. Sec. 1, Ch. 70, L. 1995; amd. Sec. 1, Ch. 398, L. 1997; amd. Sec. 47, Ch. 552, L. 1997.

Cross-References

Right of privacy, Art. II, sec. 10, Mont. Const.

Affidavits, Title 26, ch. 1, part 10.

Uniform Parentage Act, Title 40, ch. 6, part 1.

Obligations of parents for support of their children, 40-6-211.

Paternity acknowledgment, 50-15-210.

40-5-233. Establishment of paternity — administrative hearing — subpoena — compulsory blood testing. (1) (a) Paternity blood testing may be requested by the alleged father, the mother, or the child through the child's custodian and may be made in conjunction with or in addition to a notice the department issues under 40-5-232. The request must be in writing and must be supported by a sworn statement of the requester that includes:

(i) an allegation of paternity and sufficient facts to establish a reasonable probability that the alleged father engaged in an act with the child's mother during the probable time of the child's conception that could have resulted in the child's conception; or

(ii) a denial of paternity and sufficient facts to establish a reasonable probability of the nonexistence of contact between the alleged father and the child's mother that could have resulted in the child's conception.

(b) If the department determines after a review of a sworn statement that there are sufficient facts to establish a reasonable probability of paternity or nonpaternity as claimed by the requesting party, the department shall issue a subpoena ordering the alleged father, the mother, or the child through the child's custodian to submit to blood testing.

(c) A pending request for blood testing under this section does not prevent the department from issuing a notice of parental responsibility under 40-5-232.

(d) Denial of a request for paternity blood testing under this subsection (1) is not a finding of nonpaternity and does not prevent the issuance of a notice under 40-5-232. A denial does not affect the completion of any pending action initiated under 40-5-232.

(2) (a) The department may order an alleged father to appear for an administrative hearing when:

(i) the department determines that the sworn statement provided in subsection (1) does not contain sufficient facts to issue a blood test subpoena and that additional examination of witnesses or evidence is necessary; or

(ii) the department receives a timely filed written denial of paternity in response to a notice under 40-5-232.

(b) The hearing must initially be conducted by teleconferencing methods and is subject to the provisions of the Montana Administrative Procedure Act. At the request of a party, the hearings officer shall, at the close of a teleconference hearing, grant a de novo in-person hearing.

(c) The department may issue a subpoena ordering the alleged father to submit to paternity blood testing if the testimony and other supplementary evidence demonstrate a reasonable probability:

(i) that the alleged father engaged in an act with the child's mother during the probable time of the child's conception that could have resulted in the child's conception; or

(ii) when the alleged father's paternity is presumed under 40-6-105, of the nonexistence of contact between the alleged father and the child's mother that could have resulted in the child's conception.

(d) For the purposes of this subsection (2), a reasonable probability of an act during the possible time of conception may be established by affidavit of the child's mother without need for the mother to appear at the hearing.

(3) Previous paternity actions under this part that did not result in a subpoena for paternity blood testing do not prevent the department from recommencing a paternity action if the department believes it can establish any of the factors listed in subsection (2)(c) or (2)(d).

(4) When there is reasonable cause to suggest that a blood test sample of a person submitting to a blood test was not the sample of the alleged father, mother, or child, an additional hearing may be held. The scope of the hearing is limited to questions involving the blood drawing or the chain of custody at the blood drawing site. The hearings officer may order retesting of any party.

(5) If the department does not receive a timely filed written denial of paternity or if an alleged father fails to appear at a scheduled hearing or for a scheduled paternity blood test, the department may enter an order declaring the alleged father the legal father of the child. The order will take effect within 10 days after entry of the default unless the alleged father before the 10th day presents good cause for failure to make a timely denial or for failure to appear at the hearing or to undergo paternity blood testing. The department may not enter an order under this section if there is more than one alleged father unless the default applies to only one of them and all others have been excluded by the results of paternity blood testing. An order issued under the provisions of this section may be set aside as provided in 40-5-235(3).

(6) If the rights of others and the interests of justice so require, the department may apply to any district court under the provisions of 2-4-104 for an order compelling an alleged father to submit to paternity blood testing. The court shall hear the matter as expeditiously as possible. If the court finds reasonable cause to believe that the alleged father is the natural or presumed father of the child, the court shall enter an order compelling the alleged father to submit to a paternity blood test. Reasonable cause may be established by affidavit of the child's mother.

History: En. Sec. 4, Ch. 119, L. 1989; amd. Sec. 2, Ch. 70, L. 1995; amd. Sec. 48, Ch. 552, L. 1997.

Cross-References

Affidavits, Title 26, ch. 1, part 10.

Paternity acknowledgment, 50-15-210.

40-5-234. Paternity blood tests — use of expert's affidavit — effect of test results — records — presumption. (1) The department shall appoint an expert who is qualified in examining genetic markers to conduct any paternity blood test required by 40-5-233.

(2) An affidavit documenting the chain of custody of any blood specimen is admissible to establish the chain of custody.

(3) If the scientific evidence resulting from a paternity blood test:

(a) conclusively shows that the alleged father could not have been the natural father, the question of paternity must be resolved accordingly. A finding under this subsection is sufficient to overcome a presumption created by 40-6-105.

(b) shows a 95% or higher statistical probability of paternity, the alleged father is presumed to be the natural father of the child. This presumption may be rebutted in an appropriate action in district court by a preponderance of the evidence.

(c) does not exclude the alleged father and shows less than a 95% statistical probability of paternity, the test results may be weighed in conjunction with other evidence to establish paternity.

(4) The department may enter an order of nonpaternity based on a blood test exclusion and may order the department of public health and human services to prepare an amended or substitute birth certificate.

(5) The department may enter in the support order registry established in 40-5-271 a written finding of any paternity presumption created by paternity blood test results.

(6) A presumption of paternity established under this section is a sufficient basis for establishing a support order.

History: En. Sec. 5, Ch. 119, L. 1989; amd. Sec. 3, Ch. 70, L. 1995.

Cross-References

Affidavits, Title 26, ch. 1, part 10.

Paternity acknowledgment, 50-15-210.

40-5-235. Effect of order establishing paternity — birth records — relief from order. (1) An administrative order of the department declaring the paternity of a child establishes the legal existence of the parent and child relationship for all purposes and confers or imposes all parental rights, privileges, duties, and obligations.

(2) Upon the request of the mother or father of a child born in this state, the department shall prepare a substitute certificate of birth, if necessary,

consistent with the administrative order. The substitute certificate of birth is subject to the provisions of 40-6-123, with references to "court" taken to mean "department".

(3) Except for an order based on a consent to entry of an order declaring paternity, the department may set aside an administrative order establishing the paternity of a child upon the application of any affected party and upon a showing of any of the grounds and within the timeframes provided in Rule 60(b) of the Montana Rules of Civil Procedure.

(4) An order of the department under 40-5-232 through 40-5-235 may be reviewed under the provisions of Title 2, chapter 4, part 7.

History: En. Sec. 6, Ch. 119, L. 1989; amd. Sec. 78, Ch. 418, L. 1995; amd. Sec. 136, Ch. 546, L. 1995; amd. Sec. 49, Ch. 552, L. 1997.

Cross-References

Obligations of parents, Title 40, ch. 6, part 2.

Obligations of children, Title 40, ch. 6, part 3.

Paternity acknowledgment, 50-15-210.

Distribution of estate property, Title 72.

40-5-236. Referral of paternity issue to district court — record — parties — exclusion of other matters — fees. (1) If the scientific evidence resulting from a paternity blood test does not exclude the alleged father and the alleged father continues to deny paternity, the alleged father shall file a written objection with the department within 20 days after service of the paternity blood test results specifically requesting referral of the paternity issue to the district court. Upon receipt of the written objection, the department shall refer the matter to the district court for a determination based on the contents of the administrative hearing record and any further evidence that may be produced at trial. Except as otherwise provided in 40-5-231 through 40-5-237, proceedings in the district court must be conducted pursuant to Title 40, chapter 6, part 1.

(2) The administrative record must include:

(a) a copy of the notice of parental responsibility and the return of service of the notice;

(b) the alleged father's written denial of paternity, if any;

(c) the transcript of the administrative hearing;

(d) the paternity blood test results and any report of an expert based on the results; and

(e) any other relevant information.

(3) Upon filing of the record with the district court, the court acquires jurisdiction over the parties as if they had been served with a summons and complaint. The department shall serve written notice upon the alleged father, as provided in 40-5-231(2), that the issue of paternity has been referred to the district court for determination.

(4) In a proceeding in the district court, the department shall appear on the issue of paternity only. The court may not appoint a guardian ad litem for the child unless the court in its discretion determines that an appointment is necessary and in the best interest of the child. Neither the mother nor the child is a necessary party, but either may testify as a witness.

(5) No other matter may be joined with an action to determine the existence or nonexistence of the parent and child relationship under this

section. The parties shall institute an independent action to address other issues, including visitation and custody.

(6) Except as provided in 25-10-711, the department is not liable for attorney fees, including fees for attorneys appointed under 40-6-119, or fees of a guardian ad litem appointed under 40-6-110.

History: En. Sec. 7, Ch. 119, L. 1989; amd. Sec. 4, Ch. 70, L. 1995; amd. Sec. 8, Ch. 482, L. 1997; amd. Sec. 50, Ch. 552, L. 1997.

Cross-References

Paternity acknowledgment, 50-15-210.

40-5-237. District court paternity proceedings — objection to tests — additional tests — expert's report — admissibility of evidence. (1) In a matter referred to the district court, if an alleged father objects to the procedures for or the results of a paternity blood test, the alleged father shall file a written objection with the court within 20 days after service of the notice required by 40-5-236(3). The court shall order an additional paternity blood test upon the alleged father's advance payment for additional testing if a written objection is timely filed or at the request of the department. The alleged father's advance payment must be returned to the alleged father if the test does not produce evidence of the alleged father's paternity. An additional test must be performed by the same or another expert who is qualified in paternity blood testing. Failure of the alleged father to make a timely challenge is considered a waiver of any defense to the test results or test procedures, including the chain of custody.

(2) If an objection to the paternity blood test is not timely filed, the paternity blood test expert's completed and certified report of the results and conclusions of a paternity blood test is admissible as evidence without additional foundation testimony or other proof of authenticity and accuracy if the laboratory in which the expert performed the test is accredited for parentage testing by the American association of blood banks. Accreditation may be established by verified statement or reference to published sources. This subsection does not limit the right of a party to contest the identity of persons submitting to testing.

(3) In any hearing before the court or at trial, testimony relating to sexual intercourse of the mother with any person who has been excluded from consideration as a possible father of the child involved by the results of a paternity blood test is inadmissible in evidence.

(4) When a paternity blood test excludes an alleged father from possible paternity, the test is conclusive evidence of nonpaternity of the alleged father for all purposes in the district court.

History: En. Sec. 8, Ch. 119, L. 1989; amd. Sec. 5, Ch. 70, L. 1995; amd. Sec. 51, Ch. 552, L. 1997.

Cross-References

Paternity acknowledgment, 50-15-210.

40-5-238. Confidentiality of paternity hearings and records of proceedings. Because of the privacy interests involved, a hearing under 40-5-231 through 40-5-237 and this section for the purpose of determining paternity or reasonable cause to pursue paternity blood testing is closed to the public. Attendance of others may be limited by the hearing officer as necessary to protect privacy rights. All papers and records of the proceedings, other than a final adjudication of paternity, are closed to public inspection, except that they may be opened upon consent of the parties and the hearing officer or, in exceptional cases, by order of the hearing officer.

History: **En. Sec. 3, Ch. 264, L. 1995.**

Cross-References

Right of public to examine documents or to observe deliberations of public bodies, Art. II, sec. 9, Mont. Const.

40-5-239 and 40-5-240 reserved.

40-5-241. Repealed. Sec. 27, Ch. 631, L. 1993.

History: **En. Sec. 17, Ch. 612, L. 1979; amd. Sec. 46, Ch. 439, L. 1981; amd. Sec. 2, Ch. 544, L. 1985; amd. Sec. 16, Ch. 549, L. 1989; amd. Sec. 26, Ch. 702, L. 1989.**

40-5-242. Notice of support lien — civil liability upon failure to honor support lien or to comply with warrant for distraint. (1) The department may, at any time after asserting a support lien, serve a notice of the lien on any person, firm, corporation, association, or political subdivision or department of the state in possession of any real or personal property that is due, owing, or belonging to an obligor. For this purpose, personal property includes the obligor's share of a decedent's estate, workers' compensation benefits, and any proceeds or potential proceeds from suits at law. Except as provided in subsections (1)(a) and (1)(b), the department may not impose a lien under this section upon a self-sufficiency trust established pursuant to Title 53, chapter 18, part 1, or upon the assets of a self-sufficiency trust established pursuant to Title 53, chapter 18, part 1.

(a) The department may impose a lien under this section upon a self-sufficiency trust or upon the assets of a self-sufficiency trust established pursuant to Title 53, chapter 18, part 1, if the department is required by federal law to recover or collect from the trust or its assets as a condition of receiving federal financial participation for the child support enforcement program or the FAIM financial assistance program.

(b) To the extent otherwise permitted by this section, the department is not precluded from asserting a claim or imposing a lien upon real or personal property prior to transfer of the property to the trust. If the department imposes a lien upon property prior to transfer to a self-sufficiency trust, any transfer of the property to the trust is subject to the lien.

(2) Except as provided in subsection (3), a person or entity is liable to the department in an amount equal to 100% of the value of a support lien or warrant for distraint or the value of real or personal property subject to a support lien or distrained by a warrant for distraint, whichever is less, together with costs, interest, and reasonable attorney fees, if the person or entity:

(a) pays over, releases, sells, transfers, or conveys real or personal property subject to a support lien, to or for the benefit of the obligor, after the person or entity receives actual notice of filing of the support lien; or

(b) fails or refuses to surrender upon demand property of an obligor when presented with a warrant for distraint by a sheriff or levying officer under the provisions of 40-5-247.

(3) A person or entity is not liable to the department under this section when:

(a) a written release or waiver of the support lien or warrant for distraint issued by the department has been delivered to the person or entity;

(b) a determination has been made in an adjudicative proceeding, either administrative or judicial, that a support lien does not exist or that the lien has been satisfied; or

(c) the property subject to a support lien has been transferred to, paid over to, or repossessed by a person or entity holding:

(i) a prior perfected lien;

(ii) a mortgage, the proceeds of which were used by the obligor to purchase real property; or

(iii) a perfected purchase money security interest, as [defined by 30-9-107] described by 30-9-321. *(Bracketed reference deleted July 1, 2001.)*

History: En. Sec. 18, Ch. 612, L. 1979; amd. Sec. 17, Ch. 549, L. 1989; amd. Sec. 17, Ch. 631, L. 1993; amd. Sec. 1, Ch. 262, L. 1997; amd. Sec. 149, Ch. 305, L. 1999.

Compiler's Comments

1999 Amendment: Chapter 305 at end of (3)(c)(iii) substituted "described by 30-9-321" for "defined by 30-9-107". Amendment effective July 1, 2001.

Cross-References

Costs, Title 25, ch. 10.

Debtors of judgment debtor and those holding judgment debtor's property to answer, 25-14-103.

Legal interest, 31-1-106.

Discharge or layoff of employee because of attachment or garnishment prohibited, 39-2-302.

Filing costs and attorney fees to be recovered on foreclosure of liens, 71-3-124.

40-5-243. Release of excess to obligor. If any person, firm, corporation, association, political subdivision, or department of the state has in its possession earnings, deposits, accounts, or balances in excess of the amount of the debt claimed by the department plus $100, that person or entity may release the excess to the obligor without liability under this part.

History: En. Sec. 19, Ch. 612, L. 1979; amd. Sec. 18, Ch. 549, L. 1989.

Cross-References

How writ executed — return of excess, 25-13-402.

40-5-244. Banks and savings and loan associations — service effective only as to branch office served. In the case of a bank, bank association, mutual savings bank, or savings and loan association maintaining branch offices, service of any notice or document authorized by this part is only effective as to the accounts, credits, or other personal property of the obligor in the particular branch upon which service is made.

History: En. Sec. 20, Ch. 612, L. 1979; amd. Sec. 19, Ch. 549, L. 1989.

Cross-References

Service, Rule 4D, M.R.Civ.P. (see Title 25, ch. 20).

40-5-245. Repealed. Sec. 27, Ch. 631, L. 1993.

History: En. Sec. 21, Ch. 612, L. 1979; amd. Sec. 47, Ch. 439, L. 1981.

40-5-246. Repealed. Sec. 27, Ch. 631, L. 1993.

History: En. Sec. 23, Ch. 612, L. 1979; amd. Sec. 48, Ch. 439, L. 1981; amd. Sec. 20, Ch. 549, L. 1989.

40-5-247. Warrant for distraint — effect — satisfaction of support lien — redemption. (1) (a) The department may issue a warrant for distraint to execute support liens established by 40-5-248 or to enforce and collect any money obligation authorized under this chapter.

(b) The warrant must be an order, under official seal of the department, directed to a sheriff of any county of the state or to any levying officer authorized by law to enforce a district court judgment. The order must command the recipient to levy upon and sell nonexempt real and personal property to satisfy the support lien upon which the warrant is based. The warrant must include notice of:

(i) the existence of exemptions from execution;

(ii) the procedure by which an exemption may be claimed; and

(iii) the right to request a hearing to determine an exemption claim.

(c) A warrant must be signed by the director of the department or the director's designee.

(d) The warrant must be for the amount of the support lien or the amount of any other money obligation determined under this chapter, including interest and fees, if any.

(e) A warrant for distraint has the same effect as a writ of execution issued by a district court to enforce money judgments.

(2) (a) A warrant for distraint may be sent by the department to the sheriff or levying officer. Upon receipt of the warrant, the sheriff or levying officer shall proceed to execute upon the warrant in the same manner as prescribed for execution upon a judgment.

(b) A copy of the warrant must be mailed to the obligor at the obligor's last-known address at or promptly after the time of seizure.

(c) Within 10 days after the date of the mailing of the warrant to the obligor, an obligor claiming an exemption may request a hearing to determine the existence of the exemption. The department shall convene a contested case hearing to determine the claimed exemption. An order entered under this section is a final agency order, subject to judicial review under Title 2, chapter 4, part 7.

(d) A sheriff or levying officer shall return a warrant, along with any funds collected, within 90 days of the receipt of the warrant.

(e) Funds resulting from execution upon the warrant must first be applied to the sheriff's or levying officer's costs, any superior liens, the support lien, or other money obligation and to any inferior liens. Any amounts in excess of this distribution must be paid to the obligor.

(f) If the warrant is returned not fully satisfied, the department has the same remedies to collect the deficiency as are available for any civil judgment.

(3) A sheriff's or levying officer's levy against real and personal property of the obligor is not limited to property in possession of persons or other entities given notice of a support lien under 40-5-242.

(4) (a) Upon receiving payment in full of the unpaid warrant amount plus penalty and fees, if any, and accumulated interest, the department shall release the warrant.

(b) Upon receiving partial payment of the unpaid warrant amount or if the department determines that a release or partial release of the warrant will facilitate the collection of the unpaid amount, penalty, and interest, the department may release or may partially release the warrant for distraint. The department may release the warrant if it determines that the warrant is unenforceable.

(5) An obligor or other person or entity having an interest in real or personal property levied upon by a warrant for distraint at any time prior to sale of the property may pay the amount of the support lien or other money obligation and any costs incurred by the sheriff or levying officer serving the warrant. Upon payment in full, the property must be restored to the obligor or other person and all proceedings on the warrant must cease.

(6) An obligor or other person or entity having an interest in real property levied upon and sold by a sheriff or levying officer pursuant to a warrant for distraint may, within 240 days after sale of the property, redeem the property by making payment to the purchaser in the amount paid by the purchaser plus interest at the statutory interest rate payable on judgments recovered in the district court.

(7) At any time after distraint of property under a warrant for distraint, the department may release all or part of the seized property without liability if payment of the support lien or other money obligation is assured or if the action will facilitate collection of the support lien or other money obligation. The release or return does not operate to prevent future action to collect the warrant amount from the same or other property.

(8) The department may issue a warrant for distraint to collect a support lien or other money obligation under this section at any time within the statutory limitation period for enforcing and collecting delinquent child support.

(9) The use of the warrant for distraint is not exclusive, and the department may use any other remedy provided by law for the collection of child support amounts.

History: En. Sec. 27, Ch. 702, L. 1989; amd. Sec. 18, Ch. 631, L. 1993; amd. Sec. 8, Ch. 579, L. 1999.

Compiler's Comments

1999 Amendment: Chapter 579 inserted (1)(b)(i) through (1)(b)(iii) outlining notice requirements of warrant; inserted (2)(b) requiring copy of warrant to be mailed to obligor's address at or promptly after seizure; inserted (2)(c) authorizing obligor claiming exemption to request hearing within 10 days of warrant, requiring department to convene contested case hearing to determine exemption, and providing that order is final agency order subject to judicial review; and made minor changes in style. Amendment effective May 10, 1999.

Cross-References

Execution of judgment, Title 25, ch. 13.

40-5-248. Lien against real and personal property — effect of lien — interest — warrant for distraint. (1) There is a support lien on the real and personal property of an obligor:

(a) when the department has entered a final decision in a contested case under this chapter that finds the obligor owes a sum certain debt either to this department or to an obligee, or both; or

(b) upon registration under 40-5-271 of a support order that includes finding that the obligor owes a sum certain amount of delinquent support.

(2) A support lien is for the amount required to satisfy:

(a) the sum certain debt shown in a final decision in a contested case under this chapter or the sum certain support debt included in any support order registered under 40-5-271;

(b) interest claimed under this section; and

(c) any fees that may be due under 40-5-210.

(3) A support lien has the priority of a secured creditor from the date the lien is perfected as provided by this section; however, the lien is subordinate to:

(a) any prior perfected lien or security interest;

(b) a mortgage, the proceeds of which are used by an obligor to purchase real property; or

(c) any perfected purchase money security interest, as [defined in 30-9-107] described in 30-9-321.

(4) Support liens remain in effect until the delinquency upon which the lien is based is satisfied or until 2 years after the child to whom the support lien is related attains the age of majority, whichever occurs first.

(5) The lien applies to all real and personal property owned by the obligor if it can be located in the state. The lien applies to all real and personal property that the obligor can afterward acquire. Except as provided in subsections (5)(a) and (5)(b), the department may not impose a lien under this section upon a self-sufficiency trust established pursuant to Title 53, chapter 18, part 1, or upon the assets of a self-sufficiency trust established pursuant to Title 53, chapter 18, part 1.

(a) The department may impose a lien under this section upon a self-sufficiency trust or upon the assets of a self-sufficiency trust established pursuant to Title 53, chapter 18, part 1, if the department is required by federal law to recover or collect from the trust or its assets as a condition of receiving federal financial participation for the child support enforcement program or the FAIM financial assistance program.

(b) To the extent otherwise permitted by this section, the department is not precluded from asserting a claim or imposing a lien upon real or personal property prior to transfer of the property to the trust. If the department imposes a lien upon property prior to transfer to a self-sufficiency trust, any transfer of the property to the trust is subject to the lien.

(6) The department shall keep a record of support liens asserted under this section in the registry of support orders established by 40-5-271.

(7) A support lien is perfected:

(a) as to real property, upon filing a notice of support lien with the clerk of the district court in the county or counties in which the real property is or may be located at the time of filing or at any time in the future;

(b) as to motor vehicles or other items for which a certificate of ownership is issued by the department of justice, upon filing a notice of support lien with the department of justice in accordance with the provisions of Titles 23 and 61;

(c) as to all other personal property, upon filing a notice of support lien in the place required to perfect a security interest under [30-9-401] 30-9-321. The county clerk and recorder or the secretary of state, as appropriate, shall cause the notice of support lien to be marked, held, and indexed as if the notice of support lien were a financing statement within the meaning of the Uniform Commercial Code.

(8) A buyer, in the ordinary course of business, who buys an obligor's personal property for value and who buys in good faith and without knowledge of the support lien takes the property free of the support lien.

(9) (a) The department may charge interest on the support lien at the rate of 1% per month.

(b) Interest accrues at the close of the business day on the last day of each month and is calculated by multiplying the unpaid balance of the lien, including prior accrued interest existing at the end of the day, by the applicable rate of interest.

(c) A provision of this section may not be construed to require the department to maintain interest balance due accounts. The department may waive interest if waiver would facilitate the collection of the debt.

(d) Interest under this subsection (9) is in addition to and not in substitution for any other interest accrued or accruing under any other provision of law.

(10) (a) Upon receiving payment in full of the amount of the lien plus interest and fees, if any, the department shall take all necessary steps to release the support lien.

(b) Upon receiving partial payment of the support lien or if the department determines that a release or partial release of the lien will facilitate the collection of support arrearages, the department may release or partially release the support lien. The department may release the support lien if it determines that the lien is unenforceable.

(11) A support lien under this section is in addition to any other lien created by law.

(12) A support lien under this section may not be discharged in bankruptcy.

(13) Support liens provided for by this section may be enforced or collected through the warrant for distraint provided for by 40-5-247. *(Bracketed references deleted July 1, 2001.)*

History: En. Sec. 25, Ch. 631, L. 1993; amd. Sec. 2, Ch. 262, L. 1997; amd. Sec. 1, Ch. 432, L. 1997; amd. Sec. 150, Ch. 305, L. 1999.

Compiler's Comments

1999 Amendment: Chapter 305 at end of (3)(c) substituted "described in 30-9-321" for "defined in 30-9-107"; and in (7)(c) at end of introductory clause substituted "30-9-321" for "30-9-401". Amendment effective July 1, 2001.

40-5-249 and 40-5-250 reserved.

40-5-251. Debt payment schedule. At any time after notice to the obligor, the department may set or reset a level and schedule of payments to be paid upon the debt consistent with the income, earning capacity, and resources of the obligor.

History: En. Sec. 22, Ch. 612, L. 1979; amd. Sec. 21, Ch. 549, L. 1989.

Cross-References

Parents liable to Department for public assistance benefits — schedule of payments, 53-4-248.

40-5-252. Interest on debts due — waiver. (1) The department may collect interest on any support debt due and owing to it at the statutory interest rate payable on judgments recovered in the courts of this state.

(2) No provision of this part may be construed to require the department to maintain interest balance due accounts. The department may waive interest if waiver would facilitate the collection of the debt.

History: En. Sec. 24, Ch. 612, L. 1979; amd. Sec. 22, Ch. 549, L. 1989.

Cross-References

Interest on judgments, 25-9-205.

40-5-253. Administrative findings and order — administrative remedies — judicial review. (1) It is the intent of this part that administrative findings and orders be subject to judicial review, but administrative remedies must be exhausted prior to judicial review. The administrative procedures described in this part are subject to review in the appropriate district court. Except as provided in subsections (3) through (5), the review must be conducted pursuant to the Montana Administrative Procedure Act. Upon a showing by the department that administrative remedies have not been exhausted, the district court shall refuse review until the remedies are exhausted.

(2) This part may not be construed to abridge or in any way affect the obligor's right to counsel during any and all judicial or administrative proceedings pursuant to this part.

(3) A petition for judicial review is an original action and may not be filed under a preexisting cause number or joined with any other action.

(4) A summons must be issued and served under Rule 4, Montana Rules of Civil Procedure, upon the child support enforcement division of the department and each party, along with the petition for judicial review. The division may be served through any of its employees. The district court does not obtain jurisdiction unless the petition for judicial review is served on all parties within 30 days after the petition is filed with the district court.

(5) The district court shall set a briefing schedule for a petition for judicial review. A reference in a brief to the administrative record must be to a particular part of the record, suitably designated, and to specific pages of that part of the record. Intelligible abbreviations may be used. A reference to an exhibit must be to the pages of the transcript on which the exhibit is identified, offered in evidence, and received or rejected. After briefs have been filed and upon motion of a party, the district court may order oral argument.

History: En. Sec. 25, Ch. 612, L. 1979; amd. Sec. 23, Ch. 549, L. 1989; amd. Sec. 9, Ch. 482, L. 1997; amd. Sec. 9, Ch. 579, L. 1999.

Compiler's Comments

1999 Amendment: Chapter 579 in first sentence in (4) before "department" inserted "child support enforcement division of the" and inserted second sentence allowing division to be served through its employees. Amendment effective May 10, 1999.

Cross-References

Right to counsel, Art. II, sec. 24, Mont. Const.

Judicial review of contested cases, Title 2, ch. 4, part 7.

40-5-254. Statutory limitations. Support debts ensuing as a result of determinations made through the administrative procedures described in this part are subject to statutory limitations as set forth in Title 27, chapter 2.

History: En. Sec. 26, Ch. 612, L. 1979; amd. Sec. 24, Ch. 549, L. 1989.

Cross-References

Lien extinguished by statute of limitations, 71-3-122.

40-5-255. Charging off child support debts as uncollectible — sale of support debts. (1) Any support debt due the department from an obligor, which debt the department determines uncollectible, may be transferred from accounts receivable to a suspense account and cease to be accounted as an asset.

If a warrant for distraint has been filed and the support debt has subsequently been charged off as uncollectible, the department shall issue a release of lien.

(2) At any time after 10 years from the date of termination of the support obligation or after 10 years from entry of a lump-sum judgment or order for support arrears, whichever is later, the department may charge off as uncollectible any support debt upon which the department finds there is no available, practical, or lawful means by which the support debt may be collected. A proceeding or action under the provisions of this part may not be begun after expiration of the 10-year period to institute collection of a support debt. This part may not be construed to render invalid or nonactionable a warrant for distraint issued by the department prior to the expiration of the 10-year period or an assignment of earnings executed prior to the expiration of the 10-year period.

(3) The department may discount and sell to a private collection agency, credit bureau, or other private entity any interest that the state and the department may have in the unpaid balance of the support debt created by 40-5-221 and 53-4-248 or assigned to the department under 53-2-613.

(a) The sale must be by sealed bid to the highest bidder provided that the highest bid is not less than 10% of the value of the support debt subject to the sale.

(b) The sale must be subject to conditions and terms that the department may set out in a sales contract.

(c) The department shall publish notice of the sale in a newspaper having statewide circulation once a week for 4 successive weeks.

(d) Proceeds must be paid into the state treasury to the credit of the child support enforcement division special revenue fund.

History: En. Sec. 27, Ch. 612, L. 1979; amd. Sec. 49, Ch. 439, L. 1981; amd. Sec. 3, Ch. 561, L. 1985; amd. Sec. 25, Ch. 549, L. 1989; amd. Sec. 19, Ch. 631, L. 1993; amd. Sec. 10, Ch. 60, L. 1995; amd. Sec. 6, Ch. 264, L. 1995.

Cross-References

Transfer of rights and duties under obligation, Title 28, ch.1, part 10.

Assignments for benefit of creditors, Title 31, ch. 2, part 2.

Maintenance, 40-4-203.

Child support, 40-4-204.

Support obligation — spousal maintenance, 40-5-201.

Department authorized to enforce spousal maintenance awards, 40-5-207.

Lien extinguished by statute of limitations, 71-3-122.

40-5-256. Employee debtor rights protected — limitation. No employer may discharge or prejudice an employee for reason that an assignment of earnings has been presented in settlement of a support debt or that a warrant for distraint has been served against the employee's earnings. This provision does not apply if more than three warrants are served upon the same employer within any period of 12 consecutive months.

History: En. Sec. 28, Ch. 612, L. 1979; amd. Sec. 50, Ch. 439, L. 1981.

Cross-References

Discharge or layoff of employee because of attachment or garnishment prohibited, 39-2-302.

Assignments, 40-4-207.

40-5-257. Assignment of earnings to be honored — effect. (1) Any person, firm, corporation, association, political subdivision, or department of the state employing an obligor shall honor, according to its terms, a duly executed assignment of earnings, whether executed voluntarily or pursuant to a support order presented by the department. This requirement to honor the assignment of earnings and the assignment of earnings itself are applicable whether the earnings are to be paid presently or in the future and continue in force until released in writing by the department.

(2) Payment of money pursuant to an assignment of earnings presented by the department serves as full acquittance under any contract of employment. The state shall defend and hold harmless any action taken pursuant to the assignment of earnings. The department is released from liability for improper receipt of money under an assignment of earnings upon return of any money so received.

History: En. Sec. 29, Ch. 612, L. 1979; amd. Sec. 26, Ch. 549, L. 1989.

Cross-References

Property exempt from execution — earnings of judgment debtor, 25-13-614.

Discharge or layoff of employee because of attachment or garnishment prohibited, 39-2-302.

Assignments, 40-4-207.

40-5-258 through 40-5-260 reserved.

40-5-261. Procedures for making information available to consumer reporting agencies. (1) The department may make information about a support debt available to consumer reporting agencies, as defined in 31-3-102, upon request. The department may charge a fee to recover the cost of responding to requests for support debt information. The department shall provide advance notice to the obligor concerning the proposed release of information. However, lack of actual notice does not preclude the release of information to consumer reporting agencies. The notice may be incorporated into any notice served pursuant to Title 17, chapter 4, part 1; Title 40, chapter 5, part 4; this part; or the federal income tax refund intercept program under 42 U.S.C. 664. The notice must inform the obligor of the methods available for contesting the accuracy of the information.

(2) If contacted by an obligor wishing to contest the accuracy of information proposed for release to consumer reporting agencies, the department shall conduct an informal administrative review, separately or in conjunction with a hearing on any other matter concerning the obligor's support obligation, to determine the accuracy of the information. The accuracy of information provided by the department to consumer reporting agencies may be contested in accordance with the procedures provided in 31-3-124. An obligor dissatisfied with the outcome of a reinvestigation conducted by a consumer reporting agency may receive an administrative hearing on the accuracy of the information by filing a written request with the department. The hearing must be conducted in accordance with 40-5-226, and the resulting findings are subject to judicial review as provided in 40-5-253.

(3) The department shall within 30 days notify all consumer reporting agencies that were provided information pursuant to this section if a reported support debt is paid in full or is no longer being enforced by the department.

History: En. Sec. 6, Ch. 418, L. 1989.

Cross-References

Right of privacy, Art. II, sec. 10, Mont. Const.

Consumer reporting agencies, Title 31, ch. 3, part 1.

40-5-262. Rules. The department shall adopt rules to implement this section, including rules:

(1) providing for advance notice to the obligor of support debt information requested under 40-5-261;

(2) establishing the procedure for contesting the accuracy of information proposed for release to consumer reporting agencies;

(3) providing for consideration of the obligor's payment record, the availability of other remedies, and other matters relevant to determining whether the release of information would promote the collection of a support debt or would be inappropriate under the circumstances; and

(4) governing the format and frequency of reports to consumer reporting agencies.

History: En. Sec. 7, Ch. 418, L. 1989.

Cross-References

Adoption and publication of rules, Title 2, ch. 4, part 3.

40-5-263. Central clearinghouse — interstate enforcement services — powers and duties of the department. (1) The department shall establish a clearinghouse for the registration of all interstate IV-D cases referred to the department by other states. The clearinghouse shall serve as the central point for the receipt and dissemination of information regarding interstate enforcement requests, including but not limited to:

(a) petitions under the Revised Uniform Reciprocal Enforcement of Support Act, Uniform Reciprocal Enforcement of Support Act, or the Uniform Interstate Family Support Act; and

(b) wage withholding requests under part 4 of this chapter.

(2) (a) A case must be referred to the clearinghouse to be processed as a IV-D case and receive the benefits of IV-D status and clearinghouse services.

(b) The clearinghouse may accept any interstate IV-D referral made by interstate application or by petition under the Revised Uniform Reciprocal Enforcement of Support Act or the Uniform Interstate Family Support Act. An application must be made on forms prescribed by the department.

(3) Upon certification by the initiating state that a case filed in the registry of foreign support orders, including a petition under the Uniform Reciprocal Enforcement of Support Act, the Revised Uniform Reciprocal Enforcement of Support Act, or the Uniform Interstate Family Support Act, is eligible for IV-D services and that the obligor resides, has property, or derives income in this state, the department may:

(a) proceed under Title 40, chapter 5, part 1; or

(b) pursue any other remedy available to it to establish or enforce a support order.

(4) If necessary, the department shall establish the paternity of the child.

(5) The clearinghouse shall:

(a) review and acknowledge receipt of any interstate IV-D referral;

(b) request missing information from the initiating state;

(c) determine appropriate enforcement remedies and forward the referral to the appropriate enforcement unit;

(d) provide status updates to the initiating state, including the location of the responsible enforcement unit;

(e) locate an obligor and the obligor's assets, if necessary; and

(f) initiate a IV-D referral if services are provided by the department to a resident of this state and the obligor resides outside the state.

(6) If the department is providing support enforcement services to a resident of this state, the director or the director's designee may certify any interstate petition, application, and referral, including a petition under part 1 of this chapter.

(7) A lien created by operation of law or issued by order of a court or IV-D agency in another state to enforce a support order may, at the request of the other IV-D agency, be registered with the department. Upon registration, the lien applies to any of the obligor's real and personal property located in this state with the same force and effect as a lien established under 40-5-248. At the request of the other IV-D agency, a registered lien may be enforced by the department using any remedy available to enforce a support lien under 40-5-248.

History: En. Sec. 2, Ch. 287, L. 1989; amd. Sec. 56, Ch. 328, L. 1993; amd. Sec. 52, Ch. 552, L. 1997.

Cross-References

Establishment of paternity through administrative action, 40-5-231 through 40-5-238.

40-5-264. Cooperative agreements. (1) The department may enter into cooperative agreements with any person, firm, corporation, association, political subdivision, Indian tribe or tribal organization as defined in 25 U.S.C. 450b, or department of this state as a cooperating contractor to provide enforcement services.

(2) A cooperating contractor:

(a) shall act as an independent support enforcement contractor if the cooperating contractor provides enforcement services; and

(b) may pursue any remedy available to the department, as limited by the terms of the cooperative agreement.

(3) The department may refer an enforcement case to a cooperating contractor in the county where the obligor resides.

History: En. Sec. 3, Ch. 287, L. 1989; amd. Sec. 53, Ch. 552, L. 1997.

40-5-265 through 40-5-270 reserved.

40-5-271. Registration of support orders. (1) The department may, for the purpose of review and modification proceedings under 40-5-272 and 40-5-273, register support orders issued by a district court of this state or by a court or administrative agency of another state. Registration of the order under this section does not confer jurisdiction for any purpose other than for the review and modification process.

(2) When the department conducts review and modification proceedings, the department shall give the parties notice by personal service or certified mail and opportunity to contest registration of the order. A party seeking to vacate the registered order has the burden of proving that the court or agency issuing the order:

(a) did not have jurisdiction to enter the order;

(b) did not have personal jurisdiction over the party; or

(c) did not give the party reasonable notice and opportunity to be heard before the order was entered.

(3) (a) As an alternative to any other registration process or remedy available for the enforcement of a support order issued by a court or agency in another state, the department may register the support order under this subsection (3).

(b) Registration under this subsection (3) is only for the purpose of enforcement and does not confer jurisdiction for any other purpose such as visitation, custody, or paternity disputes.

(c) If an order is registered for enforcement under this subsection (3), the department shall notify the parties to the order of the registration. A copy of the registered order must be included with the notice. The notice must inform the parties:

(i) of the amount of any alleged arrearage as of the date of the notice;

(ii) that a party may request a hearing to vacate the registration or to assert defense to any alleged arrearage for any reason set out in subsection (3)(e);

(iii) that a hearing to contest the validity or enforcement of the order must be requested within 20 days after service of the notice; and

(iv) that failure to contest the validity or enforcement of the registered order in a timely manner will result in confirmation of the order and enforcement of the order and the alleged arrearage and will preclude further contest of the order with respect to any matter that could have been asserted at the hearing.

(d) A party seeking to contest the validity or enforcement of a registered order shall request a hearing within 20 days after service of the notice of registration. If a party fails to contest the validity or enforcement of the registered order in a timely manner, the order is confirmed by operation of law. If a party timely requests a hearing to contest the validity or enforcement of the order, the department shall schedule the matter for hearing.

(e) A party contesting the validity or enforcement of a registered order or seeking to vacate the registration has the burden of proving one or more of the following defenses:

(i) the court or agency issuing the order did not have subject matter jurisdiction to enter the order or lacked personal jurisdiction over the contesting party;

(ii) the court or agency issuing the order did not give the party reasonable notice and opportunity to be heard before the order was entered;

(iii) the order was obtained by fraud;

(iv) the issuing court or agency has stayed enforcement of the order pending appeal;

(v) the order has been vacated, suspended, or modified by a later order;

(vi) there is a defense under the law of this state to the remedy sought; or

(vii) the statute of limitations precludes enforcement of some or all of the arrearages.

(f) If the contesting party does not establish a defense under subsection (3)(e) to the validity or enforcement of the order, the department shall issue an order confirming the order. Confirmation of a registered order, whether by operation of law or after notice and hearing, precludes further contest of the order with respect to any matter that could have been asserted at the time of the registration. A confirmed order is enforceable as of the date of confirmation in the same manner as an order issued by the department or a district court of this state.

(g) In a proceeding for arrears, the statute of limitations under the laws of this state or of the issuing state, whichever is longer, applies.

(h) Hearings under this subsection (3) are subject to the provisions of the Montana Administrative Procedure Act and must initially be conducted by teleconferencing methods. At the request of a party, the hearings officer shall, at the close of a teleconference hearing, grant a de novo in-person hearing.

History: En. Sec. 1, Ch. 266, L. 1991; amd. Sec. 54, Ch. 552, L. 1997.

40-5-272. Application for review of child support orders. (1) Upon the application of the department, the obligor, or the obligee, a hearings officer appointed pursuant to 40-5-273 shall review support orders filed with the support order registry. The purpose of the review is to determine whether the support order should be modified in accordance with the guidelines.

(2) Jurisdiction to conduct the review and to issue a modifying order under 40-5-273 is authorized when:

(a) the obligor and the obligee reside in this state; or

(b) jurisdiction can be obtained as provided under 40-5-231.

(3) Jurisdiction to review a child support order under this section does not confer jurisdiction for any other purpose, such as custody or visitation disputes.

(4) Criteria constituting sufficient grounds for review of a child support order include:

(a) inconsistency with this state's guidelines, unless the inconsistency is considered negligible under department rules; or

(b) availability of health insurance coverage to the obligor's child through the obligor's employment or other group insurance.

(5) The department shall make available procedures and forms that allow the obligor or the obligee to complete the review process without legal counsel.

(6) To the extent that they are consistent with this section, the provisions of 40-5-145, 40-5-149, and 40-5-150 apply to this section.

History: En. Sec. 2, Ch. 266, L. 1991; amd. Sec. 50, Ch. 328, L. 1993.

40-5-273. Administrative review of child support orders — modifying orders. (1) A review application setting forth facts meeting any of the criteria for review of a child support order established in 40-5-272 must be scheduled for an administrative review. Unless the department determines under rules of the department that an in-person review is necessary, the review must be conducted by teleconferencing methods. A notice that an administrative review will be conducted must be served either personally or by certified mail on the obligor and the obligee. If service is by certified mail, the department must receive a return receipt signed by the person to whom the notice was mailed for the service to be effective. The notice must include the following information as an exception to 2-4-601:

(a) a statement of the purpose, objectives, and possible consequences of the review;

(b) a statement of the right of the obligor and the obligee to request the department to issue subpoenas compelling the appearance of witnesses and the production of documents for a hearing; and

(c) a requirement that the obligor and the obligee provide the department with telephone numbers at which they and their witnesses may be contacted for the review.

(2) The department may issue an order commanding the obligor or the obligee, or both, to produce financial information. The order must be served either personally or by certified mail with the notice that a review will be conducted. If service is by certified mail, the department must receive a return receipt signed by the person to whom the order was mailed for the service to be effective. The department may also issue subpoenas ordering the parties to produce information in their possession about the obligor and the obligee that may be reasonably necessary for application of the guidelines. Any information so obtained by the department must be provided to the parties before a hearing.

(3) The requested modification of the order must be determined on the evidence submitted to the department under the following conditions:

(a) If an applicant other than the department fails to provide a telephone number for the review or fails to be at the number provided when telephoned for the review, the failure may be considered a withdrawal of the application.

(b) If a party other than the applicant fails to provide a telephone number for the review or fails to be at the number provided when telephoned for the review, the failure is considered to mean that the party does not oppose the modification.

(c) If the department is the applicant and if either the obligor or the obligee, or both, fails to provide a telephone number for the review or fails to be at the number provided when telephoned for the review, the failure may be considered an admission that the party or parties do not oppose the modification.

(4) (a) An order entered under the circumstances described in subsection (3)(a), (3)(b), or (3)(c) becomes final within 30 days of issuance unless a party provides the hearings officer an affidavit showing good cause for failure to provide a telephone number or failure to be available when telephoned.

(b) A proposed modification consent order or notice of proposed modification becomes final 30 days after issuance unless during that period a party files with the department a written request for further administrative proceedings.

(c) The department shall grant a modification hearing if it receives a timely written request by a party aggrieved by the department's determination. The hearing is subject to the provisions of this section relating to a review. The department may adopt rules regulating the fair and efficient conduct of the hearing. Unless the department determines under department rules that an in-person hearing is necessary, the hearing must be conducted by teleconferencing methods.

(5) A provision of law may not be construed to mean that an obligor or an obligee is a client of the department, and the department is not considered a party to the action.

(6) (a) In addition to the powers and duties provided by other law, the department shall, to ensure the equitable determination of a support obligation, during a review:

(i) question witnesses in a nonadversarial manner to elicit full disclosure of all pertinent facts;

(ii) introduce evidence on behalf of the parties;

(iii) apply the guidelines to the facts elicited from the review; and

(iv) inquire as to any circumstances that may require variance from the guidelines.

(b) If a party is represented by legal counsel, the department may allow the counsel to present that party's case.

(7) The department shall determine a support obligation in accordance with the guidelines and shall issue a modifying order. A stipulation by the parties in a proceeding under this section may not be contested before entry of the final department order. If the department determines that the difference between the existing support order and the amount determined under the guidelines is negligible under rules issued by the department, the modifying order may not change the amount of the support obligation. Even though the review may indicate that a modification of the support obligation is appropriate, the department may not modify the support order if the department determines, after the review, that to do so would not be in the best interests of the child under the rules issued by the department. An increase in child support is presumed to be in the best interests of the child unless, after a review, either the obligor or the obligee demonstrates it would not be in the best interests of the child. The modifying order may modify the underlying support order from the date of service of a notice that an administrative review will be conducted under this section and may modify the underlying order from the date found to be the date that the amount required for support decreased. The obligee may be ordered to repay the obligor for any support amount overpayment found to have been paid since the date that the amount required for support decreased. If the case is a IV-D case, the department shall, on request of the obligor, enforce the obligee's repayment of the overpaid amount using any procedure provided in this chapter for payment, enforcement, and collection of child support or a delinquency.

(8) The department shall consider whether or not health insurance for the child is available and shall include an appropriate requirement for the provision of the child's health insurance needs in a modifying order in accordance with part 8 of this chapter.

(9) In addition to complying with other requirements of law, the modifying order must include provisions:

(a) that each party, other than the department, is required to promptly file with the department and update, as necessary, information on:

(i) the identity of the party;

(ii) the party's social security number;

(iii) the party's residential and mailing addresses;

(iv) the party's telephone number;

(v) the party's driver's license number;

(vi) the name, address, and telephone number of the party's employer; and

(vii) if the child is covered by a health or medical insurance plan, the name of the insurance carrier or medical insurance plan, the policy identification number, the names of the persons covered, and any other pertinent information regarding coverage or, if the child is not covered, information as to availability of coverage for the child through the obligor's and obligee's employers;

(b) that in a subsequent child support enforcement action, upon sufficient showing that diligent effort has been made to ascertain the location of a party, the department's due process requirements for notice and service of process are met with respect to the party upon delivery of written notice by regular mail to the most recent known address of the party or the party's employer's address reported to the department; and

(c) that the modifying order is subject to future administrative review and modification by the department upon the request of the department or a party under 40-5-271 through 40-5-273 when the department is providing services under IV-D.

(10) The department shall keep information provided under subsection (9)(a) confidential except as necessary for purposes of Title IV-D of the Social Security Act.

(11) An order entered under this section by the department is a final agency decision, subject to judicial review pursuant to the Montana Administrative Procedure Act, except as provided in 40-5-253. An order entered under this section must notify the parties that the order is subject to judicial review under Title 2, chapter 4, part 7. A final order entered under a stipulation of parties waives the stipulating parties' right to judicial review.

(12) The parties to the support order and the department when it is providing services under IV-D may enforce the support order or modify that order independently, as provided in 40-4-208 and 53-2-613(5)(d).

History: En. Sec. 3, Ch. 266, L. 1991; amd. Sec. 10, Ch. 482, L. 1997; amd. Sec. 55, Ch. 552, L. 1997; amd. Sec. 74, Ch. 51, L. 1999; amd. Sec. 10, Ch. 579, L. 1999.

Compiler's Comments

1999 Amendments — Composite Section: Chapter 51 in (12) at end after "53-2-613" substituted "(5)(d)" for "(4)(d)". Amendment effective March 15, 1999.

Chapter 579 in (1) and (2) inserted "either personally or by certified mail" and inserted sentence requiring department to receive return receipt if service by certified mail; at end of (9) substituted "provisions" for "the following notices and warnings"; substituted language in (9)(a) and (9)(b) outlining information required to be filed with department and procedures regarding department's due process requirements for notice and service for former language in (9)(a) that read: "that the obligor shall keep the department informed of the name and address of the obligor's current employer and information on health insurance available to the obligor through the obligor's employment or other group insurance"; inserted (10) requiring department to keep information confidential except for purposes of Title IV-D of the Social Security Act; and made minor changes in style. Amendment effective May 10, 1999.

40-5-274. Child support payments to follow the child. (1) A support order issued or modified under this part must contain a provision requiring the child support obligation to be paid to:

(a) the legal custodian of the minor child;

(b) a person, organization, or agency to which the legal custodian voluntarily or involuntarily relinquishes physical custody of the child; or

(c) to any other person, organization, or agency entitled by law, assignment, or similar reason to receive or collect the child support obligation.

(2) If the department is providing services under Title IV-D of the Social Security Act, payment of support must be made through the department for distribution to the person, organization, or agency entitled to the payment.

(3) An order that omits the provision required by subsection (1) is subject to the requirements of subsection (1) without need for an amendment to the order or for any further action by the department.

History: En. Sec. 24, Ch. 631, L. 1993; amd. Sec. 56, Ch. 552, L. 1997.

40-5-275. Order to seek employment. (1) In a proceeding under this chapter to enforce a support order, if an obligor claims inability to pay support because of unemployment or underemployment, the department may order the obligor to seek suitable employment and make progress reports on that activity to the department unless the obligor proves by a preponderance of the evidence that:

(a) the obligor is engaged in diligent, bona fide efforts to seek suitable employment; or

(b) the obligor, due to illness, injury, or other incapacity, does not have the ability to seek employment or to engage in work if employment is offered to the obligor.

(2) The seek-work order must direct the obligor to:

(a) seek employment within a specified amount of time;

(b) file a weekly report with the department showing at least five new attempts by the obligor to find employment; and

(c) include in the report filed under subsection (2)(b) the name, address, and telephone number of the employers with whom the obligor sought employment and the name of the individuals the obligor contacted to inquire about or apply for employment.

(3) The order is effective for 6 months or until the obligor finds work, whichever occurs first.

(4) Failure to report or otherwise comply with a seek-work order, absent good cause, is evidence of willful nonpayment of child support for which the obligor may be determined to have committed the offense of nonsupport under 45-5-621 or may be held in civil contempt under Title 40, chapter 5, part 6. The department may enforce the order as provided in 40-5-226.

(5) For the purpose of this section, "suitable employment" is employment commensurate with the obligor's education, training, professional or occupational qualifications, job skills, work history, and the availability of employment opportunities in the community, or in the absence of commensurate employment available within a reasonable range of the obligor's area of residence, suitable employment is any employment that the obligor is capable of performing.

History: En. Sec. 12, Ch. 552, L. 1997.

Part 3

Child Support Income Deduction

Part Cross-References

Discharge or layoff of employee because of attachment or garnishment prohibited, 39-2-302.

Child support, 40-4-204.

Assignments of earnings, 40-4-207.

Administrative enforcement of support, Title 40, ch. 5, part 2.

Child Support Enforcement Act, Title 40, ch. 5, part 4.

Obligations of parents for support and education of their children, 40-6-211.

40-5-301. Short title. This part may be cited as the "Child Support Income Deduction Act of 1981".

History: **En. Sec. 1, Ch. 171, L. 1981.**

40-5-302. Purpose — applicability. (1) The purpose of this part is to provide a direct method of deducting money from a person's income for the payment of child support.

(2) Income withholding under this part is available without amendment of the support order even though the support order did not provide for withholding or provided for other payment arrangements.

History: **En. Sec. 2, Ch. 171, L. 1981; amd. Sec. 57, Ch. 552, L. 1997.**

Cross-References

Child support, 40-4-204.

Obligations of parents for support and education of their children, 40-6-211.

40-5-303. Petition for income deduction — who may initiate. (1) If an obligor is exempted from immediate income withholding under 40-5-315 or is not otherwise subject to an income-withholding order, the obligor's income may be withheld for the payment of child support if the obligor becomes delinquent in the payment of support, a person or entity referred to in subsection (2) notifies the obligor that income withholding will be initiated if the delinquent amount is not paid within 8 days of the date of the notice, and the obligor does not pay the delinquent amount within that time. Notification that income withholding will be initiated if a delinquency is not paid within 8 days of the date of the notice is not necessary if such a notice was given for a prior delinquency and the prior delinquency in fact existed. This notice is different from the notice required by 40-5-305.

(2) Income withholding for the payment of child support may be initiated by:

(a) the person named as the recipient of the child support payments in the child support order;

(b) the child or the guardian of the child named in the child support order; or

(c) the department of public health and human services.

(3) (a) At the request of an initiating party who has determined that an obligor is delinquent, the district court shall issue an order for income deductions for immediate service upon the obligor's payor or payors. The order is limited to current support unless modified to include arrears as provided in 40-5-308.

(b) At the same time an income deduction order is issued, the requesting party shall notify the obligor as provided in 40-5-305 that income deductions have been initiated.

(4) Deductions under this section for current support may be terminated only if:

(a) the district court determines after a hearing that the obligor was not delinquent when the deduction order was issued;

(b) the obligation to pay support has terminated and all delinquencies are paid in full; or

(c) the department of public health and human services has superseded the deduction order under authority of Title 40, chapter 5, part 4.

(5) As used in this part, the following definitions apply:

(a) "Employer" includes a payor.

(b) (i) "Income" means any form of periodic payment to a person, regardless of source, including commissions, bonuses, workers' compensation, disability benefits, payments under a pension or retirement program, interest and earnings, and wages.

(ii) Income does not include:

(A) an amount, other than creditor claims, required by law to be withheld, including federal, state, and local taxes and social security; or

(B) an amount exempted from judgment, execution, or attachment by federal or state law.

(c) "Payor" means any entity that pays income to an obligor on a periodic basis and includes any person, firm, corporation, association, employer, trustee, political subdivision, or state agency or an agent of any one of them, subject to the jurisdiction of the courts of this state under Rule 4B of the Montana Rules of Civil Procedure.

History: En. Sec. 3, Ch. 171, L. 1981; amd. Sec. 31, Ch. 609, L. 1987; amd. Sec. 23, Ch. 702, L. 1989; amd. Sec. 137, Ch. 546, L. 1995; amd. Sec. 58, Ch. 552, L. 1997.

Cross-References

Representation of child, 40-4-205.

Enforcement of minor's rights, 41-1-202.

40-5-304. When child support payments considered delinquent. (1) Nonpayment of child support required by a district court or administrative order or by a similar order of a court of another jurisdiction becomes delinquent under this part 8 working days after the last day of the month in which the payment is due.

(2) Child support payments may be considered delinquent under this part only in reference to a court or administrative order setting child support payments.

(3) Intervening agreements or orders establishing a schedule for payment of delinquent support do not prevent income withholding under this part.

History: En. Sec. 4, Ch. 171, L. 1981; amd. Sec. 4, Ch. 635, L. 1991; amd. Sec. 59, Ch. 552, L. 1997.

Cross-References

Payment of maintenance or support to court, 40-4-206.

40-5-305. Notice. (1) A party initiating income deductions under this part shall serve the obligor with notice if:

(a) an order for immediate income deductions is issued because of a delinquency;

(b) additional delinquencies accrued subsequent to the issuance of an income-deduction order and the requesting party proposes to add those delinquencies to an existing order for income deductions;

(c) immediate withholding under 40-5-315 or delinquency withholding under 40-5-303 has commenced for current support and there are delinquencies due for a period prior to issuance of the income-deduction order that the requesting party proposes to add to the deduction order; or

(d) the obligation to pay current support has terminated and there are support arrears still owing for the period prior to termination.

(2) The notice must contain a statement:

(a) of the amount subject to withholding, including a computation showing the period and total amount of the delinquency as of the date of the notice;

(b) that withholding applies to all current and subsequent payors;

(c) of the procedures to follow if the obligor desires to contest income withholding on the grounds that the initiation of withholding or the modification of an existing order for deductions is improper or that the amount to be deducted is in error due to a mistake of fact; and

(d) of the period of time within which the obligor is required to file a request for hearing and that failure to file the hearing request within the time limit will result in an income-deduction order being served upon the payor for the amount stated in the notice.

(3) The notice must be served upon the obligor personally or by certified mail.

History: En. Sec. 5, Ch. 171, L. 1981; amd. Sec. 60, Ch. 552, L. 1997.

Cross-References

Service by officer, Title 25, ch. 3, part 2.

Service, Rule 4D, M.R.Civ.P. (see Title 25, ch. 20).

40-5-306. Discharge of delinquency. (1) In a case in which only arrears are owed, if the obligor pays the total amount of child support in arrears within 15 days after service of the notice specified in 40-5-305, an order for deduction may not issue. This discharge of delinquency does not affect or otherwise limit any action as a result of any subsequent delinquencies.

(2) If there is a current support obligation, payment of arrears after service of the notice required under 40-5-305 or after service of the income-deduction order on the payor does not prevent the issuance or continuance of an income-deduction order for the payment of current support.

History: En. Sec. 6, Ch. 171, L. 1981; amd. Sec. 61, Ch. 552, L. 1997.

40-5-307. Delinquency of child support denied — hearing. If, within 15 days after service of a notice under 40-5-305, the obligor responds to the notice and denies that income withholding initiated because of a delinquency is proper or denies that the amount or arrearages stated in the notice is owing, the district court shall hold a hearing to determine whether income withholding will take place or continue.

History: En. Sec. 7, Ch. 171, L. 1981; amd. Sec. 62, Ch. 552, L. 1997.

Cross-References

District Court jurisdiction, Title 3, ch. 5, part 3.

40-5-308. Order for deduction from income for child support payments. (1) The court may authorize the requesting party to continue an immediate income-deduction order issued because of a delinquency, may modify an existing deduction order, or may authorize issuance of an income-deduction order if:

(a) the obligor fails to timely respond to the notice provided under 40-5-305;

(b) the obligor fails to appear at a scheduled hearing;

(c) the court determines that the obligor is delinquent in the payment of support; or

(d) the court determines there are new or additional delinquencies to be added to an existing deduction order.

(2) The order must state:

(a) the action involved;

(b) the total amount of back child support due and the amount of each court-ordered installment of child support;

(c) the amount to be deducted from the obligor's income and the amount, if any, allowed to the payor under 40-5-309(2) as a fee for handling the deduction;

(d) the length of time the order is to remain in effect, if ascertainable; and

(e) the name and address of the person or entity to whom the deduction is to be paid by the payor.

History: En. Sec. 8, Ch. 171, L. 1981; amd. Sec. 4, Ch. 276, L. 1995; amd. Sec. 63, Ch. 552, L. 1997.

Cross-References

Earnings of judgment debtor, 25-13-614.

What property subject to attachment, 27-18-102.

Discharge or layoff of employee because of attachment or garnishment prohibited, 39-2-302.

40-5-309. Amount to be deducted from income. (1) (a) The amount of money to be deducted each pay period from the obligor's income is:

(i) (A) the amount of money necessary to pay current installments of child support as they become due and payable; plus

(B) the amount of money that, when deducted in equal amounts each pay period, will pay off all outstanding child support payments delinquent within 2 years; or

(ii) not less than 25% of the obligor's disposable earnings.

(b) If withholding is annualized, when deducted in equal amounts, the amount withheld each pay period must be sufficient to pay all installments due in a 12-month period under the order to withhold.

(2) The district court may allow a fee not to exceed $5 per deduction, which the payor may deduct from the obligor's income for the expense of administering the deduction.

(3) The total amount to be deducted under subsections (1) and (2) may not exceed the maximum amount permitted under section 303(b) of the Consumer Credit Protection Act, 15 U.S.C. 1673(b), as amended.

(4) Except as provided in 40-5-315, the child support income deduction must cease when there is no past-due child support owing, unless the district court orders continued income deductions for payment of child support installments as they become due and payable.

History: En. Sec. 9, Ch. 171, L. 1981; amd. Sec. 1, Ch. 625, L. 1987; amd. Sec. 17, Ch. 635, L. 1991; amd. Sec. 11, Ch. 60, L. 1995; amd. Sec. 64, Ch. 552, L. 1997.

Cross-References

Payment of maintenance or support to court, 40-4-206.

40-5-310. Priority of income deduction. An order for the deduction of income for the payment of child support payments takes precedence over any:

(1) assignment of income;

(2) voluntary deductions from the obligor's income; and

(3) other court-ordered garnishment of income.

History: En. Sec. 10, Ch. 171, L. 1981; amd. Sec. 65, Ch. 552, L. 1997.

Cross-References

Earnings of judgment debtor exempt from execution, 25-13-614.

What property subject to attachment, 27-18-102.

Wage brokers — restrictions upon assignment of wages or salary, 31-1-304.

Assignments for benefit of creditors, Title 31, ch. 2, part 2.

40-5-311. Remedy not exclusive. The remedy provided in this part for the collection of unpaid child support is not exclusive. This part provides a remedy in addition to all other remedies in law available to obligees of unpaid child support.

History: En. Sec. 11, Ch. 171, L. 1981.

Cross-References

Remedies additional — cumulative, 40-5-144, 40-5-404.

40-5-312. Duties of payors. (1) A payor who has been served with an order for deduction under this part shall deduct the amount designated in the order beginning not later than the first pay period that occurs after 14 days from the service of the order. The payor shall, within 7 working days of the date the obligor is paid, promptly pay the deducted amount as directed by the order. The payor shall include with the payment a statement indicating the date the amount was deducted from the obligor's income.

(2) Whenever a payor receives more than one deduction order from the same district court, the payor may combine all amounts deducted into a single payment for that month, with the portion that is attributable to each obligor separately designated.

(3) Whenever there is more than one deduction order against a single obligor the payor shall:

(a) honor all deduction orders to the extent that the total amount deducted from the obligor's income does not exceed the limits set in 40-5-309; and

(b) comply with the orders in the sequence in which they were served upon the payor except for income-withholding orders issued by the department of public health and human services. Under 40-5-423, orders issued by the department have priority over all other orders without regard to the sequence in which they were served.

(4) The payor shall promptly notify the clerk of the district court that issued the deduction order of the termination of the obligor's employment and provide the obligor's last-known address and the name and address of the obligor's new payor, if known.

History: En. Sec. 1, Ch. 276, L. 1995; amd. Sec. 66, Ch. 552, L. 1997.

40-5-313. Obligor rights protected — penalties. (1) An employer may not discharge, discipline, or refuse to hire a person because:

(a) the person has a child support obligation;

(b) a withholding order has been issued for the person's income; or

(c) proceedings have been initiated under this part.

(2) An employer who violates the provisions of this section may be fined not more than $100.

History: En. Sec. 2, Ch. 276, L. 1995; amd. Sec. 67, Ch. 552, L. 1997.

Cross-References

Discharge or layoff of employee because of attachment or garnishment prohibited, 39-2-302.

40-5-314. Civil liability for failure to comply with wage deduction order. (1) A payor who purposely and knowingly fails to deduct support money from the obligor's income and remit the money when ordered to do so under this part is liable to the obligee of the support order for any amount up to the accumulated amount the payor should have deducted and remitted.

(2) A payor who complies with a deduction order under this part is not liable to the obligor or to any other person claiming rights derived from the obligor for wrongful deductions.

History: En. Sec. 3, Ch. 276, L. 1995; amd. Sec. 68, Ch. 552, L. 1997.

40-5-315. Immediate income deductions. (1) Notwithstanding any provision in this part requiring a delinquency as a prerequisite to an order for income deductions, except as provided in subsection (2), the income of a person obligated to pay child support by an order of a district court issued after October 1, 1991, is subject to an immediate deduction order on the effective date of the order.

(2) An obligor's income is not subject to deduction under this section in any case in which the district court finds:

(a) that there is good cause not to require immediate deduction; or

(b) that there is an alternative arrangement between the parties for the payment of support that provides sufficient security to ensure compliance with the arrangement.

(3) (a) For the purposes of subsection (2), a finding of good cause not to require immediate deduction must, at a minimum, be based on:

(i) a written determination and explanation by the district court as to why implementation of immediate deductions is not in the best interests of the child; and

(ii) in cases involving the modification of support orders, proof of timely payment of previously ordered support.

(b) As used in subsection (2)(b), "alternative arrangement" means a written agreement between the obligor and obligee and, in cases in which there is an assignment of support rights under 53-2-613, the department of public health and human services that has been approved and entered into the record by the district court that issued or modified the support order.

(4) The clerk of court shall administer immediate income deductions under this section. The clerk of court, at any time after docketing the support order or modification of a support order, at the request of the obligee, and without need for amendment to the support order or for any further action by the district court, shall issue the order for income deductions for service upon the obligor's payor. The deduction order must direct the payor to promptly deliver the amount deducted to the department of public health and human services, as provided in 40-5-909, for distribution to the obligee.

(5) Deductions under this section may be terminated only when:

(a) the obligation to pay support has terminated and all arrearages are paid in full;

(b) the obligor requests termination and the obligee and obligor have entered into an alternative arrangement as set forth in subsection (2)(b); or

(c) the department of public health and human services has superseded the deduction order under authority of Title 40, chapter 5, part 4.

(6) If a delinquency occurs subsequent to issuance of an immediate deduction order or if arrearages occur prior to beginning the deductions, the arrearages may be added to the deduction order only after compliance with the notice of hearing requirements of 40-5-305.

(7) (a) After October 1, 1991, whenever a support order is registered as provided by 40-5-184 or other law, the support order is subject to immediate orders to deduct income under this section.

(b) Withholding income under this section must be imposed when an obligor has income derived from within this state and the support order was issued in another state.

(8) This section applies only to support orders that are not being enforced by the department of public health and human services under Title IV-D of the Social Security Act. The withholding of income for support orders being enforced by the department is provided for in Title 40, chapter 5, part 4, and those procedures, if applicable, supersede the provisions of this section.

History: En. Sec. 16, Ch. 635, L. 1991; amd. Sec. 138, Ch. 546, L. 1995; amd. Sec. 69, Ch. 552, L. 1997; amd. Sec. 11, Ch. 579, L. 1999.

Compiler's Comments

1999 Amendment: Chapter 579 in (3)(b) after "agreement" substituted "between" for "that is signed by" and after "53-2-613" deleted "signed by"; and made minor changes in style. Amendment effective May 10, 1999.

Part 4

Child Support Enforcement Act Administrative Income Withholding

Part Cross-References

Administrative enforcement of support, Title 40, ch. 5, part 2.

Child support income deduction, Title 40, ch. 5, part 3.

40-5-401. Short title. This part may be cited as the "Child Support Enforcement Act".

History: En. Sec. 1, Ch. 571, L. 1985; amd. Sec. 6, Ch. 702, L. 1989.

40-5-402. Purpose — applicability. (1) The purpose of this part is to provide a more effective and efficient way to guarantee the support of dependent children by the person or persons primarily responsible for such support by ensuring that the support of children is the highest priority in the allocation of a responsible parent's income.

(2) This part applies to all support obligations being enforced or collected by the department of public health and human services pursuant to Title IV-D of the Social Security Act.

(3) When the requirements of this part are met, an employer or other payor of income to a person having a support obligation under a court or administrative order must be directed to withhold from the person's income in an amount sufficient to meet the support obligation and to defray any arrearages that are due or may become due.

(4) Unless an exception under 40-5-411(4) is contained in a support order, withholding of income is required under this part without need for any amendment to the support order involved or any action by the court or entity that issued the support order even though the support order did not address withholding or the support order provided for other payment arrangements.

(5) Withholding, once commenced, applies to all current and subsequent payors of income to a person obligated to pay support until the withholding is terminated as provided by this part.

(6) The provisions for income withholding under this part take precedence over any other law or court order.

History: En. Sec. 2, Ch. 571, L. 1985; amd. Sec. 5, Ch. 635, L. 1991; amd. Sec. 139, Ch. 546, L. 1995.

Cross-References

Child support, 40-4-204.

Obligations of parents, Title 40, ch. 6, part 2.

40-5-403. Definitions. As used in this part, the following definitions apply:

(1) "Alternative arrangement" means a written agreement between the obligor and obligee, and the department in the case of an assignment of rights under 53-2-613, that has been approved and entered in the record of the court or administrative authority issuing or modifying the support order.

(2) "Department" means the department of public health and human services provided for in 2-15-2201.

(3) "Employer" includes a payor.

(4) "Income" means any form of periodic payment to a person, regardless of source, including commissions, bonuses, workers' compensation, disability payments, payments under a pension or retirement program, interest, and earnings and wages. However, income does not include:

(a) any amount required by law to be withheld, other than creditor claims, including federal, state, and local taxes and social security; and

(b) any amounts exempted from judgment, execution, or attachment by federal or state law.

(5) "Obligee" means either a person to whom a duty of support is owed or a public agency of this or another state to which a person has assigned the right to receive current and accrued support payments.

(6) "Obligor" means a person who owes a duty to make payments under a support order.

(7) "Payor" means any payor of income to an obligor on a periodic basis and includes any person, firm, corporation, association, employer, trustee, political subdivision, state agency, or any agent thereof who is subject to the jurisdiction of the courts of this state under Rule 4B of the Montana Rules of Civil Procedure.

(8) "Support order" has the meaning provided in 40-5-201.

History: En. Sec. 3, Ch. 571, L. 1985; amd. Sec. 24, Ch. 702, L. 1989; amd. Sec. 6, Ch. 635, L. 1991; amd. Sec. 140, Ch. 546, L. 1995; amd. Sec. 11, Ch. 482, L. 1997; amd. Sec. 70, Ch. 552, L. 1997; amd. Sec. 12, Ch. 579, L. 1999.

Compiler's Comments

1999 Amendment: Chapter 579 in definition of alternative arrangement after "agreement" substituted "between the obligor and obligee and the department" for "signed by the obligor and obligee and signed by the department". Amendment effective October 1, 1999.

Cross-References

Interest on judgments, 25-9-205.

Earnings of judgment debtor exempt from execution, 25-13-614.

Maintenance, 40-4-203.

Child support, 40-4-204.

Department authorized to enforce maintenance awards, 40-5-207.

40-5-404. Other remedies available. (1) (a) The remedies provided in this part are in addition to and not in substitution for any other remedy that may otherwise be available to the department, and the department may simultaneously pursue other remedies to enforce a support obligation or to collect support arrearages.

(b) If the department is enforcing a support order of another state, an Indian tribe, or a foreign country under this part, the department may proceed under Title 40, chapter 5, part 1.

(2) (a) The department may enforce a support order of another state, an Indian tribe, or a foreign country under this part without registration of the support order under 40-5-180, 40-5-271, or any other law providing for registration of support orders.

(b) If the department is enforcing an order under subsection (2)(a), in addition to those defenses available under this part, a party may contest the validity of the support order by proving any defense contained in 40-5-190.

History: En. Sec. 20, Ch. 571, L. 1985; amd. Sec. 7, Ch. 702, L. 1989; amd. Sec. 71, Ch. 552, L. 1997.

Cross-References

Administrative enforcement of support, Title 40, ch. 5, part 2.

Child support income deduction, Title 40, ch. 5, part 3.

40-5-405. Rulemaking authority. The department shall adopt rules and forms to participate in and carry out the provisions of this part.

History: En. Sec. 21, Ch. 571, L. 1985.

Cross-References

Rule defined, 2-4-102.

Adoption and publication of rules, Title 2, ch. 4, part 3.

40-5-406 through 40-5-410 reserved.

40-5-411. Immediate income withholding. (1) Except as provided in subsection (4), in the case of a child support order, whether temporary or final, that is issued by a court or administrative authority of this state after January 1, 1990, the income of the obligor is subject to immediate withholding under this part regardless of whether support payments are in arrears.

(2) After October 1, 1991, when a support order of another state is registered in Montana under the provisions of 40-5-184 or other applicable law, the support obligation is subject to immediate income withholding under this section.

(3) The department may direct the payor of income to the obligor to commence the withholding of the obligor's income on:

(a) the effective date of the support order or the date of registration of the support order; or

(b) the date, if any, that the department becomes authorized by law to provide child support enforcement services.

(4) An obligor's income is not subject to immediate withholding if the court or administrative authority that issued or modified the support order finds:

(a) that there is good cause not to require immediate withholding; or

(b) that there is an alternative arrangement between the parties for the payment of support that provides sufficient security to ensure compliance with the arrangement.

(5) For the purposes of subsection (4), any finding of good cause not to require immediate income withholding must be based on at least:

(a) a written determination and explanation by the court or administrative authority as to why implementation of immediate income withholding would not be in the best interests of the child; and

(b) proof of timely payment of previously ordered support in cases involving the modification of support orders.

(6) Immediate withholding under this section terminates only:

(a) upon the conditions provided in 40-5-417; or

(b) at the request of the obligor if:

(i) withholding has not been previously terminated and subsequently initiated under 40-5-412 because of a delinquency; and

(ii) the obligor meets one of the exemptions under subsection (4).

History: En. Sec. 4, Ch. 571, L. 1985; amd. Sec. 8, Ch. 702, L. 1989; amd. Sec. 7, Ch. 635, L. 1991.

Cross-References

Property exempt from execution, Title 25, ch. 13, part 6.

40-5-412. Delinquency income withholding. (1) (a) In the case of support orders not subject to immediate income withholding under 40-5-411, including cases in which the court or administrative authority has made a finding of good cause or determines that an alternative arrangement exists, the income of the obligor is subject to withholding under this part beginning on the day the obligor becomes delinquent in the payment of support.

(b) For purposes of this section, an obligor becomes delinquent 8 working days after the last day of the month in which the payment is due.

(c) Agreements or orders establishing a schedule for payment of delinquent support do not prevent income withholding under this part.

(2) (a) If the department determines that an obligor is delinquent, the department may notify the obligor that income withholding will be initiated if the delinquent amount is not received within 8 days of the date of the notice. If the obligor does not pay the delinquent amount within that time, the department may immediately send an order to withhold income to any payor. Notification that income withholding will be initiated if the delinquent amount is not received within 8 days of the date of the notice is not necessary if such a notice was given for a prior delinquency and the prior delinquency in fact existed. This notice is different from the notice required by subsection (2)(b). The order must be limited to current support unless modified to include arrears as provided in 40-5-413.

(b) At the same time an order to withhold income is sent to a payor, the department shall notify the obligor as provided in 40-5-413 that income withholding has been initiated.

(3) Notwithstanding the provisions of subsection (1), income withholding must be initiated, without regard to whether there is a delinquency, on the earlier of:

(a) the date the obligor requests that withholding begin; or

(b) at the request of the obligee if the obligor is found, after an opportunity for hearing under 40-5-414, to be delinquent under the terms of an alternative arrangement for the payment of support.

(4) To accomplish the purpose of subsection (1), the department shall monitor all support payments not otherwise subject to immediate withholding. To facilitate monitoring, the department by written notice to the obligor may direct an obligor to pay all support through the department, notwithstanding a court order directing payments to be made to the obligee or clerk of court.

(5) The only basis for contesting withholding under this section is a mistake of fact, which does not include a mistake of fact relating to establishment of custody and visitation but includes a mistake:

(a) concerning the obligor's identity;

(b) concerning the existence of the support obligation;

(c) concerning the amount of support to be paid;

(d) in the determination that the obligor is delinquent in the payment of support;

(e) in computation of delinquent support amounts owed; or

(f) in the allegation that the obligor is in default of an alternative agreement.

(6) A mistake of fact under subsection (5) does not include mistakes relating to issues of paternity or establishment of custody and visitation.

History: En. Sec. 5, Ch. 571, L. 1985; amd. Sec. 9, Ch. 702, L. 1989; amd. Sec. 41, Ch. 16, L. 1991; amd. Sec. 8, Ch. 635, L. 1991; amd. Sec. 12, Ch. 482, L. 1997; amd. Sec. 72, Ch. 552, L. 1997.

40-5-413. Notice of income withholding. (1) The department shall serve the obligor with a notice if:

(a) income withholding is initiated because of a delinquency;

(b) additional arrearages accrued subsequent to the issuance of an order to withhold and the department proposes to add those arrearages to an existing withholding order; or

(c) immediate withholding or delinquency withholding has commenced for current support and there are arrearages due for a period prior to entry of the order to withhold that the department proposes to add to the withholding order.

(2) The notice must contain a statement:

(a) of the amount subject to withholding, including a computation showing the period and total amount of the arrearages as of the date of the notice;

(b) that withholding applies to all current and subsequent payors;

(c) of the procedures to follow if the obligor desires to contest income withholding on the grounds that the initiation of withholding or the modification of an existing withholding order is improper or that the amount to be withheld is in error due to a mistake of fact, as provided in 40-5-412;

(d) of the period of time within which the obligor is required to file a request for a hearing and that failure to file a request within the time limit will result in income withholding orders being served upon the payor for the amount stated in the notice; and

(e) in those cases in which withholding is being initiated at the request of an obligee without regard to whether there is a delinquency as provided in 40-5-412(3), a statement that the obligor can require the obligee to appear and show proof that the obligor is not meeting the terms of the alternative arrangement.

(3) The notice must be served upon the obligor personally or by certified mail.

History: En. Sec. 6, Ch. 571, L. 1985; amd. Sec. 10, Ch. 702, L. 1989; amd. Sec. 9, Ch. 635, L. 1991; amd. Sec. 73, Ch. 552, L. 1997; amd. Sec. 75, Ch. 51, L. 1999.

Compiler's Comments

1999 Amendment: Chapter 51 in (2)(e) near middle substituted "a delinquency" for "an arrearage". Amendment effective March 15, 1999.

Cross-References

Due process of law, Art. II, sec. 17, Mont. Const.

Registered or certified mail, 1-1-202.

Actual and constructive notice, 1-1-217.

Notice and opportunity to be heard, Title 2, ch. 3, part 1.

Montana Administrative Procedure Act, Title 2, ch. 4.

40-5-414. Hearing. (1) (a) To contest the withholding of income initiated because of a delinquency or the modification of an existing order to withhold, an obligor may within 10 days of being served with notice of income withholding under 40-5-413 file with the department a written request for an administrative hearing to be held pursuant to the contested case provisions of Title 2, chapter 4, part 6.

(b) The obligor shall include with the hearing request a statement of one or more of the grounds for contesting income withholding provided in 40-5-412. If the hearing request fails to include that statement, the hearings officer may deny the hearing for failure to state an issue upon which a hearing may be granted.

(2) Venue for the administrative hearing may be in the county where the obligor resides if the obligor resides in this state, the county in which the payor or the payor's agent is located, or the county in which the department or any of its regional offices is located.

(3) The hearing must initially be held by teleconferencing methods and is subject to the Montana Administrative Procedure Act. At the request of a party, the hearings officer shall grant a de novo in-person hearing.

(4) If the obligor files a timely request for a hearing:

(a) that includes a statement showing a probable mistake of fact, the initiation of delinquency income withholding by the department and the modification of an existing withholding order may be stayed upon written request of the obligor until conclusion of the hearing or the date of the hearing if the obligor fails to appear at the scheduled hearing. However, if the obligor is only contesting an arrearage amount and is not contesting withholding for current support, income withholding for current support is not stayed. In a proceeding to modify an existing order, income withholding under the existing order to withhold is not stayed.

(b) unless good cause is found, the department shall, within 60 days of receipt of a request for a hearing, conduct a hearing. Unless good cause is found, within 60 days after a hearing is held, any posthearing briefs are received, and all evidence has been provided to the department concerning a notice of intent to withhold income, the department shall inform the obligor whether income withholding must take place.

(5) The department may continue an order to withhold income issued because of a delinquency, may modify an existing order to withhold income, or may issue an order to withhold income if:

(a) the obligor fails to file a timely written request for hearing that includes the statement showing a mistake of fact;

(b) the obligor fails to appear at a scheduled hearing;

(c) the hearings examiner determines from the evidence that the obligor is delinquent in the payment of support;

(d) there is an existing order to withhold and if the hearings examiner determines from the evidence that the obligor owes new or additional amounts in arrears; or

(e) in cases in which income withholding is being initiated at the request of an obligee without regard to whether there is an arrearage, the hearings examiner determines from the evidence that the obligor did not meet the terms of the alternative arrangement.

(6) For purposes of the hearing process, arrearages of support must be computed on the basis of the amount owed and unpaid on the date on which the obligor became delinquent. When income withholding is initiated because of a delinquency, payment of the arrearage after service of the notice or after service of an order to withhold on a payor is not a basis for not initiating or continuing income withholding. Whenever the notice of income withholding is issued because an arrearage has accrued or additional income is being withheld to satisfy additional arrearages, unless good cause is found, within 60 days after a hearing is held, any posthearing briefs are received, and all evidence has been provided, the department shall inform the obligor whether income withholding must take place.

(7) If the obligor fails to request a hearing within 10 days after service of the notice of income withholding or fails to appear at a scheduled hearing or if the hearings examiner determines that the obligor owes unpaid support or determines that a modification of an existing order is proper, the department shall issue an order to withhold income in accordance with 40-5-415.

History: **En. Sec. 7, Ch. 571, L. 1985; amd. Sec. 11, Ch. 702, L. 1989; amd. Sec. 10, Ch. 635, L. 1991; amd. Sec. 12, Ch. 60, L. 1995; amd. Sec. 13, Ch. 482, L. 1997; amd. Secs. 74, 100, Ch. 552, L. 1997.**

40-5-415. Order to withhold income — rules. (1) When the requirements of this part have been met, the department shall serve an order or modification order to withhold and deliver income upon any payor or combination of payors. The order must:

(a) direct the payor and successor payors to withhold from the obligor's income each month the amount specified in the order if sufficient funds are available;

(b) direct the payor to deliver the amount withheld to the department in the same month in which the funds were withheld;

(c) state that the order is binding on the payor until further notice by the department;

(d) state the rights and duties of the payor under this part; and

(e) include a statement that the obligor is required under a support order to provide health insurance coverage for the obligor's child, if appropriate.

(2) An order or modification order to withhold and deliver the obligor's income made under this section is binding upon the payor immediately upon service of the order upon the payor. Service of the order or modification order to withhold may be made either personally or by certified mail.

(3) Whenever there is more than one payor, the department may, in its discretion, apportion the total amount to be withheld each month among payors. Whenever an obligor's income is subject to withholding for more than one obligee, the department may consolidate the payments received each month and distribute the income among the obligees according to department rules.

History: En. Sec. 8, Ch. 571, L. 1985; amd. Sec. 12, Ch. 702, L. 1989; amd. Sec. 11, Ch. 635, L. 1991; amd. Sec. 20, Ch. 631, L. 1993.

Cross-References

Actual and constructive notice, 1-1-217.

40-5-416. Determination of amount of income to be withheld. (1) (a) Subject to the limitations provided in subsection (2), the amount of funds to be withheld each month from the obligor's income must be the amount of money necessary to pay current installments of support as they become due and payable.

(b) If income is being withheld to satisfy an arrearage, the amount of funds to be withheld must include the greater of:

(i) the amount of money that, when deducted in equal amounts each month, will pay all outstanding support arrearages and interest, if any, within 2 years; or

(ii) 25% of the obligor's income.

(c) If income is being withheld under this part, the department may allow a fee not to exceed $5 each month, which may be withheld by the payor as compensation for the administrative costs of each withholding.

(d) If a support order subject to income withholding is expressed in terms of a monthly obligation, the order may be annualized and withheld on a weekly or biweekly basis, corresponding to the obligor's regular pay period. If withholding is annualized, when deducted in equal amounts, the amount withheld each pay period must be sufficient to pay all installments due in a 12-month period under the order to withhold.

(2) The maximum amounts withheld from the obligor's wages or salaries, including fees, may not exceed the maximum amount permitted under section 303(b) of the federal Consumer Credit Protection Act, 15 U.S.C. 1673(b), as amended.

(3) At any time, if the obligor can show that substantial hardship will result if the maximum permissible withholding is implemented or continued, the department for cause shown may in its discretion determine a lesser amount to be withheld each month in satisfaction of support arrearages.

History: En. Sec. 9, Ch. 571, L. 1985; amd. Sec. 13, Ch. 702, L. 1989; amd. Sec. 12, Ch. 635, L. 1991; amd. Sec. 13, Ch. 60, L. 1995.

Cross-References

Earnings of judgment debtor — exemptions, 25-13-614.

40-5-417. Modification or termination of withholding orders. (1) The department may at any time modify the order to withhold income to:

(a) reflect payment in full of the arrearages by income withholding or otherwise;

(b) recognize an increase or decrease in the support order; or

(c) indicate any other reason the amount to be withheld is to be reduced or changed.

(2) If an arrearage occurs while the department is collecting an amount of money necessary to pay current installments of support as they become due and payable, the department may adjust the amount of income required to be withheld to also satisfy the arrearage, as provided in this part.

(3) An income withholding order terminates only when the department is no longer authorized under the law to collect support or, when appropriate, services rendered under 40-5-203 have come to an end or when the obligation to pay support is terminated and all arrearages are paid in full, whichever occurs first.

(4) The payment in full of any arrearage amount may not be the sole basis for termination of withholding as long as there is a support obligation enforceable by the department.

History: En. Sec. 14, Ch. 571, L. 1985; amd. Sec. 14, Ch. 702, L. 1989; amd. Sec. 13, Ch. 635, L. 1991.

Cross-References

Modification of child support, 40-4-219.

40-5-418. Payment records. (1) The department, in collecting, disbursing, or receiving payments pursuant to orders to withhold income, shall maintain complete, accurate, and clear records of all payments and disbursements.

(2) Certified payment records maintained by the department must, without further proof or foundation, be admitted into evidence in any legal proceedings under this part. Such records constitute prima facie evidence of the amount of support paid and arrearages that have accrued since the department began to monitor support payment in a case.

History: En. Sec. 15, Ch. 571, L. 1985.

Cross-References

Public records — presumption of correctness, 26-1-602.

Montana Rules of Evidence, Title 26, ch. 10.

Self-authentication, Rule 902, M.R.Ev. (see Title 26, ch. 10).

Public records, Rule 1005, M.R.Ev. (see Title 26, ch. 10).

40-5-419 and 40-5-420 reserved.

40-5-421. Duties of payor. (1) A payor who has been served with an order to withhold and deliver income shall deduct the amount designated in the order beginning not later than the first pay period that occurs after service of the order. The payor shall, within 7 working days of the date the obligor is paid, promptly deliver the amount withheld to the department as directed by the order or in accordance with any subsequent modification of the order received from the department. The payor shall include with the payment a statement indicating the date the amount was withheld from the obligor's income.

(2) Whenever the payor is obligated to withhold income for more than one obligor, the payor may combine all amounts withheld into a single payment for that month with the portion of the withholding that is attributable to each obligor separately designated.

(3) Whenever there is more than one order for withholding against a single obligor, the payor shall comply with the orders in the sequence in which they were served upon the payor and shall honor all withholding orders to the extent that the total amount withheld from the obligor's wages or salary does not exceed the limits set in 40-5-416.

(4) The payor shall promptly notify the department of the termination of the obligor's employment or other source of income and provide the obligor's last-known address and the name and address of the obligor's new employer or other source of income, if known to the payor.

History: **En. Sec. 10, Ch. 571, L. 1985; amd. Sec. 14, Ch. 635, L. 1991; amd. Sec. 75, Ch. 552, L. 1997.**

40-5-422. Obligor rights protected — penalties. (1) An employer may not discharge, discipline, or refuse to hire an obligor:

(a) because the person has a child support obligation; or

(b) because of the institution of income withholding on the obligor's income or the initiation of proceedings under this part.

(2) Any person who violates this section may be fined not more than $500 and not less than $150 and may be required to make full restitution to the aggrieved obligor, including reinstatement and backpay.

History: **En. Sec. 12, Ch. 571, L. 1985; amd. Sec. 18, Ch. 702, L. 1989.**

Cross-References

Discharge or layoff of employee because of attachment or garnishment prohibited, 39-2-302.

40-5-423. Priority of income withholding. An order to withhold and deliver income under this part takes priority over any:

(1) wage or income deduction order under any other state law and any income-withholding order issued in another state and sent to a payor in this state;

(2) voluntary or involuntary assignment of wages;

(3) other voluntary deductions from the obligor's income;

(4) levies, writs of execution, or garnishments of the obligor's income; and

(5) any other claims by creditors.

History: **En. Sec. 13, Ch. 571, L. 1985; amd. Sec. 76, Ch. 552, L. 1997.**

Cross-References

What property subject to attachment, 27-18-102.

40-5-424. Civil liability for failure to comply with income withholding order. (1) A payor who fails to withhold and deliver support money from the obligor's income when ordered to do so under 40-5-415 is liable to the department for any amount up to the accumulated amount the payor should have withheld and delivered.

(2) No payor who complies with an order to withhold under this part is liable for wrongful withholding to the obligor or to any other person claiming rights derived from the obligor.

History: **En. Sec. 11, Ch. 571, L. 1985.**

Cross-References

Damages — measure of damages, Title 27, ch. 1, parts 2 and 3.

40-5-425. Repealed. Sec. 22, Ch. 635, L. 1991.

History: En. Sec. 5, Ch. 702, L. 1989.

40-5-426 through 40-5-430 reserved.

40-5-431. Registration of interstate income withholding orders. (1) Whenever an obligor, whether or not the obligor resides in this state, derives income within this state and an order for income withholding of the obligor's income has been issued by a public agency of another state as a means to enforce support orders under Title IV-D of the Social Security Act, that agency may register the income withholding order with the department. Upon registration of the foreign withholding order, it must be treated in the same manner and have the same effect as an income withholding order issued by the department. The provisions of 40-5-188 through 40-5-191 apply to this section to the extent that they are consistent with this section.

(2) The application for registration of a foreign order for income withholding must include:

(a) a certified copy of the support order, with all modifications of the order;

(b) a certified copy of the income withholding order;

(c) a sworn statement of the facts entitling the agency to issue an income withholding order, including a statement of the amount of arrearages and a statement that all procedural due process requirements of the foreign jurisdiction for issuance of the income withholding order have been carried out in full;

(d) the name, address, and social security number of the obligor;

(e) the name and address of the obligor's employer or of any other payor of income to the obligor if the order for income withholding of the foreign jurisdiction extends to other income; and

(f) the name and address of the agency or person to whom support payments collected by the department under income withholding procedures should be transmitted.

(3) When the foreign income withholding order is registered, the department shall serve the order upon the payor, with directions to the payor to comply with the order and to deliver the withheld amounts to the department. Registration of a foreign income-withholding order under this section does not confer jurisdiction for any other purpose, such as modification of the support order, custody, or visitation.

History: En. Sec. 16, Ch. 571, L. 1985; amd. Sec. 51, Ch. 328, L. 1993.

Cross-References

Uniform Interstate Family Support Act, Title 40, ch. 5, part 1.

40-5-432. Application for interstate withholding. (1) Whenever an obligor resides in this state and derives income within this state and a support order issued in another jurisdiction is being enforced by a public agency of that jurisdiction pursuant to Title IV-D of the Social Security Act, that agency may apply to the department for income withholding services.

(2) The application for interstate income withholding must include:

(a) a certified copy of the support order, with all modification thereof;

(b) an affidavit by the obligee containing a statement that the obligor is delinquent in the payment of support in an amount equal to at least 1 month's support payment and a computation of the period and total amount of the arrearage as of the date of the application;

(c) a certified copy of the payment record if such records are maintained by the agency or any other agency within that jurisdiction;

(d) the name, address, and social security number of the obligor;

(e) the name and address of all known payors within this state; and

(f) the name and address of the agency or person to whom support payments collected by the department under income withholding procedures should be sent.

(3) Upon receipt of the application, the department shall commence procedures to establish orders for income withholding, including notice and opportunity for hearing under this part. The department shall further advise the obligor that the income withholding was requested on the basis of an application from another jurisdiction.

(4) In any hearing based on an application under this section, the certified copy of the support order and affidavit, without further proof or foundation, constitutes prima facie evidence that the support order is valid and that the obligee or public agency is entitled to an order of income withholding and that the amount of current support payments and arrearages are as stated.

(5) In accordance with 40-5-414, a final decision on whether or not income withholding is appropriate must be rendered within 45 days of service of notice on the obligor. If, however, because of the interstate aspects of the case, the hearing examiner is unable to resolve a dispute over the amount of arrearages within such time and the hearing examiner has found that the obligor is delinquent in an amount equal to at least 1 month's support payment, the hearing examiner shall authorize immediate service of the order for withholding as to current support and may continue the hearing on the disputed amounts beyond the 45-day limit.

History: En. Sec. 17, Ch. 571, L. 1985.

40-5-433. Additional duties of department in interstate income withholding. (1) If the department determines that the obligor is no longer employed in this state or no longer derives income within this state, the department shall promptly notify the agency which requested income withholding of the changes and shall forward to that agency all information it has with respect to the obligor's new address and the name and address of the obligor's new employer or other source of income.

(2) The department shall promptly transmit payments received on an income withholding order to the agency or person designated in the interstate application.

History: En. Sec. 18, Ch. 571, L. 1985; amd. Sec. 15, Ch. 635, L. 1991.

40-5-434. Initiation of income withholding in other jurisdictions. Whenever the department is authorized or required under the laws of this state to enforce and collect on a support order and the obligor is employed or has a source of income in another state, the department shall request the agency responsible for income withholding in that state to implement income withholding procedures. The department shall compile and transmit to the withholding agency of the other state all documentation required by the law of that state necessary for the purpose of obtaining an income withholding order in that state. The department shall also transmit to the withholding agency a certified copy of any subsequent modification of the support order.

History: En. Sec. 19, Ch. 571, L. 1985.

40-5-435 through 40-5-439 reserved.

40-5-440. Repealed. Sec. 34, Ch. 504, L. 1995.

History: En. Sec. 18, Ch. 635, L. 1991.

40-5-441. Repealed. Sec. 34, Ch. 504, L. 1995.

History: En. Sec. 19, Ch. 635, L. 1991.

40-5-442. Repealed. Sec. 34, Ch. 504, L. 1995.

History: En. Sec. 20, Ch. 635, L. 1991.

40-5-443. Payors to provide information — exemption from liability. (1) For the purposes of this part, upon written request by the department or by another IV-D agency, a payor or former payor and any labor union of which the obligor or obligee is or may have been a member shall provide the requester with the following information, if known, regarding the obligor or obligee:

(a) last-known residential address;

(b) social security number;

(c) dates of employment or union membership;

(d) amounts of wages, salaries, commissions, contract proceeds, and other earnings or amounts paid;

(e) whether health insurance coverage is or was available through the payor or union and, if so:

(i) the name of the insurer or health care provider;

(ii) the policy numbers or other identifiers; and

(iii) the persons covered; and

(f) names, telephone numbers, and addresses of current and former employers, payors, and unions.

(2) A payor or labor union that discloses information in compliance with this section is exempt from any liability to the obligor or obligee that may result from the disclosure.

(3) Failure to disclose information in compliance with this section subjects the payor or labor union to the sanctions provided in 40-5-226.

(4) The requester shall keep the information provided under subsection (1) confidential except for purposes of Title IV-D of the Social Security Act.

History: En. Sec. 21, Ch. 635, L. 1991; amd. Sec. 7, Ch. 264, L. 1995; amd. Sec. 77, Ch. 552, L. 1997.

Part 5 reserved

Part 6

Civil Contempt for Nonsupport

40-5-601. Failure to pay support — civil contempt. (1) For purposes of this section, "support" means child support; spousal support; health insurance, medical, dental, and optical payments; day care expenses; and any other payments due as support under a court or administrative order.

Submission of health insurance claims is a support obligation if health insurance coverage is ordered.

(2) If a person obligated to provide support fails to pay as ordered, the payee or assignee of the payee of the support order may petition a district court to find the obligated person in contempt.

(3) The petition may be filed in the district court:

(a) that issued the support order;

(b) of the judicial district in which the obligated person resides; or

(c) of the judicial district in which the payee or assignee of the payee resides or has an office.

(4) Upon filing of a verified petition alleging facts constituting contempt of the support order, the district court shall issue an order requiring the obligated person to appear and show cause why the obligated person should not be held in contempt and punished under this section.

(5) The obligated person is presumed to be in contempt upon a showing that:

(a) there is a support order issued by a court or administrative agency of this or another state with jurisdiction to enter the order;

(b) the obligated person had actual or constructive knowledge of the order; and

(c) the obligated person failed to pay support as ordered.

(6) Certified payment records maintained by a clerk of court or administrative agency authorized by law or by the support order to collect support are admissible in a proceeding under this section and are prima facie evidence of the amount of support paid and any arrearages under the support order.

(7) Following a showing under subsection (5), the obligated person may move to be excused from the contempt by showing clear and convincing evidence that the obligated person:

(a) has insufficient income to pay the arrearages;

(b) lacks personal or real property that can be sold, mortgaged, or pledged to raise the needed sum;

(c) has unsuccessfully attempted to borrow the sum from a financial institution;

(d) has no other source, including relatives, from which the sum can be borrowed or secured;

(e) does not have a valid out-of-court agreement with the payee waiving, deferring, or otherwise compromising the support obligation; or

(f) cannot, for some other reason, reasonably comply with the order.

(8) In addition to the requirement of subsection (7), the obligated person shall also show by clear and convincing evidence that factors constituting the excuse were not occasioned or caused by the obligated person voluntarily:

(a) remaining unemployed or underemployed when there is employment suitable to the obligated person's skills and abilities available within a reasonable distance from the obligated person's residence;

(b) selling, transferring, or encumbering real or personal property for fictitious or inadequate consideration within 6 months prior to a failure to pay support when due;

(c) selling or transferring real property without delivery of possession within 6 months prior to a failure to pay support when due or, if the sale or transfer includes a reservation of a trust for the use of the obligated person, purchasing real or personal property in the name of another person or entity;

(d) continuing to engage in an unprofitable business or contract unless the obligated person cannot reasonably be removed from the unprofitable situation; or

(e) incurring debts subsequent to entry of the support order that impair the obligated person's ability to pay support.

(9) If the obligated person is not excused under subsections (7) and (8), the district court shall find the obligated person in contempt of the support order. For each failure to pay support under the order, the district court shall order punishment as follows:

(a) not more than 5 days incarceration in the county jail;

(b) not more than 120 hours of community service work;

(c) not more than a $500 fine; or

(d) any combination of the penalties in subsections (9)(a) through (9)(c).

(10) An order under subsection (9) must include a provision allowing the obligated person to purge the contempt. The obligated person may purge the contempt by complying with an order requiring the obligated person to:

(a) seek employment and periodically report to the district court all efforts to find employment;

(b) meet a repayment schedule;

(c) compensate the payee for the payee's attorney fees, costs, and expenses for a proceeding under this section;

(d) sell or transfer real or personal property or transfer real or personal property to the payee, even if the property is exempt from execution;

(e) borrow the arrearage amount or report to the district court all efforts to borrow the sum;

(f) meet any combination of the conditions in subsections (10)(a) through (10)(e); or

(g) meet any other conditions that the district court in its discretion finds reasonable.

(11) If the obligated person fails to comply with conditions for purging contempt, the district court shall immediately find the obligated person in contempt under this section and impose punishment.

(12) A proceeding under this section must be brought within 3 years of the date of the last failure to comply with the support order.

History: En. Sec. 1, Ch. 523, L. 1993.

Cross-References

Contempts, Title 3, ch. 1, part 5.

Part 7

Suspension of Licenses for Nonsupport

Part Cross-References

Professional and occupational licensing, Title 37.

Drivers' licenses, Title 61, ch. 5.

40-5-701. Definitions. As used in this part, the following definitions apply:

(1) (a) "Child" means:

(i) a person under 18 years of age who is not emancipated, self-supporting, married, or a member of the armed forces of the United States;

(ii) a person under 19 years of age who is still in high school;

(iii) a person who is mentally or physically incapacitated when the incapacity began prior to that person reaching 18 years of age; and

(iv) in IV-D cases, a person for whom:

(A) support rights are assigned under 53-2-613;

(B) a public assistance payment has been made;

(C) the department is providing support enforcement services under 40-5-203; or

(D) the department has received a referral for interstate services from an agency of another state under the provisions of the Uniform Interstate Family Support Act, the Revised Uniform Reciprocal Enforcement of Support Act, the Uniform Reciprocal Enforcement of Support Act, or Title IV-D of the Social Security Act.

(b) The term may not be construed to limit the ability of the department to enforce a support order according to its terms when the order provides for support extending beyond the time the child reaches 18 years of age.

(2) "Delinquency" means a support debt or support obligation due under a support order in an amount greater than or equal to 6 months' support payments as of the date of service of a notice of intent to suspend a license.

(3) "Department" means the department of public health and human services.

(4) "IV-D case" means a case in which the department is providing support enforcement services as a result of:

(a) an assignment of support rights under 53-2-613;

(b) a payment of public assistance;

(c) an application for support enforcement services under 40-5-203; or

(d) a referral for interstate services from an agency of another state under the provisions of the Uniform Reciprocal Enforcement of Support Act, the Revised Uniform Reciprocal Enforcement of Support Act, the Uniform Interstate Family Support Act, or Title IV-D of the Social Security Act.

(5) "License" means a license, certificate, registration, permit, or any other authorization issued by an agency of the state of Montana granting a person a right or privilege to engage in a business, occupation, profession, recreational activity, or any other privilege that is subject to suspension, revocation, forfeiture, termination, or a declaration of ineligibility to purchase by the licensing authority prior to its date of expiration.

(6) "Licensing authority" means any department, division, board, agency, or instrumentality of this state that issues a license.

(7) "Obligee" means:

(a) a person to whom a support debt or support obligation is owed; or

(b) a public agency of this or another state that has the right to receive current or accrued support payments or that is providing support enforcement services under this chapter.

(8) "Obligor" means a person who owes a duty of support or who is subject to a subpoena or warrant in a paternity or child support proceeding.

(9) "Order suspending a license" means an order issued by a support enforcement entity to suspend a license. The order must contain the name of the obligor, the type of license, and, if known, the social security number of the obligor.

(10) "Payment plan" includes but is not limited to a plan approved by the support enforcement entity that provides sufficient security to ensure compliance with a support order and that incorporates voluntary or involuntary income withholding under part 3 or 4 of this chapter or a similar plan for periodic payment of a support debt and, if applicable, current and future support.

(11) "Recreational activity" means an activity for which a license or permit is issued by the department of fish, wildlife, and parks under Title 87, chapter 2, part 6 or 7, except 87-2-708 or 87-2-711, or under 87-2-505, 87-2-507, 87-2-508, or 87-2-510.

(12) "Subpoena" means a writ or order issued by a district court or the department in a proceeding or as part of an investigation related to the paternity or support of a child that commands a person to appear at a particular place and time to testify or produce documents or things under the person's control.

(13) "Support debt" or "support obligation" means the amount created by the failure to provide or pay:

(a) support to a child under the laws of this or any other state or under a support order;

(b) court-ordered spousal maintenance or other court-ordered support for the child's custodial parent; or

(c) fines, fees, penalties, interest, and other funds and costs that the support enforcement entity is authorized to collect by the use of any procedure available to the entity for the payment, enforcement, and collection of child support or spousal maintenance or support.

(14) "Support enforcement entity" means:

(a) in IV-D cases, the department; or

(b) in all other cases, the district court that entered the support order or a district court in which the support order is registered.

(15) (a) "Support order" means an order that provides a determinable amount for temporary or final periodic payment of a support debt or support obligation and that may include payment of a determinable or indeterminable amount for insurance covering the child issued by:

(i) a district court of this state;

(ii) a court of appropriate jurisdiction of another state, an Indian tribe, or a foreign country;

(iii) an administrative agency pursuant to proceedings under Title 40, chapter 5, part 2; or

(iv) an administrative agency of another state with a hearing function and process similar to those of the department.

(b) If an action for child support is commenced under this part and the context so requires, support order also includes:

(i) judgments and orders providing periodic payments for the maintenance or support of the child's custodial parent; and

(ii) amounts for the recovery of fines, fees, penalties, interest, and other funds and costs that the support enforcement entity is authorized to collect by the use of any procedure available to the entity for the payment, enforcement, and collection of child support or spousal maintenance or support.

(16) "Suspension" includes the withdrawal, withholding, revocation, forfeiture, or nonissuance of a license and license privileges.

(17) "Warrant" means a bench warrant, a warrant to appear, an order to show cause, or any other order issued by the district court relating to the appearance of a party in a paternity or child support proceeding.

History: En. Sec. 3, Ch. 523, L. 1993; amd. Sec. 141, Ch. 546, L. 1995; amd. Sec. 186, Ch. 42, L. 1997; amd. Sec. 78, Ch. 552, L. 1997; amd. Sec. 13, Ch. 579, L. 1999.

Compiler's Comments

1999 Amendment: Chapter 579 in definition of support debt or support obligation inserted "the failure to provide or pay", at beginning of (a) deleted "the failure to provide", substituted language in (b) regarding court-ordered spousal maintenance or other court-ordered support for custodial parent for "a support order for spousal maintenance if the judgment or order requiring payment of maintenance also contains a judgment or order requiring payment of child support for a child for whom the person awarded maintenance is the custodial parent", and inserted (c) expanding definition to include fines, fees, penalties, interest, and other funds and costs collected for child support or spousal maintenance or support; in definition of support order inserted (b) to include judgments and orders for periodic payment and fines, fees, penalties, interest, and other funds and costs collected for support or spousal maintenance or support; and made minor changes in style. Amendment effective October 1, 1999.

40-5-702. Notice of intent to suspend license. (1) Upon the petition of an obligee alleging the existence of a delinquency or upon the failure of an obligor to comply with a subpoena or warrant, a support enforcement entity may issue a notice of intent to suspend a license.

(2) The notice must be served upon the obligor personally or by certified mail and may:

(a) in a IV-D case, be incorporated into any notice served under Title 17, chapter 4, part 1, or Title 40, chapter 5, part 2 or 4;

(b) in all other cases, be combined with any other enforcement proceeding.

(3) The notice must state that the obligor's license will be suspended 60 days after service unless within that time the obligor:

(a) pays the entire support debt stated in the notice;

(b) enters into a payment plan approved by the support enforcement entity;

(c) complies with the subpoena or warrant; or

(d) appears and shows cause in a hearing before the support enforcement entity under 40-5-703 that suspension of a license is not appropriate.

(4) In a IV-D case, the notice must advise the obligor that hearings conducted under 40-5-703 are subject to the contested case provisions of the Montana Administrative Procedure Act.

History: En. Sec. 4, Ch. 523, L. 1993; amd. Sec. 79, Ch. 552, L. 1997.

40-5-703. Hearing — order suspending license. (1) To show cause why suspension of a license would not be appropriate, the obligor shall request a hearing from the support enforcement entity that issued the notice of intent to suspend the license. The request must be made within 60 days of the date of service of the notice.

(2) Upon receipt of a request for hearing from an obligor, the support enforcement entity shall schedule a hearing for the purpose of determining if suspension of the obligor's license is appropriate. A court hearing may be conducted by teleconferencing methods. A department hearing must initially be conducted by teleconferencing methods and is subject to the Montana Administrative Procedure Act. The support enforcement entity shall stay suspension of the license pending the outcome of the hearing.

(3) The only issues that may be determined in a hearing under this section are the amount of the support debt or support obligation, if any, whether or not a delinquency exists, whether or not the obligor has entered into a payment plan, and whether or not the obligor failed to comply with a subpoena or warrant.

(4) If an obligor fails to respond to a notice of intent to suspend a license, fails to timely request a hearing, or fails to appear at a regularly scheduled hearing, the obligor's defenses, objections, or request for a payment plan must be considered to be without merit and the support enforcement entity shall enter a final decision and order accordingly.

(5) If the support enforcement entity determines that the obligor owes a delinquency and that the obligor has not entered into a payment plan or that the obligor failed to comply with a subpoena or warrant, the support enforcement entity shall issue an order suspending the obligor's license and ordering the obligor to refrain from engaging in the licensed activity. The support enforcement entity shall send a copy of the order suspending a license to the obligor and shall notify the licensing authority in writing of the suspension. Notification to the licensing authority is not required if the support enforcement entity has previously suspended the license of the obligor and the suspension is still in effect.

(6) The determinations of the department under this section are a final agency decision and are subject to judicial review under 40-5-253 and the Montana Administrative Procedure Act.

(7) A determination made by the support enforcement entity under this part is independent of any proceeding of the licensing authority to suspend, revoke, deny, terminate, or renew a license.

History: En. Sec. 5, Ch. 523, L. 1993; amd. Sec. 14, Ch. 482, L. 1997; amd. Secs. 80, 100, Ch. 552, L. 1997.

40-5-704. Suspension, denial, and nonrenewal of licenses. (1) Upon receipt of the notice of suspension of the license under 40-5-703(5), a licensing authority shall implement the suspension of the license by:

(a) determining if it has issued a license to the obligor whose name appears on the notice;

(b) entering the suspension on the appropriate records;

(c) reporting the suspension as appropriate;

(d) making good faith efforts to deny recreational activity licenses for the next applicable license year; and

(e) if required by law, demanding surrender of the suspended license.

(2) An order issued by a support enforcement entity under 40-5-703 suspending a license and the notice of suspension given under 40-5-703(5) must

be processed by the licensing authority without an additional review or hearing involving the licensing authority concerning suspension of the license.

(3) Notwithstanding the provisions of any other law setting terms of suspension, revocation, denial, termination, or renewal of a license, an order issued by a support enforcement entity suspending a license must be implemented by the licensing authority and continues until the support enforcement entity advises the licensing authority that the suspension has been stayed or terminated.

(4) In the event that a license is suspended, any funds paid by the obligor to the licensing authority for costs related to issuance, renewal, or maintenance of a license may not be refunded to the obligor.

(5) Unless an order staying suspension of a license is in effect, an obligor who continues to engage in the business, occupation, profession, recreational activity, or other licensed activity while the obligor's license is suspended under this section is guilty of a misdemeanor and upon conviction shall be punished by a fine of not less than $250 or more than $500 or by imprisonment in the county jail for a term not to exceed 6 months, or both. Upon conviction of a second or subsequent violation, the obligor shall be punished by a fine of not less than $500 or more than $2,000 or by imprisonment in the county jail for a term not to exceed 1 year, or both. The support enforcement entity or the licensing authority may elect the remedy under this section or any other remedy provided for engaging in a licensed activity without a license or while the license is suspended.

(6) The licensing authority is exempt from liability to the licensee for activities conducted in compliance with this part.

(7) The licensing authority has no jurisdiction to modify, remand, reverse, vacate, or stay the order of the support enforcement entity suspending a license.

(8) To the extent that inconsistencies exist between this part and the procedural requirements for suspension of a license issued by the department, this part supersedes those requirements.

History: En. Sec. 6, Ch. 523, L. 1993; amd. Sec. 79, Ch. 418, L. 1995; amd. Sec. 142, Ch. 546, L. 1995; amd. Sec. 81, Ch. 552, L. 1997.

40-5-705 through 40-5-708 reserved.

40-5-709. Nondisciplinary suspension for failure to pay child support. Notwithstanding any other provision of this title, the support enforcement entity has the authority to suspend a license or privilege to obtain a license under this part without any action by the licensing authority. The licensing authority shall, upon receipt of notice of suspension of the license under 40-5-703(5) from the support enforcement entity, suspend the license or privilege to obtain a license of the named individual. The suspension must be nondisciplinary for professional or occupational licenses, and the provisions of 2-4-631 do not apply.

History: En. Sec. 7, Ch. 523, L. 1993; amd. Sec. 82, Ch. 552, L. 1997.

40-5-710. Stay of suspension of license — payment plan — hardship. (1) An obligor may at the time of the hearing conducted under 40-5-703 or, except for a recreational activity license, at any time after the hearing, petition the support enforcement entity for an order staying suspension of the license.

(2) The support enforcement entity shall consider the obligor's petition for a stay separately from any determination on whether suspension of a license is appropriate.

(3) The support enforcement entity may stay suspension of a license upon a showing that suspension or continued suspension of a license would create a significant hardship to the obligor, to the obligor's employees, to legal dependents residing in the obligor's household, or to persons, businesses, or other entities served by the obligor.

(4) A stay terminates upon:

(a) termination of the circumstances upon which a hardship is based;

(b) failure by the obligor to abide by the terms and conditions of a payment plan; or

(c) the date of termination, if any, provided in the order staying suspension of the license.

(5) If the licensing authority has been notified of an order suspending a license, the support enforcement entity shall notify the licensing authority of any stay or reinstatement unless the support enforcement entity has suspended the license of the obligor for another delinquency or for failure to comply with a subpoena or warrant and the suspension for the other delinquency or failure to comply with a subpoena or warrant is still in effect. The support enforcement entity shall send a copy of any order staying or reinstating suspension of the license to the obligor.

(6) (a) Upon receipt of a notice staying or reinstating suspension of the license, the licensing authority shall:

(i) enter the information on appropriate records;

(ii) report the action as appropriate; and

(iii) demand surrender of the suspended license or return the reinstated license.

(b) Further action by the licensing authority is not necessary to implement the stay or reinstatement of suspension of the license.

History: **En. Sec. 8, Ch. 523, L. 1993; amd. Sec. 83, Ch. 552, L. 1997.**

40-5-711. Termination of order to suspend license. (1) Except as provided in subsection (3), when the support enforcement entity determines that the support debt or support obligation is paid in full or the obligor has complied with the subpoena or warrant, it shall terminate the order suspending the license. The support enforcement entity shall send a copy of the order terminating the suspension of the license to the obligor.

(2) Entry of an order terminating suspension of a license does not limit the ability of a support enforcement entity to issue a new order suspending the license of the same obligor in the event of another delinquency or failure to comply with a subpoena or warrant.

(3) A suspension of a recreational activity license is effective for the license year. The suspension does not terminate if the support enforcement entity determines that the support debt or support obligation is paid in full or the obligor has complied with the subpoena or warrant.

History: **En. Sec. 9, Ch. 523, L. 1993; amd. Sec. 84, Ch. 552, L. 1997.**

40-5-712. Fees. A licensing authority subject to this part may charge the obligor a fee to cover the administrative costs incurred by the licensing authority under this part. Fees collected pursuant to this section by a licensing authority with a state special revenue fund must be deposited in the state special revenue fund for the use of the licensing authority to pay the costs of administering this part.

History: **En. Sec. 10, Ch. 523, L. 1993.**

40-5-713. Rulemaking authority. The department shall adopt rules necessary for the implementation and administration of this part. The licensing authority shall adopt rules necessary for the implementation and administration of this part.

History: **En. Sec. 11, Ch. 523, L. 1993.**

Cross-References

Adoption and publication of rules, Title 2, ch 4, part 3.

Part 8

Medical Support Order Enforcement

40-5-801. Short title. This part may be known and cited as the "Medical Support Reform Act".

History: **En. Sec. 1, Ch. 504, L. 1995.**

40-5-802. Purpose. The purpose of this part is to promote the health and medical care of children and to conserve the expenditure of public assistance funds by ensuring that children have access to reasonable health insurance coverage or a health benefit plan provided by their parents, who are primarily responsible for their support.

History: **En. Sec. 2, Ch. 504, L. 1995.**

40-5-803. Scope. This part does not expand any coverage available to any individual under any health insurance coverage or a health benefit plan required under federal law or Title 33, chapter 22, though this part may expand the class of children who may be eligible for individual insurance or health benefit plan coverage due to a duty of support owed to them by their parents.

History: **En. Sec. 3, Ch. 504, L. 1995.**

40-5-804. Definitions. For purposes of this part, the following definitions apply:

(1) "Child" means an individual, whether over or under 18 years of age, to whom or on whose behalf a legal duty of support is owed by a parent. The term includes but is not limited to a child enrolled or eligible for enrollment under a health benefit plan or individual insurance policy.

(2) "Child support guidelines" means guidelines adopted under the provisions of 40-5-209.

(3) "COBRA" means the federal Consolidated Omnibus Budget Reconciliation Act of 1985, under which dependent children of employees may continue to receive, for a limited time under specific circumstances, health plan coverage after termination of employment.

(4) "Department" means the department of public health and human services as provided for in 2-15-2201.

(5) "Health benefit plan" or "plan" means a group health benefit plan or combination of plans, other than public assistance programs, that provides

medical care or benefits for a child. The term includes but is not limited to a health maintenance organization, self-funded group, medical or health service corporation, or similar plan.

(6) "Individual insurance" means health or medical insurance coverage other than a group health benefit plan or public assistance that is or may be provided individually for a child.

(7) "Medical care" means diagnosis, cure, mitigation, treatment, or prevention of disease, illness, or injury, including well baby checkups, periodic examinations, and any other undertaking for the purpose of affecting any structure or function of the body.

(8) "Medical support order" means a judgment, decree, or order, including approval of a settlement agreement issued by a tribunal of competent jurisdiction, that provides for the medical care of a child and that complies with the requirements of this part.

(9) "Obligated parent" means the parent who is required by a medical support order to provide for the medical care of a child. The obligated parent is not necessarily the same as an obligor for child support.

(10) "Parent" means a father or mother and includes a child's guardian or other adult caretaker having lawful charge of the child.

(11) "Payor" or "payor of income" means a person, firm, corporation, association, union, employer, trustee, political subdivision, state agency, or any agent thereof who pays income to a parent on a periodic basis, who has or provides individual insurance or a health benefit plan, and who is subject to the jurisdiction of this state under Rule 4B of the Montana Rules of Civil Procedure.

(12) "Plan administrator" means the person or entity that assesses and collects premiums, accepts and processes claims, and pays benefits.

(13) "Primary parent" means the parent with whom the child resides for the most 24-hour periods in a plan year.

(14) "Qualified medical child support order" means an order that meets the requirements of 29 U.S.C. 1169.

(15) "Third-party custodian" means an agency or person other than a parent who:

(a) is authorized by legal process to have physical custody of a child;

(b) has actual physical custody of a child with the written consent of the parent or parents having legal custody of the child; or

(c) has actual physical custody of a child because of the parents' neglect, failure, or inability to provide for the child's support, medical care, and other needs.

(16) "Tribunal" means a court of competent jurisdiction or the department.

History: En. Sec. 4, Ch. 504, L. 1995.

40-5-805. Establishing medical support orders. (1) In an action or proceeding to establish a child support order, whether temporary or final, or to modify an existing child support order, the tribunal shall also establish a medical support order. In establishing a medical support order, a tribunal shall consider:

(a) the best interests of the child;

(b) the child's present and anticipated needs for medical care;

(c) the financial ability of the parents to pay for individual insurance or a health benefit plan; and

(d) the extent to which an available health benefit plan or individual insurance coverage is subsidized or reduced in cost by an employer or by participation in a plan on a group basis.

(2) Except as otherwise provided in this part, a tribunal may not consider a child's eligibility for a public assistance program as a factor in determining a parent's financial ability to afford individual insurance or a health benefit plan.

History: En. Sec. 5, Ch. 504, L. 1995.

40-5-806. Contents of medical support order. (1) A medical support order may specify terms for individual insurance coverage and, to the extent of options within an available health benefit plan, the terms for plan coverage, including:

(a) minimum required policy limits;

(b) minimum required coverage;

(c) maximum terms for deductibles or required copayments; and

(d) other significant terms.

(2) If a child is already covered by individual insurance or a health benefit plan, if the child does not have existing coverage but coverage can be obtained under a health benefit plan that is available to the primary parent, or if the child does not have existing coverage and coverage for the child under a plan is available to the other parent, then the medical support order must require participation in that plan unless:

(a) the cost of continuing coverage or the cost of the health benefit plan is not reasonable or cost-beneficial; or

(b) another plan or individual insurance is available that will better serve the interests of the parties.

(3) If health benefit plans are available to both parents at a combined cost that is reasonable or cost-beneficial and with benefits that are complementary or compatible as primary and secondary coverage, the medical support order must require both parents to provide coverage for the child.

(4) If, at the time of the medical support order, coverage for the child in a health benefit plan is not available to either parent, the parent other than the primary parent must be required to obtain individual insurance coverage for the child. If the cost of individual insurance is not reasonable or cost-effective, the parent other than the primary parent must be required to obtain individual insurance or a health benefit plan at such time in the future that it becomes available to that parent at reasonable cost. The requirements in this subsection (4) to obtain a plan are not enforceable if:

(a) the primary parent has obtained individual insurance or a health benefit plan for the child and both parents have agreed in writing to share the costs of maintaining the coverage; or

(b) the other parent persuades the tribunal that the cost of available health benefit plans is not reasonable or cost-beneficial.

(5) This section also applies when a child is placed with a third-party custodian, unless a parent has obtained individual insurance or a plan for the child and both parents have agreed in writing to share the costs of maintaining

the coverage or a parent persuades the tribunal that the cost of available individual insurance and plans is not reasonable or cost-beneficial. For purposes of this subsection, the primary parent is considered to be the parent with whom the child resided for the most 24-hour periods in the 12 months prior to placement with the third-party custodian.

(6) The medical support order must also provide that the cost of individual insurance or the health benefit plan, any copayments and deductibles required under the coverage, and all medical expenses for the child that are not covered by individual insurance or the plan must be shared between parents in accordance with the child support guidelines. If the order fails to designate each parent's share, each parent is liable for 50% of the costs and expenses.

(7) The costs of providing individual insurance or a health benefit plan may not be used as a direct offset to the child support obligation. However, as provided by the child support guidelines, the costs may be considered in making or modifying a child support order.

(8) (a) Individual insurance or a health benefit plan is presumed to be available at reasonable cost if:

(i) an amount payable for individual insurance or health benefit plan premiums does not exceed 25% of the obligated parent's total parental child support obligation when calculated under the child support guidelines without credit for the medical support obligation; or

(ii) a health benefit plan is available through an employer or other group organization for which the premium is partially or entirely paid by the employer or other group organization.

(b) The presumption under subsection (8)(a) may be rebutted by clear and convincing evidence, and the tribunal has the discretion to:

(i) order individual insurance or health benefit plan coverage when the amount of the premium may be greater than the presumptive amount; or

(ii) not order coverage when the amount of the premium is less than the presumptive amount.

History: En. Sec. 6, Ch. 504, L. 1995; amd. Sec. 14, Ch. 579, L. 1999.

Compiler's Comments

1999 Amendment: Chapter 579 deleted former (7) that read: "(7) Except as provided in subsection (7)(b), if the cost of individual insurance or a health benefit plan is not reasonable or cost-beneficial or if a plan is not otherwise available and if the child is a recipient of medical assistance under Title XIX of the federal Social Security Act or later becomes a recipient of medical assistance:

(i) when the child is a recipient together with a parent, the medical support order must require the other parent to pay $50 per month;

(ii) when the child is not a recipient with a parent, the medical support order must require each parent to pay $50 per month; and

(iii) when the child is a recipient with both parents, neither parent has an obligation under this subsection (7)(a).

(b) The tribunal may order the parent or parents to pay a greater or lesser amount each month as the tribunal finds appropriate to the circumstances.

(c) The amounts ordered to be paid under this subsection (7) must be paid to the department for return to the appropriate state treasury fund to help offset the costs of the medical assistance program"; and made minor changes in style. Amendment effective October 1, 1999.

40-5-807. Mandatory provisions of medical support order. (1) Unless the tribunal expressly specifies otherwise, a medical support order must include terms directed toward the provisions of 40-5-806(2) through (8), even though a provision contained in those subsections may not apply to the parent's circumstances at the time the order is entered. The terms may be established as alternatives or contingencies that provide that if circumstances later change, the health needs of the child will continue to be met under one of the subsections without need for modification of the medical support order or other action by the tribunal that issued the order or any other tribunal of competent jurisdiction.

(2) If circumstances change and a parent believes that corresponding changes in costs are not reasonable or cost-beneficial, the parent may move to petition any appropriate tribunal for relief.

(3) If a health benefit plan is provided through an employer, union, or other group, the medical support order must also include provisions necessary to entitle the order to recognition as a qualified medical child support order.

History: En. Sec. 7, Ch. 504, L. 1995; amd. Sec. 15, Ch. 579, L. 1999.

Compiler's Comments

1999 Amendment: Chapter 579 in first sentence in (1) substituted "40-5-806(2) through (8)" for "40-5-806(2) through (9)". Amendment effective October 1, 1999.

40-5-808. Persistence and duration of obligation. (1) A parent's obligation to provide for medical care of a child ceases only when the parental obligation to support a child terminates under law.

(2) The obligations to provide medical care for a child, provide financial child support, and provide or comply with visitation and custody arrangements are independent of each other, and the failure or inability to provide one or more does not reduce one of the others.

(3) A guardian or caretaker who is not the child's father or mother may not be compelled to support the child or be held liable for the child's expenses, except to the extent that the guardian or caretaker has voluntarily agreed in writing to assume the responsibility.

History: En. Sec. 8, Ch. 504, L. 1995.

40-5-809. Effect of order on health benefit plans. (1) The duties and responsibilities under a plan pursuant to this part apply equally to a union or employer that serves as the administrator of a plan for a parent who is a member or employee.

(2) A copy of a medical support order requiring enrollment of a child in a health benefit plan may be submitted to the plan administrator by either parent, by the department, by a third-party custodian, or by an employer-payor of either parent. The party submitting the order shall submit the child's name and birth date and the names and mailing addresses of the parents. If the child is a recipient of public assistance, the party submitting the order shall also submit the address of the department. If there is a third-party custodian of the child, the address of the third-party custodian must also be submitted. A copy of a medical support order may be served on the plan administrator by certified mail.

(3) Presentation of the medical support order to the plan administrator authorizes each parent, the department, if the department has interest, or the third-party custodian to receive pertinent notices from the plan administrator and to freely communicate and generally interact with the plan administrator in all respects regarding the child's benefits as fully and effectively as if the obligated parent were to do so personally.

(4) If a medical support order requires the child to be enrolled in a health benefit plan, presentation of the order to the plan administrator binds the plan to enroll the child in the plan as provided by this part.

(5) If a health benefit plan is available through the obligated parent's employer or other payor of income, presentation of the medical support order to the payor binds the payor to enrollment of the child in the plan and to automatically deduct premium payments required by the plan from the obligated parent's income and remit them to the plan provider for as long as the obligated parent is eligible for coverage.

(6) (a) Ambiguities and discrepancies in an order may not be used to unreasonably or unnecessarily delay health benefit plan coverage for a child.

(b) If more than one plan is available to an obligated parent and the medical support order fails to specify a plan or combination of benefits to be provided for a child or if there has been a change in plans due to a change in employment of the obligated parent or for some other reason, the parties and the department shall apply the medical support order so as to provide the child with coverage under a plan that has a reasonable cost and that provides the child with benefits closest to those described in the order.

History: En. Sec. 9, Ch. 504, L. 1995; amd. Sec. 15, Ch. 482, L. 1997.

40-5-810. Authorization to enroll and participate in health benefit plan. (1) A plan administrator shall enroll a child when given a medical support order even if the obligated parent fails to execute documents required by the plan. The parents, the department, and a third-party custodian may release to a plan provider, employer, union, or other group any information necessary to obtain or enforce medical support or to facilitate the preparation, submission, processing, verification, or payment of claims.

(2) The signature of either parent, of an authorized representative of the department, or of a third-party custodian authorizes the plan to receive and process claims and exercise any available options for the continuation or extension.

History: En. Sec. 10, Ch. 504, L. 1995.

40-5-811. Authorization to cure nonpayment of health benefit plan premium. In the case of an actual or threatened adverse action that would reduce or terminate plan benefits because of nonpayment of premium or insufficient payment of premium, the other parent, the department, or the third-party custodian may advance the cost of necessary premiums and keep benefits continually in force for the child. The advance may be entered as a judgment for unpaid child support in favor of the advancing party and against the obligated parent.

History: En. Sec. 11, Ch. 504, L. 1995.

40-5-812. Obligations of health benefit plan. (1) Upon receipt of a medical support order requiring a parent to provide coverage for a child, the administrator of a health benefit plan who receives the order shall accept the order as a valid authorization to enroll or provide benefits to the child. The health benefit plan may rely upon the face of the order and need not inquire as to its legal sufficiency.

(2) A plan administrator shall give the nonobligated parent, the department, whenever public assistance is paid to the child, or a third-party

custodian all notices and correspondence from the plan and allow them to freely communicate and interact with the plan in all respects regarding the child's benefits as fully and effectively as if done by the obligated parent.

(3) A copy of the medical support order must be accepted by the plan administrator as a request and application of the eligible obligated parent requesting that new or continued benefits, including continuation coverage available under COBRA, be provided for the child. As soon as practical and no later than 30 days after receipt of the order or upon the obligated parent obtaining eligibility, the child must be enrolled under the plan as an individual entitled to available benefits. Enrollment may not be delayed until an open enrollment period.

(4) If a plan is provided by an employer or other payor of income, the payor shall deduct the necessary premiums, if any, from the income of the obligated parent and remit the premiums to the plan as provided in 40-5-813.

(5) Within 30 days after receipt of a copy of a medical support order, the health benefit plan shall give written notice to both parents, to the department, and to any third-party custodian setting forth the status of the child's enrollment in the plan and the addresses and telephone numbers of the offices where further information can be obtained and where changes of address and other updated information should be submitted.

(6) If coverage is transferred to a different plan, within 30 days of transfer, the new plan shall provide written notice to both parents, to the department, whenever public assistance is paid for the child, or to the third-party custodian setting forth the status of the child's enrollment in the plan and the addresses and telephone numbers of the offices where further information can be obtained and where changes of address and other updated information should be submitted.

(7) A plan administrator may not terminate a child's coverage unless:

(a) written evidence shows that the medical support order is no longer in effect, that the child will be enrolled in another health benefit plan, or that individual insurance is provided;

(b) the employer, union, or other group eliminates coverage for all members or employees;

(c) the plan is available through the obligated parent's employer or other payor of income and the obligated parent's employment or right to receive income from the payor is terminated and continued coverage under COBRA is not available or the time for such coverage is expired; or

(d) the plan is available through the obligated parent's employer or other payor of income, the amount of the premium or the premium together with child support exceeds the limits in this section, and the other parent, the department, or the third-party custodian has not cured the insufficiency under 40-5-811.

History: **En. Sec. 12, Ch. 504, L. 1995.**

40-5-813. Obligation of payor. (1) Upon receipt of a medical support order, a payor providing a health benefit plan shall withhold from the obligated parent's income an amount equal to the required premium, if any, and apply the withheld amount to the plan premium, except that amounts withheld may not exceed the maximum amount permitted under the federal Consumer Credit

Protection Act. If the premium exceeds the maximum, the payor may not withhold the excess. If the premium, together with child support to be withheld, exceeds the maximum, child support has priority and the payor may not withhold the part of the premium that is in excess of the maximum.

(2) A medical support order has priority over garnishment of the income of the obligated parent for any purpose, except child support.

(3) (a) The payor shall continue withholding premiums when an obligated parent resumes employment following any break in service, layoff, leave of absence, or other similar circumstance.

(b) Upon the termination of employment, extended layoff, or any other break in service that causes coverage under a health benefit plan to cease, the payor shall immediately notify the other parent and the department or the third-party custodian, if either submitted the medical support order or submitted a written notice of interest to the plan.

(4) (a) A payor who is an employer may not discharge, refuse to employ, or take other disciplinary action against an obligated parent solely because of the issuance of a medical support order.

(b) The obligated parent has the burden of proving that the issuance of the medical support order was the sole reason for the employer's action.

(c) A payor knowingly violating this section is subject to the contempt powers of the tribunal issuing the medical support order. The tribunal may, in addition, impose a civil penalty of not more than $150.

History: En. Sec. 13, Ch. 504, L. 1995.

40-5-814. Obtaining information. Upon the request of either of the child's parents, the department, or a third-party custodian, a health benefit plan shall provide information about the child's health benefit coverage, including but not limited to:

(1) a description of the benefits and options available under the plan and summaries of the terms and costs of all plans and options for which the child is eligible;

(2) names and addresses of the employer, union, plan, or other entities involved in administering the plan;

(3) identification cards or other methods for access to coverage, including but not limited to numbers, codes, or other references applicable to the plan or to the group through which the child participates;

(4) claims received or paid on behalf of the child, including the dates and amounts of payments and the names and addresses of parties who have submitted claims or received payment for claims; and

(5) other information relevant to the preparation, submission, processing, or verification of claims.

History: En. Sec. 14, Ch. 504, L. 1995.

40-5-815. Paying claims. Payment for a medical claim assigned to the department must be to the department. If a medical claim is not assigned to the department and the claim is submitted by a parent or a third-party custodian, payment must be to the health service provider involved. Payment may be to the parent or third-party custodian submitting the claim if there is written evidence of prepayment to the health service provider by that parent or third-party custodian.

History: En. Sec. 15, Ch. 504, L. 1995.

40-5-816. Newborn children. A health benefit plan must provide the coverage required by 33-22-301 to a newborn child covered by this part.

History: En. Sec. 16, Ch. 504, L. 1995.

40-5-817. Adopted children — preexisting conditions. A health benefit plan shall provide the coverage required by 33-22-130 to a child placed for adoption.

History: En. Sec. 17, Ch. 504, L. 1995.

40-5-818. Nonexclusion — nondiscrimination by health benefit plan. A health benefit plan may not deny or limit enrollment of an obligated parent's child or discriminate against a child because:

(1) the child is not claimed as a dependent on the obligated parent's state or federal income tax return or considered as a dependent for tax purposes;

(2) the child was born out of wedlock;

(3) the child does not reside with the obligated parent;

(4) the child does not reside in the health plan's service area. A plan that provides medical care at particular locations or geographic areas shall also provide comparable benefits for a child whose residence or location is elsewhere.

(5) the natural child of the obligated parent has a preexisting condition, unless the plan does not provide for enrollment or provides only for limited enrollment of children with preexisting conditions.

History: En. Sec. 18, Ch. 504, L. 1995.

40-5-819. Medical assistance eligibility. A health benefit plan may not use information pertaining to medical assistance eligibility under Title XIX of the federal Social Security Act as a factor in enrolling a child in a plan or in making payments for benefits on behalf of the covered child. A health benefit plan may not impose any restrictions or requirements on recipients of medical assistance or the department different from those applicable to any other plan participant.

History: En. Sec. 19, Ch. 504, L. 1995.

40-5-820. Void health benefit plans. A health benefit plan provision that denies or restricts coverage for a child in violation of a provision of 40-5-815 through 40-5-818 is void as against public policy.

History: En. Sec. 20, Ch. 504, L. 1995.

40-5-821. Penalty imposed by tribunal. (1) In addition to any other penalty provided by this part or other law, a tribunal, after a hearing, may impose a civil penalty not to exceed $25 for each day that a parent, health benefit plan, employer, union, or other payor is found to have knowingly violated a medical support order or a provision of or a rule adopted under this part.

(2) Imposition of a civil penalty under this section may be appealed if the tribunal is a court or may be reviewed under Title 2, chapter 4, part 7, if the tribunal is the department.

History: En. Sec. 21, Ch. 504, L. 1995; amd. Sec. 187, Ch. 42, L. 1997.

40-5-822. Duties of parents — consequences of noncompliance. (1) An obligated parent shall promptly execute and deliver to the provider of individual insurance, to a health benefit plan, or to another proper party all forms and instruments necessary to ensure the child's timely enrollment and continuous participation in any individual insurance or plan ordered by the medical support order. An obligated parent shall timely submit claims for processing, verification, and payment. Intentional delay or interference with enrollment or with the timely submission for processing, verification, and payment of a claim is punishable as provided in 40-5-821 and by an award of costs and attorney fees to an opposing party.

(2) An obligated parent shall provide the other parent, the department, and the third-party custodian with identification cards or other methods for access to coverage, including but not limited to numbers, codes, or other references applicable to the individual insurance, health benefit plan, or group through which the child receives coverage. Intentional delay or failure to provide information is punishable as provided in 40-5-821 and by an award of costs and attorney fees to an opposing party.

(3) If a party receives a reimbursement payment from individual insurance or from a health benefit plan but is not the party who has paid or is paying the underlying bill of the health service provider, the party receiving the payment shall promptly pay over the proceeds to the proper party. In addition to any applicable penalty for theft, conversion, civil contempt, or other wrongdoing, the amount of the payment may be entered as a judgment in favor of the proper party and against the party failing to promptly pay over the reimbursement.

(4) An obligated parent who defaults on a medical support order by failing to obtain individual insurance or a health benefit plan or who permits the individual insurance or plan coverage to lapse without securing a comparable replacement is liable for all of the child's medical expenses and shall indemnify the other parent, the department, or the third-party custodian for the cost of obtaining health benefit coverage and for all medical expenses of the child. The obligated parent may be relieved of liability by proving to the satisfaction of the tribunal that:

(a) no reasonable-cost or cost-beneficial individual insurance coverage or health benefit plan was available for the child during the period of time involved and the other parent, the department, or the third-party custodian has received notice of the nonavailability;

(b) the individual insurance coverage or plan ceased to be available for reasons wholly unrelated to the conduct of the obligated parent, replacement coverage has not been available, and timely written notice of the nonavailability has been given to the other parent, the department, or the third-party custodian; or

(c) the other parent or third-party custodian has obtained health coverage for the child and all parties have entered into an enforceable written agreement to share the costs of the coverage.

(5) An obligated parent who provides individual insurance coverage or a health benefit plan that is deficient under the requirements of the medical support order is liable, including liability by indemnification, for all of the child's medical expenses that should have been covered but were not and for the cost to the other parent, the department, or the third-party custodian of obtaining coverage that complies with the order. The obligated parent may be relieved of liability by proving to the satisfaction of the tribunal that:

(a) the coverage provided for the child has been the best available during the periods of time involved and timely written notice regarding the coverage available was given to the other parent, the department, or the third-party custodian;

(b) benefits have been reduced for reasons wholly unrelated to the conduct of the obligated parent, better coverage has not been available, and timely written notice has been given to the other parent, the department, or the third-party custodian; or

(c) the other parent or the third-party custodian has obtained coverage for the child and all parties have entered into an enforceable written agreement to share the costs of the coverage.

(6) Any liability for medical costs and expenses incurred under this section may be entered as a judgment for unpaid support in favor of the party or agency paying the same and against the obligated parent.

(7) The consequences of noncompliance with a medical support order apply, to the extent possible, to a judgment, decree, or support order that requires a parent to obtain medical or health insurance coverage for a child or to pay for a child's medical care and that was entered:

(a) by a tribunal prior to enactment of this part; or

(b) by a court or administrative agency of competent jurisdiction in another state or territory.

History: **En. Sec. 22, Ch. 504, L. 1995.**

40-5-823. Health coverage — notice of intent to purchase. (1) The department or a court on request of the department may issue an order requiring the obligated parent to appear and show cause why an order should not be issued permitting the department to purchase individual insurance or health benefit plan coverage for the obligated parent's child and requiring recovery of the premium from the obligated parent if the tribunal finds that:

(a) a medical support obligation has been established by order of a tribunal;

(b) the obligated parent has become delinquent by failing to provide individual insurance or a health benefit plan or lets the individual insurance or health benefit plan lapse;

(c) there is no payor to whom an order of enrollment under 40-5-812 applies;

(d) the child is currently eligible for medical assistance benefits under Title XIX of the federal Social Security Act, as amended; and

(e) other individual insurance or a health benefit plan is available for the child and can be purchased at a reasonable cost.

(2) Prior to issuing or requesting an order to show cause, the department shall give the obligated parent notice of the intent to purchase coverage under this section and an opportunity to enroll the child in individual insurance or a health benefit plan within 30 days after notice is received by the obligated parent.

(3) If the obligated parent provides written proof within the 30 days after receipt of the notice that the child is enrolled in individual insurance or a health benefit plan, no further action may be taken by the department.

(4) After issuing a show cause order and after opportunity for hearing, the tribunal shall promptly rule upon the issues. The proceeding must be dismissed if the tribunal finds that the obligated parent has enrolled the child in individual insurance or a health benefit plan or that the individual insurance or plan that the department intends to purchase is not reasonable.

(5) A health benefit plan purchased under this section may be continued by the department until:

(a) the child is no longer eligible for medical assistance benefits;

(b) the obligated parent is no longer responsible under the law for the medical needs of the child; or

(c) the obligated parent provides written proof that the child has been enrolled in individual insurance or another adequate health benefit plan.

History: En. Sec. 23, Ch. 504, L. 1995.

40-5-824. Expedited enforcement procedures. (1) A parent, the department, or the third-party custodian may apply to the court for expedited enforcement procedures under this part. If the child receives medicaid, a parent or third-party custodian may apply to the department for and the department may on its own motion use expedited enforcement procedures under this part.

(2) Upon receipt of an application, the tribunal may issue an order requiring the obligated parent to appear and show cause why an order, penalty, fine, or any combination should not be determined, assessed, and entered under one or more provisions of this part. The obligated parent may appear at the hearing or submit an affidavit asserting the obligated parent's position and defense. The show cause order must be issued if the tribunal finds that:

(a) a medical support obligation has been established by order of a tribunal or by a court or administrative agency of another state, territory, or Indian reservation;

(b) the obligated parent is liable for medical costs and expenses or premium payments under this part;

(c) a parent receives a reimbursement payment from individual insurance or a health benefit plan and fails to promptly turn the payment over to the party who has paid or is paying the underlying bill of the health service provider;

(d) a parent is delinquent in paying to the other parent, the department, or a third-party custodian the parent's share of:

(i) copayments and deductibles required under the individual insurance or plan; or

(ii) costs and expenses not covered by individual insurance or a health benefit plan; or

(e) there are fines, penalties, or other financial sanctions that may be imposed under this part.

(3) Prior to applying for expedited enforcement, the applicant shall give the obligated parent notice of the claim under this part. The obligated parent may pay the claim within 30 days after receiving the notice. A copy of the notice must be given to the other parent, to the department, if the department is not the applicant or the tribunal hearing the matter and if public assistance is paid for the child, or to the third-party custodian. The other parent, the department, or the third-party custodian may participate in the proceedings as a party.

(4) An application for expedited enforcement may be based on any credible statements or evidence presented to the tribunal, including the sworn affidavit of:

(a) a health care provider who has provided care or benefits for the child;

(b) an authorized representative of the department, the health benefit plan, or the individual insurer;

(c) either parent of the child; or

(d) the third-party custodian of the child.

(5) The order to show cause must inform the obligated parent and any other party of the party's right to respond by affidavit. An affidavit may include written proof of payment. A hearing must be scheduled after service of the order on the obligated parent. A court hearing may be conducted by teleconferencing methods. A department hearing must initially be conducted by teleconferencing methods and is subject to the Montana Administrative Procedure Act. If an affidavit with written proof of payment is not received by the tribunal within 15 days and the obligated parent does not appear at the hearing, judgment may be entered for the relief requested. If an affidavit with written proof of payment is received but the obligated parent does not appear at the hearing, the tribunal may resolve the issues on the basis of credible documents and affidavits submitted.

(6) After issuing a show cause order and after opportunity for hearing, the tribunal shall promptly rule upon the issues. The proceeding must be dismissed if the tribunal finds written proof of payment of the liability and the amount of the liability is not contested by a party to the proceedings.

(7) If the tribunal finds the obligated parent liable, the tribunal shall enter the amount of the liability as an award against the liable parent. If requested to do so, the tribunal may make an award specifically in favor of a health care provider, health benefit plan, or individual insurer to the extent that an unsatisfied bill of the health care provider, health benefit plan, or individual insurer is part of the unsatisfied medical support liability involved. If the tribunal finds that the conduct, claim, or response of a party was frivolous or in bad faith, the tribunal may impose sanctions against the party including an award of costs and attorney fees.

(8) Awards under this section may be collected by any remedy available for the collection of delinquent child support, but claims for current or past-due child support have priority.

(9) An award under this section is a final order and may be appealed if the tribunal is a court or may be reviewed under Title 2, chapter 4, part 7, if the tribunal is the department.

History: En. Sec. 24, Ch. 504, L. 1995; amd. Sec. 16, Ch. 482, L. 1997; amd. Sec. 100, Ch. 552, L. 1997.

40-5-825. Rulemaking authority. The department may adopt rules to implement this part.

History: En. Sec. 25, Ch. 504, L. 1995.

Cross-References

Adoption and publication of rules, Title 2, ch. 4, part 3.

Part 9

Centralized Child Support Registration and Payment

40-5-901. Definitions. As used in this part, unless the context requires otherwise, the following definitions apply:

[(1) "Date of hire" means the first day that an employee starts work for which the employee is owed compensation by the payor of income.]

(2) "Department" means the department of public health and human services provided for in 2-15-2201.

[(3) (a) "Employee" means a person 18 years of age or older who performs labor in this state for an employer in this state for compensation and for whom the employer withholds federal or state tax liabilities from the employee's compensation.

(b) The term does not include an employee of a federal or state agency performing intelligence or counterintelligence functions if the head of the agency has determined that reporting pursuant to 40-5-922 with respect to the employee could endanger the safety of the employee or compromise an ongoing investigation or intelligence mission.]

(4) "Employer" means a person, firm, corporation, association, governmental entity, or labor organization that engages an employee for compensation and withholds federal or state tax liabilities from the employee's compensation.

(5) "Foreign support order" means a support order entered or last modified by a court or administrative agency of another state, the District of Columbia, the Commonwealth of Puerto Rico, a territory or insular possession subject to the jurisdiction of the United States, an Indian tribe, or a foreign jurisdiction.

(6) "Income withholding" generally means procedures for directing a payor to withhold from an obligor's income an amount sufficient to pay the obligor's support obligation and to defray arrears that are or may become due. Specifically:

(a) when preceded by "IV-D", income withholding means the procedures set out in Title 40, chapter 5, part 4; and

(b) when preceded by "non IV-D", income withholding means those cases in which an immediate income-withholding order is issued under 40-5-315 after January 1, 1994.

(7) "Interstate case" means a case referred to the department by, or from the department to, another IV-D agency.

[(8) "Labor organization" means a labor union, union local, union affiliate, or union hiring hall.]

(9) "Obligee" means the payee under a support order or a person or agency entitled to receive support payments.

(10) "Obligor" means a person who is obligated to pay support under a support order.

(11) "Payor" means:

(a) an employer or person engaged in a trade or business in this state who engages an employee for compensation; or

(b) when used in context with income withholding, means a person, firm, corporation, association, employer, trustee, political subdivision, state agency, or agent paying income to an obligor on a periodic basis.

[(12) "Rehire" means the first day, following a termination of employment, that an employee begins to again perform work or provide services for a payor. Termination of employment does not include temporary separations from employment, such as unpaid medical leave, an unpaid leave of absence, or a temporary or seasonal layoff.]

(13) "Support order" means a judgment, decree, or order, whether temporary or final, that:

(a) is for the benefit of a child or a state agency;

(b) provides for monetary support, health care, arrearages, or reimbursement;

(c) may include related costs and fees, interest, and similar other relief; and

(d) may include an order for maintenance or other support to be paid to a child's custodial parent.

(14) "IV-D" or "IV-D case" means a case in which the department is providing services under the provisions of Title IV-D of the Social Security Act and the regulations promulgated under that act. A IV-D case also includes a case in which the department is collecting a support debt assigned to this or another state under Title IV-D. *(Bracketed language terminates on occurrence of contingency—sec. 1, Ch. 27, L. 1999.)*

History: En. Sec. 1, Ch. 552, L. 1997; amd. Sec. 16, Ch. 579, L. 1999.

Compiler's Comments

1999 Amendment: Chapter 579 in definition of support order in (d) inserted "or other support" and after "paid" substituted "to a child's custodial parent" for "to a former spouse when the former spouse is the custodial parent of a child for whom child support is awarded". Amendment effective October 1, 1999.

Contingent Termination — Request for Federal Exemptions: Section 1, Ch. 27, L. 1999, revised sec. 104, Ch. 552, L. 1997, to contain the following contingent termination provisions and order that the department of public health and human services seek federal exemptions: "(1) [Sections 9, 11, 22 through 24, and 95] [37-1-307, 40-1-107, 40-4-105, 40-5-922, 40-5-924, and 61-5-107] and the bracketed language in [sections 1 through 3, 10, 25, 45, and 89] [40-4-204, 40-5-226, 40-5-901, 40-5-906, 40-5-907, 40-5-923, and 40-6-116] terminate on the date of the suspension if the federal government suspends federal payments to this state for this state's child support enforcement program and for this state's program relating to temporary assistance to needy families because of this state's failure to enact law as required by the federal Personal Responsibility and Work Opportunity Reconciliation Act of 1996.

(2) [Sections 9, 11, 22 through 24, and 95] [37-1-307, 40-1-107, 40-4-105, 40-5-922, 40-5-924, and 61-5-107] and the bracketed language in [sections 1 through 3, 10, 25, 45, and 89] [40-4-204, 40-5-226, 40-5-901, 40-5-906, 40-5-907, 40-5-923, and 40-6-116] terminate on the date that a final decision is rendered in federal court invalidating the child support provisions of the federal Personal Responsibility and Work Opportunity Reconciliation Act of 1996.

(3) If the director of the department of public health and human services certifies to the governor and the secretary of state in writing that one of the following provisions is no longer required by federal law because of repeal of or amendment to federal statutes that require that provision, the provision terminates on the date the certification takes effect:

(a) [section 9] [40-5-922];

(b) [section 11] [40-5-924];

(c) [sections 22 through 24] [37-1-307, 40-1-107, and 40-4-105];

(d) [section 95] [61-5-107];

(e) the bracketed provisions in [sections 1 through 3, 10, 25, 45, and 89] [40-4-204, 40-5-226, 40-5-901, 40-5-906, 40-5-907, 40-5-923, and 40-6-116].

(4) If the bracketed language in [sections 1 through 3, 10, 25, 45, and 89] [40-4-204,

40-5-226, 40-5-901, 40-5-906, 40-5-907, 40-5-923, and 40-6-116] terminates, the code commissioner is instructed to renumber subsections, adjust internal references, and correct grammar and arrangement." Amendment effective February 18, 1999.

40-5-902 through 40-5-905 reserved.

40-5-906. Child support information and processing unit. (1) The department shall establish and maintain a centralized child support case registry and payment processing unit. The purpose of this unit is to facilitate mass case processing by utilizing computer technology to identify parents and their income and to initiate automated procedures to collect child support as it becomes due and payable.

(2) The case registry must include a database of information concerning child support orders, all cases receiving IV-D services, and all district court and administrative cases with support orders entered or modified after October 1, 1998.

(3) The case registry must use automated systems to obtain information from federal, state, and local databases with regard to the location of obligors and their income and assets. This information must be shared with the courts of this state and, upon request, may be shared with child support enforcement agencies of this and other states for the purpose of establishing paternity and establishing and enforcing child support obligations.

(4) To assist creditors, credit managers, and others who need timely verification of the existence of child support liens in IV-D cases, the case registry must include a directory of liens, which must include liens against an obligor's real and personal property filed by the department with other agencies and lien registries. Information in the lien registry may be made available through automated systems, which may include voice response units.

(5) Each IV-D case with a child support order must be electronically monitored so that when a timely payment of support is not made, enforcement action may be taken. To accomplish this purpose, payments due under a child support order must be paid to the department for processing and disbursement.

(6) In either a IV-D income-withholding case in this state or a state non IV-D case, if immediate income withholding is authorized after January 1, 1994, an employer or other payor of income shall pay all support withheld from an obligor's income to one centralized location as specified by the department.

(7) To facilitate automated disbursement of support payments, automated enforcement actions, and service of notice when required, an obligor or obligee must be directed to provide, and update as necessary, information sufficient to locate the obligor and obligee and to locate the obligor's income and assets.

[(8) An employer or labor organization shall report a newly hired or rehired employee. Information reported by an employer must be electronically compared to the information database to align an obligor who owes a duty of support with a source of income. When a match is revealed in a IV-D case, a notice will, if appropriate to the case, be promptly transmitted to the employer directing the employer to commence withholding for the payment of the obligor's support obligation.]

(9) The department may enter into contracts or cooperative agreements with any person, business, firm, corporation, or state agency to establish,

operate, or maintain the case registry and payment processing unit or any function or service afforded by the unit, provided that:

(a) the department is ultimately responsible for operation of the case registry and payment processing unit, including any function or service afforded by the unit;

(b) there is a board to act in an advisory capacity to the case registry and processing unit. The board shall advise the department in the policy, direction, control, and management of the case registry and processing unit and in determining forms, data processing needs, terms of contracts and cooperative agreements, and other similar technical requirements. Board members who are not employed by the department shall serve without pay, but are entitled to reimbursement for travel, meals, and lodging while engaged in board business, as provided in 2-18-501 through 2-18-503. Except for members who represent the department, appointed board members shall serve for a term of 2 years. The board consists of five members as follows:

(i) a district court judge nominated by the district court judges' association;

(ii) a clerk of court nominated by the association of clerks of the district courts;

(iii) the supreme court administrator or designee;

(iv) two members, appointed by the department director, one from the child support enforcement division and one from the operations and technology division; and

(v) a representative of a county data processing unit, nominated by the association of clerks of the district courts; and

(c) the costs charged to the department under the contract or cooperative agreement may not exceed the actual costs that the department would have incurred without the contract or cooperative agreement.

(10) The department may adopt rules to implement 19-2-909, 19-20-306, 40-5-157, 40-5-275, and this part. Rules must be drafted, adopted, and applied in a manner that:

(a) minimizes the personal intrusiveness on the employer or employee of any requested information;

(b) minimizes the costs to the department and any employer or employee with respect to obtaining and submitting any requested information; and

(c) maximizes the confidentiality and security of any employer or employee information that the department gathers under 19-2-909, 19-20-306, 40-5-157, 40-5-275, and this part. *(Bracketed language terminates on occurrence of contingency—sec. 1, Ch. 27, L. 1999.)*

History: En. Sec. 2, Ch. 552, L. 1997.

Compiler's Comments

Contingent Termination — Request for Federal Exemptions: Section 1, Ch. 27, L. 1999, revised sec. 104, Ch. 552, L. 1997, to contain the following contingent termination provisions and order that the department of public health and human services seek federal exemptions: "(1) [Sections 9, 11, 22 through 24, and 95] [37-1-307, 40-1-107, 40-4-105, 40-5-922, 40-5-924, and 61-5-107] and the bracketed language in [sections 1 through 3, 10, 25, 45, and 89] [40-4-204, 40-5-226, 40-5-901, 40-5-906, 40-5-907, 40-5-923, and 40-6-116] terminate on the date of the suspension if the federal government suspends federal payments to this state for this state's child support enforcement program and for this state's program relating to temporary assistance to needy families because of this state's failure to enact law as required by the federal Personal Responsibility and Work Opportunity Reconciliation Act of 1996.

(2) [Sections 9, 11, 22 through 24, and 95] [37-1-307, 40-1-107, 40-4-105, 40-5-922, 40-5-924, and 61-5-107] and the bracketed language in [sections 1 through 3, 10, 25, 45, and 89] [40-4-204, 40-5-226, 40-5-901, 40-5-906, 40-5-907, 40-5-923, and 40-6-116] terminate on the date that a final decision is rendered in federal court invalidating the child support provisions of the federal Personal Responsibility and Work Opportunity Reconciliation Act of 1996.

(3) If the director of the department of public health and human services certifies to the governor and the secretary of state in writing that one of the following provisions is no longer required by federal law because of repeal of or amendment to federal statutes that require that provision, the provision terminates on the date the certification takes effect:

(a) [section 9] [40-5-922];

(b) [section 11] [40-5-924];

(c) [sections 22 through 24] [37-1-307, 40-1-107, and 40-4-105];

(d) [section 95] [61-5-107];

(e) the bracketed provisions in [sections 1 through 3, 10, 25, 45, and 89] [40-4-204, 40-5-226, 40-5-901, 40-5-906, 40-5-907, 40-5-923, and 40-6-116].

(4) If the bracketed language in [sections 1 through 3, 10, 25, 45, and 89] [40-4-204, 40-5-226, 40-5-901, 40-5-906, 40-5-907, 40-5-923, and 40-6-116] terminates, the code commissioner is instructed to renumber subsections, adjust internal references, and correct grammar and arrangement." Amendment effective February 18, 1999.

40-5-907. Case registry — abstracts — information required — mandatory updating. (1) There must be registered in the case registry an abstract of:

(a) each case, including interstate cases, receiving IV-D services provided by the department;

(b) each support order entered and each modification of an existing support order made in this state after October 1, 1998; and

(c) each subsequent order or action establishing, modifying, adjusting, granting relief from, terminating, or otherwise affecting a support order in a registered case.

(2) Each abstract must include:

(a) the name, sex, [social security number, other] identification numbers, if any, date of birth, driver's license number, telephone number, and residential and mailing addresses of the parents;

(b) the child's name, date of birth, sex, [social security number, if any,] and residential address if different from that of the child's custodian;

(c) the name and location of the obligee if the obligee is a person or agency other than the child's parent;

(d) the name, address, and telephone number of the obligor's employer or of another payor of income to the obligor;

(e) if the child is covered by a health or medical insurance plan, the name of the insurance carrier or health benefit plan, the policy identification number, the name of the persons covered, and any other pertinent information regarding coverage, or if the child is not covered, information as to the availability of coverage for the child through the obligor's and obligee's employers; and

(f) any other information that the department considers relevant and requires by rule.

(3) The abstract of a support order must include:

(a) the amount of the support payment and supplemental support payments, if any, for each child and the amount of spousal maintenance if ordered in the same case;

(b) the specific day or dates the payment is due;

(c) the inclusive dates of the support obligation;

(d) the terms of any condition that may affect the amount of the payment, the due date, or the obligation to pay support;

(e) each subsequent judgment for support arrears and the amounts of any interest, late payment penalties, and fees included in the judgment;

(f) any specific child support lien imposed against real or personal property of the obligor;

(g) the terms of any medical and health coverage provision for the child; and

(h) the name and county of the judicial district or the name and address of the agency where the record of the case is located and the cause number or case identification number for the case.

(4) (a) For each IV-D case with a support order registered in the case registry, there must be a record of the date and the amount of support payments made by the obligor, dates and amounts of support collected from other sources, dates of distribution of support payments, names and locations of persons or agencies to whom support payments and collections were distributed, and the balance of support owed by the obligor.

(b) Except as provided in subsection (5), the department need not maintain payment records in a non IV-D case.

(5) A copy of each non IV-D income-withholding order must be included in the case registry. For each registered income-withholding order, there must be a record of payments received by the department from the payor under the income-withholding order, the date and amount of each payment, the date the department distributed the payment, and the person or agency to whom the payment was distributed.

(6) The statistical report required by the department under 50-15-302 may be combined with and made a part of the abstract of support order form.

(7) (a) Each support order entered or modified in this state after October 1, 1998, must include a requirement that the obligor and obligee update, as necessary, the information included in the abstract under subsection (2).

(b) The order must also provide that in a subsequent child support enforcement action, upon sufficient showing that diligent effort has been made to ascertain the location of the obligor or obligee, the court or agency taking the enforcement action may consider the due process requirements for notice and service of process to be met with respect to the party upon delivery of written notice by regular mail to the most recent address or employer address reported to the case registry.

(c) If the support order does not include the provisions required by subsections (7)(a) and (7)(b) or if the support order was entered or last modified in this state before October 1, 1998, the department may give written notice of the provisions to the obligor and obligee. Upon receipt of the notice, the provisions have the same force and effect on the obligor and obligee as if included in the support order. *(Bracketed language terminates on occurrence of contingency—sec. 1, Ch. 27, L. 1999.)*

History: En. Sec. 3, Ch. 552, L. 1997.

Compiler's Comments

Contingent Termination — Request for Federal Exemptions: Section 1, Ch. 27, L. 1999, revised sec. 104, Ch. 552, L. 1997, to contain the following contingent termination provisions and order that the department of public health and human services seek federal exemptions: "(1) [Sections 9, 11, 22 through 24, and 95] [37-1-307, 40-1-107, 40-4-105, 40-5-922, 40-5-924, and 61-5-107] and the bracketed language in [sections 1 through 3, 10, 25, 45, and 89] [40-4-204, 40-5-226, 40-5-901, 40-5-906, 40-5-907, 40-5-923, and 40-6-116] terminate on the date of the suspension if the federal government suspends federal payments to this state for this state's child support enforcement program and for this state's program relating to temporary assistance to needy families because of this state's failure to enact law as required by the federal Personal Responsibility and Work Opportunity Reconciliation Act of 1996.

(2) [Sections 9, 11, 22 through 24, and 95] [37-1-307, 40-1-107, 40-4-105, 40-5-922, 40-5-924, and 61-5-107] and the bracketed language in [sections 1 through 3, 10, 25, 45, and 89] [40-4-204, 40-5-226, 40-5-901, 40-5-906, 40-5-907, 40-5-923, and 40-6-116] terminate on the date that a final decision is rendered in federal court invalidating the child support provisions of the federal Personal Responsibility and Work Opportunity Reconciliation Act of 1996.

(3) If the director of the department of public health and human services certifies to the governor and the secretary of state in writing that one of the following provisions is no longer required by federal law because of repeal of or amendment to federal statutes that require that provision, the provision terminates on the date the certification takes effect:

(a) [section 9] [40-5-922];

(b) [section 11] [40-5-924];

(c) [sections 22 through 24] [37-1-307, 40-1-107, and 40-4-105];

(d) [section 95] [61-5-107];

(e) the bracketed provisions in [sections 1 through 3, 10, 25, 45, and 89] [40-4-204, 40-5-226, 40-5-901, 40-5-906, 40-5-907, 40-5-923, and 40-6-116].

(4) If the bracketed language in [sections 1 through 3, 10, 25, 45, and 89] [40-4-204, 40-5-226, 40-5-901, 40-5-906, 40-5-907, 40-5-923, and 40-6-116] terminates, the code commissioner is instructed to renumber subsections, adjust internal references, and correct grammar and arrangement." Amendment effective February 18, 1999.

40-5-908. Registration procedures. (1) In a court case, before a decree, judgment, or order may be docketed, the parties to the action or their attorneys shall prepare, on a form prescribed by the department, the abstract of a support order required under 40-5-907(3) and deliver it to the clerk of court whenever:

(a) a support order is entered or an existing order is modified after October 1, 1998;

(b) in an existing case not included under subsection (1)(a), the department has filed a notice of IV-D services and a support order is established, modified, adjusted, terminated, or otherwise affected or relief is granted from the support order; and

(c) in each case with a previously registered abstract, there is an action subsequent to registration that establishes, modifies, adjusts, terminates, grants relief from, or otherwise affects the support order in a registered case.

(2) The clerk of court shall deliver a completed abstract and copy of a non IV-D income-withholding order to the department within 5 working days of the receipt of an abstract or issuance of the non IV-D income-withholding order.

(3) (a) The department shall prepare and register abstracts of administrative support orders established by the department.

(b) For a foreign support order involving IV-D services from the department, the department shall attempt to acquire the information necessary for completion of the abstract from the person, court, or agency requesting IV-D services, and to the extent the information is provided, the department shall enter the information into the registry.

(4) As an alternative to the preparation and delivery of abstracts and non IV-D income-withholding orders to the department, the department may enter into cooperative agreements with district courts, clerks of court, or other

appropriate agencies of this and other states to gather and transmit the information through electronic information networking systems.

History: **En. Sec. 4, Ch. 552, L. 1997.**

40-5-909. Centralized payment center — mandatory payments to center. (1) Payments due under a support order must be paid through the department for processing and distribution to the person or agency entitled to receive the payment whenever:

(a) the case is receiving IV-D services; or

(b) the support obligation is payable through non IV-D income withholding.

(2) A support order entered or modified in this state after October 1, 1998, that excludes the obligor from paying support through income withholding must provide that:

(a) if the case is or later becomes a IV-D case or if support becomes payable through IV-D or non IV-D income withholding, support payments must be paid through the department; and

(b) a payment that is not made to the department does not constitute payment of support or credit toward satisfaction of the support obligation unless the payment is verified by the department to its satisfaction.

(3) (a) If a support order does not include the provisions required by subsection (2) or directs payment of support to a payee other than the department, the department may give written notice to the obligor and obligee directing or redirecting payments to the department. After receipt of the notice, payment other than as directed does not constitute payment of support or credit toward satisfaction of the support obligation.

(b) An obligor who redirects payments to the department is not liable to the obligee or answerable to the court for not making payments as directed by the court.

(c) While support is required to be paid through the department, the notice directing or redirecting payments to the department may not be superseded by any subsequent order of a court or agency directing the obligor to make payments other than to the department.

(4) After the obligor has been ordered or directed to make payments to the department under this section, the obligor shall make the payments to the department and is not entitled to credit against a support obligation for payment made to a person or agency other than the department.

(5) (a) When the obligor is paying support through IV-D or non IV-D income withholding, the income-withholding order must direct the payor to make the payments through the department.

(b) If a payor is directed by the income-withholding order to make payments to a payee other than the department, the department may redirect the payments to the department by written order to the employer or payor. The order supersedes any prior, inconsistent court or agency order.

(c) For as long as income withholding is appropriate to the case, the directive to the payor to make payments to the department may not be superseded by any subsequent order of a court or agency directing payments to any other payee.

(6) Payments of support that are received by the department in interstate cases or as the result of a writ of execution, warrant for distraint, state and federal tax offset, or similar enforcement remedy must be processed through the case management and payment processing unit.

(7) (a) If, through a private collection action, an obligee obtains a payment of support that must be processed and distributed through the case management and payment processing unit, the obligee shall forward the payment to the department within 5 working days of the receipt of the payment.

(b) If the department takes an enforcement action against the obligor because the obligee failed to timely forward a payment of support under subsection (7)(a), the obligee is liable in a civil action to the obligor for the amount that should have been forwarded to the department.

(8) (a) Payments made to the department under this section must be by cash, personal or business check, money order, automatic bank account withdrawal, certified funds, electronic funds transfer services, or any other means acceptable to the department.

(b) Payments may not be credited to the obligor's child support obligation until actually received by the department.

(c) The withholding of income by a payor or employer under an order to withhold issued under Title 40, chapter 5, part 3 or 4, is not alone sufficient for credit against an obligor's support obligation. Payments withheld from an obligor's income that are not actually received by the department may not be credited to the obligor's child support obligation. The payor or employer is liable to the obligor in a civil action initiated by the obligor for the amount withheld but not paid to the department.

(d) A check presented to the department as payment, whether by the obligor, the obligor's employer, or another payor on the obligor's behalf, that is dishonored by the issuing bank may not be credited to the obligor's child support obligation.

(e) A payment made out to or delivered to any other person or agency other than to the department may not be credited to the obligor's support obligation.

(9) An uncredited payment under this section is considered as still owed by the obligor and may be collected using any remedy available under law.

History: **En. Sec. 5, Ch. 552, L. 1997.**

40-5-910. Distribution of payments. (1) Support payments processed through the case processing unit must be promptly disbursed unless one of the following circumstances or a similar circumstance prevents prompt distribution:

(a) the location of the obligee is unknown;

(b) the support debt is in litigation or, in an income-withholding case, the income-withholding action is contested; or

(c) the department receives a payment that does not include sufficient information to identify the case or the obligee.

(2) A disbursement must comply with department rules for distribution in IV-D cases.

(3) If the department is unable to make a distribution because the obligee's location is unknown, the department shall return the payment to the obligor.

(4) If a payment properly distributed under this section is later determined by a court or by department decision to be refundable to the obligor for any

reason, except for when the department is the obligee, the department need not pay the refund or recover the refunded amount from the obligee or from any person or agency to whom the amount was distributed.

(5) If the department distributes a support payment in error or if a distribution is made to a person, obligee, or agency not entitled to retain the distributed amount, the department may obtain restitution by means of a setoff against future payments, including arrears payments, received on behalf of the person, obligee, or agency. A setoff against future payments of current support is limited to 10% of the payment.

History: **En. Sec. 6, Ch. 552, L. 1997.**

40-5-911. Monitor payments — enforcement. The department shall monitor all IV-D cases in the case registry and payment processing unit to promptly identify failures to make timely payment of support. If payment is not timely made, the department may:

(1) determine why a timely payment was not received and take any action the department considers appropriate if there is an order to withhold income issued to a current payor;

(2) promptly transmit an income-withholding order to the obligor's payor if the obligor is not currently subject to income withholding; or

(3) promptly transmit an income-withholding order upon receipt of information identifying a payor if a payor was formerly unknown; and

(4) take any additional enforcement action the department considers appropriate in all cases with an identified delinquency.

History: **En. Sec. 7, Ch. 552, L. 1997.**

40-5-912 through 40-5-920 reserved.

40-5-921. Certification of records. (1) Copies, including optically scanned copies, of support payment records, abstracts, and any supporting documents maintained by the case registry and payment processing unit, when certified by a designated employee of the department, must, without further proof or foundation, be admitted into evidence in any legal proceedings.

(2) Support payment records for a case maintained in the case registry and payment processing unit constitute prima facie evidence of the amount of support paid and arrearages that have accrued since the department began to process and monitor support payments through the unit.

(3) Copies of judicial orders and other documents on file with a clerk of court, when transmitted to the department by the clerk by facsimile or other electronic means, are rebuttably presumed to be true and correct copies of the original documents and may be offered into evidence, without authentication or verification, in a department proceeding under this part. A person contesting the authenticity of the document may rebut the presumption with a certified copy of the original document.

History: **En. Sec. 8, Ch. 552, L. 1997.**

40-5-922. *(Temporary)* **Directory of new hires — employer reporting requirements.** (1) (a) An employer doing business in the state shall report to the department the hiring or rehiring of an employee to whom the employer anticipates paying income.

(b) An employer shall report the hiring or rehiring of an employee by submitting a copy of the employee's completed W-4 form or, at the option of the employer, its informational equivalent or any other format agreed to by the department. The report must include the employee's name, date of hire, social security number, and residential and mailing addresses, and the name, address, and federal identification number of the employer. The report may include the employee's date of birth.

(c) If an employer provides health or medical insurance coverage for an employee and the coverage may be extended to the employee's children, the employer may, along with the date the employee becomes eligible for coverage, provide that information as part of the new hire report under subsection (1)(b).

(2) Transmission of the reports must be by first-class mail, electronic or magnetic transmission, including facsimile transmission, or any other format agreed to by the department. Written reports must be submitted within 20 days of the employee's date of hire or rehire. Reports transmitted electronically or magnetically may be made by two transmissions monthly, if necessary, not less than 12 or more than 16 days apart.

(3) An employer who has employees in two or more states and who transmits new hire reports electronically or magnetically may comply with this section by designating one of the states in which there is an employee and transmitting the report of new hires to that state. A multistate employer who elects to report to only one state shall give written notice of the state to which the employer will transmit new reports. As required by 42 U.S.C. 653a(b)(1)(B), this notice must be transmitted to the secretary of the federal department of health and human services.

(4) An employer providing reports is not liable to the employee for the disclosure or any subsequent use by the processing center of the information. *(Terminates on occurrence of contingency—sec. 1, Ch. 27, L. 1999.)*

History: En. Sec. 9, Ch. 552, L. 1997.

Compiler's Comments

Contingent Termination — Request for Federal Exemptions: Section 1, Ch. 27, L. 1999, revised sec. 104, Ch. 552, L. 1997, to contain the following contingent termination provisions and order that the department of public health and human services seek federal exemptions: "(1) [Sections 9, 11, 22 through 24, and 95] [37-1-307, 40-1-107, 40-4-105, 40-5-922, 40-5-924, and 61-5-107] and the bracketed language in [sections 1 through 3, 10, 25, 45, and 89] [40-4-204, 40-5-226, 40-5-901, 40-5-906, 40-5-907, 40-5-923, and 40-6-116] terminate on the date of the suspension if the federal government suspends federal payments to this state for this state's child support enforcement program and for this state's program relating to temporary assistance to needy families because of this state's failure to enact law as required by the federal Personal Responsibility and Work Opportunity Reconciliation Act of 1996.

(2) [Sections 9, 11, 22 through 24, and 95] [37-1-307, 40-1-107, 40-4-105, 40-5-922, 40-5-924, and 61-5-107] and the bracketed language in [sections 1 through 3, 10, 25, 45, and 89] [40-4-204, 40-5-226, 40-5-901, 40-5-906, 40-5-907, 40-5-923, and 40-6-116] terminate on the date that a final decision is rendered in federal court invalidating the child support provisions of the federal Personal Responsibility and Work Opportunity Reconciliation Act of 1996.

(3) If the director of the department of public health and human services certifies to the governor and the secretary of state in writing that one of the following provisions is no longer required by federal law because of repeal of or amendment to federal statutes that require that provision, the provision terminates on the date the certification takes effect:

(a) [section 9] [40-5-922];

(b) [section 11] [40-5-924];

(c) [sections 22 through 24] [37-1-307, 40-1-107, and 40-4-105];

(d) [section 95] [61-5-107];

(e) the bracketed provisions in [sections 1 through 3, 10, 25, 45, and 89] [40-4-204, 40-5-226, 40-5-901, 40-5-906, 40-5-907, 40-5-923, and 40-6-116].

(4) If the bracketed language in [sections 1 through 3, 10, 25, 45, and 89] [40-4-204, 40-5-226, 40-5-901, 40-5-906, 40-5-907, 40-5-923, and 40-6-116] terminates, the code commissioner is instructed to renumber

subsections, adjust internal references, and correct grammar and arrangement." Amendment effective February 18, 1999.

40-5-923. Information and records — disclosure. Information in the case registry and payment processing unit that contains the social security number, residential address, income sources, and employers of an obligee or obligor [and the employee W-4 forms or similar forms transmitted to the department] is private and confidential and may be disclosed only to:

(1) courts, tribunals, and administrative agencies in this and any agency of another state having jurisdiction over child support, custody, visitation, and welfare pursuant to 42 U.S.C. 651, et seq.;

(2) public assistance and medicaid agencies and the revenue, workers' compensation, and employment security programs of this or any other state for the purpose of determining eligibility, continued eligibility, or fraud by programs operated by those agencies and programs;

(3) the obligor or obligee who is the subject of the information;

(4) the state vital statistics agency for the purposes of 50-15-302; and

(5) the department of revenue. *(Bracketed language terminates on occurrence of contingency—sec. 1, Ch. 27, L. 1999.)*

History: **En. Sec. 10, Ch. 552, L. 1997.**

Compiler's Comments

Contingent Termination — Request for Federal Exemptions: Section 1, Ch. 27, L. 1999, revised sec. 104, Ch. 552, L. 1997, to contain the following contingent termination provisions and order that the department of public health and human services seek federal exemptions: "(1) [Sections 9, 11, 22 through 24, and 95] [37-1-307, 40-1-107, 40-4-105, 40-5-922, 40-5-924, and 61-5-107] and the bracketed language in [sections 1 through 3, 10, 25, 45, and 89] [40-4-204, 40-5-226, 40-5-901, 40-5-906, 40-5-907, 40-5-923, and 40-6-116] terminate on the date of the suspension if the federal government suspends federal payments to this state for this state's child support enforcement program and for this state's program relating to temporary assistance to needy families because of this state's failure to enact law as required by the federal Personal Responsibility and Work Opportunity Reconciliation Act of 1996.

(2) [Sections 9, 11, 22 through 24, and 95] [37-1-307, 40-1-107, 40-4-105, 40-5-922, 40-5-924, and 61-5-107] and the bracketed language in [sections 1 through 3, 10, 25, 45, and 89] [40-4-204, 40-5-226, 40-5-901, 40-5-906, 40-5-907, 40-5-923, and 40-6-116] terminate on the date that a final decision is rendered in federal court invalidating the child support provisions of the federal Personal Responsibility and Work Opportunity Reconciliation Act of 1996.

(3) If the director of the department of public health and human services certifies to the governor and the secretary of state in writing that one of the following provisions is no longer required by federal law because of repeal of or amendment to federal statutes that require that provision, the provision terminates on the date the certification takes effect:

(a) [section 9] [40-5-922];

(b) [section 11] [40-5-924];

(c) [sections 22 through 24] [37-1-307, 40-1-107, and 40-4-105];

(d) [section 95] [61-5-107];

(e) the bracketed provisions in [sections 1 through 3, 10, 25, 45, and 89] [40-4-204, 40-5-226, 40-5-901, 40-5-906, 40-5-907, 40-5-923, and 40-6-116].

(4) If the bracketed language in [sections 1 through 3, 10, 25, 45, and 89] [40-4-204, 40-5-226, 40-5-901, 40-5-906, 40-5-907, 40-5-923, and 40-6-116] terminates, the code commissioner is instructed to renumber subsections, adjust internal references, and correct grammar and arrangement." Amendment effective February 18, 1999.

40-5-924. *(Temporary)* **Automated access to financial records — confidentiality — no liability — definitions.** (1) For the purposes of this section, unless the context otherwise indicates, the following definitions apply:

(a) "Account" means a savings, checking, deposit and withdrawal, demand deposit, money market, profit and loss, or time deposit account opened by a depositor in a financial institution.

(b) "Depositor" means a person, share account holder, sole proprietor, or joint owner of an account in a financial institution in this state.

(c) "Financial institution" means:

(i) a depository institution, as defined in section 3(c) of the Federal Deposit Insurance Act, 12 U.S.C. 1813(c);

(ii) an institution-affiliated party, as defined in the Federal Deposit Insurance Act, 12 U.S.C. 1813(u);

(iii) any state credit union, as defined in 32-3-102, or federal credit union, as defined in section 101 of the Federal Credit Union Act, 12 U.S.C. 1752, including an institution-affiliated party of such a credit union, as defined in section 206(r) of the act, 12 U.S.C. 1786(r); and

(iv) any benefit association, insurance company, safe deposit company, money market mutual fund, or similar entity authorized to do business in the state.

(d) "Obligor" means a person who owes a debt for child, spousal, or medical support as determined by the department or as specified by order of a tribunal of competent jurisdiction, the amount of which exceeds $500 or a total of 3 months debt, whichever is less.

(2) (a) Upon written request from the department, a financial institution shall run a data match of the department's list of obligors with the financial institution's depositors and provide the information in a computer or other reasonable format accessible by the financial institution. The department may not request the information referred to in this subsection from a financial institution more than once in each calendar quarter.

(b) The information on an obligor found to be a depositor at a financial institution must include the obligor's full name, social security number or other taxpayer identification number, and account number. If normally kept by the financial institution, the information must also include the mailing address, employment address, and any other information that identifies the obligor.

(c) The financial institution shall provide the requested information within 30 days of the request from the department.

(3) The department shall run a computer match of all obligors with the information from the financial institution required in subsection (2). If there is a match between an obligor and a depositor, the financial institution shall, upon request of the department, provide additional information within 30 days, including but not limited to:

(a) verification of the obligor's full name and social security number;

(b) the financial institution's account number;

(c) the nature of the account or accounts held by the obligor;

(d) the funds available in the account less any preexisting encumbrance held by the financial institution; and

(e) any taxes, penalties, interest, or other costs to be legally imposed on the account if the account is accessed prior to a maturity date.

(4) The amounts available in an obligor's account do not include amounts available pursuant to overdraft coverage offered by the financial institution.

(5) The financial institution shall honor a subsequent appropriate lien from the department sent to the financial institution.

(6) (a) A financial institution receiving a data request, data match, or lien from the department may not provide notice to an obligor identified in the information submitted to the department. Failure to provide notice does not constitute a violation of the financial institution's duty of good faith to its customers.

(b) A notice given by a financial institution to an obligor identified by the department subjects the financial institution to the contempt authority of the department under 40-5-226.

(7) The department shall pay a financial institution a reasonable fee for providing the information required in subsection (2), not to exceed the actual documented costs incurred by the financial institution.

(8) Information requested by the department and provided by a financial institution under this section is confidential and may be used only for IV-D purposes. Use of information for any other purpose without the authorization of the department subjects the user to a civil penalty of not more than $500 per name per use.

(9) A financial institution is not liable to a person for:

(a) a disclosure of information to the department under this section;

(b) encumbering or surrendering assets held by the financial institution in response to a notice of lien or levy issued by the department; or

(c) any other action under this section taken in good faith to comply with the requirements of this section as long as the action is reasonable. *(Terminates on occurrence of contingency—sec. 1, Ch. 27, L. 1999.)*

History: En. Sec. 11, Ch. 552, L. 1997.

Compiler's Comments

Contingent Termination — Request for Federal Exemptions: Section 1, Ch. 27, L. 1999, revised sec. 104, Ch. 552, L. 1997, to contain the following contingent termination provisions and order that the department of public health and human services seek federal exemptions: "(1) [Sections 9, 11, 22 through 24, and 95] [37-1-307, 40-1-107, 40-4-105, 40-5-922, 40-5-924, and 61-5-107] and the bracketed language in [sections 1 through 3, 10, 25, 45, and 89] [40-4-204, 40-5-226, 40-5-901, 40-5-906, 40-5-907, 40-5-923, and 40-6-116] terminate on the date of the suspension if the federal government suspends federal payments to this state for this state's child support enforcement program and for this state's program relating to temporary assistance to needy families because of this state's failure to enact law as required by the federal Personal Responsibility and Work Opportunity Reconciliation Act of 1996.

(2) [Sections 9, 11, 22 through 24, and 95] [37-1-307, 40-1-107, 40-4-105, 40-5-922, 40-5-924, and 61-5-107] and the bracketed language in [sections 1 through 3, 10, 25, 45, and 89] [40-4-204, 40-5-226, 40-5-901, 40-5-906, 40-5-907, 40-5-923, and 40-6-116] terminate on the date that a final decision is rendered in federal court invalidating the child support provisions of the federal Personal Responsibility and Work Opportunity Reconciliation Act of 1996.

(3) If the director of the department of public health and human services certifies to the governor and the secretary of state in writing that one of the following provisions is no longer required by federal law because of repeal of or amendment to federal statutes that require that provision, the provision terminates on the date the certification takes effect:

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(d) [section 95] [61-5-107];

(e) the bracketed provisions in [sections 1 through 3, 10, 25, 45, and 89] [40-4-204, 40-5-226, 40-5-901, 40-5-906, 40-5-907, 40-5-923, and 40-6-116].

(4) If the bracketed language in [sections 1 through 3, 10, 25, 45, and 89] [40-4-204, 40-5-226, 40-5-901, 40-5-906, 40-5-907, 40-5-923, and 40-6-116] terminates, the code commissioner is instructed to renumber subsections, adjust internal references, and correct grammar and arrangement." Amendment effective February 18, 1999.

CHAPTER 6

PARENT AND CHILD

Part 1 — Uniform Parentage Act

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Execution of judgments when family property and interest involved, Title 25, ch. 13.

Montana Rules of Civil Procedure relating to marriage, children, and family, Rules 4D(2)(b), 4D(2)(c), 4D(5)(a)(iii), 20(a), and 27(a)(2), M.R.Civ.P. (see Title 25, ch. 20).

Evidence rules relating to marriage, children, and family, 26-1-601, 26-1-602,26-1-802.

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Workers' compensation law relating to families, Title 39, ch. 71, part 1; 39-71-602; 39-71-723; 39-71-737; 39-71-741; 39-71-742; 39-71-2203.

Rights and obligations of minors, Title 41, ch. 1.

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General criminal provisions relating to family, 45-1-205, 45-2-101, 45-2-211.

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Criminal procedure provisions relating to family members, 46-16-212, 46-23-1022, 46-23-1102.

Diagnostic tests for pregnant women and newborn infants, Title 50, ch. 19.

Child care, Title 52, ch. 2, part 7.

Per diem payments for care of persons at institutions, Title 53, ch. 1, part 4.

General welfare provisions relating to family, 53-2-101, 53-2-201, 53-2-206, 53-2-610, 53-3-111, 53-3-115.

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Automobile registration may be transferred to surviving heir without letters of administration, 61-3-201.

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Montana Uniform Transfers to Minors Act, Title 72, ch. 26.

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Part 1

Uniform Parentage Act

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Department to accept custody of children committed by courts, 52-2-115.

UPC — guardians of minors, Title 72, ch. 5, part 2.

40-6-101. Short title. This part may be cited as the "Uniform Parentage Act".

History: En. 61-301 by Sec. 1, Ch. 512, L. 1975; R.C.M. 1947, 61-301.

40-6-102. Definitions. As used in this part, the following definitions apply:

(1) "Blood test" means a test that demonstrates through examination of genetic markers either that an alleged father is not the natural father of a child or that there is a probability that an alleged father is the natural father of a child. The genetic markers may be identified from a person's blood or a tissue sample. The blood or tissue sample may be taken by blood drawing, buccal swab, or any other method approved by the American association of blood banks. A blood test may include but is not limited to the human leukocyte antigen test and DNA probe technology.

(2) "Parent and child relationship" means the legal relationship existing between a child and the child's natural or adoptive parents incident to which the law confers or imposes rights, privileges, duties, and obligations. It includes the mother and child relationship and the father and child relationship.

(3) "Support judgment" or "support order" means an order, whether temporary or final, that provides for the periodic payment of an amount of money expressed in dollars for the support of a child, including medical and health needs, child care, education, recreation, clothing, transportation, and other related expenses and costs specific to the needs of the child.

History: En. 61-302 by Sec. 2, Ch. 512, L. 1975; R.C.M. 1947, 61-302; amd. Sec. 6, Ch. 70, L. 1995; amd. Sec. 85, Ch. 552, L. 1997.

40-6-103. Relationship not dependent on marriage. The parent and child relationship extends equally to every child and to every parent, regardless of the marital status of the parents.

History: En. 61-303 by Sec. 3, Ch. 512, L. 1975; R.C.M. 1947, 61-303.

40-6-104. How parent and child relationship established. The parent and child relationship between a child and:

(1) the natural mother may be established by proof of her having given birth to the child or under this part;

(2) the natural father may be established under this part;

(3) an adoptive parent may be established by proof of adoption.

History: En. 61-304 by Sec. 4, Ch. 512, L. 1975; R.C.M. 1947, 61-304.

Cross-References

Certificates of adoption, 50-15-311.

40-6-105. Presumption of paternity. (1) A person is presumed to be the natural father of a child if any of the following occur:

(a) the person and the child's natural mother are or have been married to each other and the child is born during the marriage or within 300 days after the marriage is terminated by death, annulment, declaration of invalidity, or divorce or after a decree of separation is entered by a court;

(b) before the child's birth, the person and the child's natural mother have attempted to marry each other by a marriage solemnized in apparent compliance with law, although the attempted marriage is or could be declared invalid, and:

(i) if the attempted marriage could be declared invalid only by a court, the child is born during the attempted marriage or within 300 days after its termination by death, annulment, declaration of invalidity, or divorce; or

(ii) if the attempted marriage is invalid without a court order, the child is born within 300 days after the termination of cohabitation;

(c) after the child's birth, the person and the child's natural mother have married or attempted to marry each other by a marriage solemnized in apparent compliance with law, although the attempted marriage is or could be declared invalid, and:

(i) the child's mother and the child's alleged father have acknowledged the alleged father's paternity of the child in writing in accordance with subsection (1)(e) and the acknowledgment is filed with the department of public health and human services;

(ii) with the person's consent, the person is named as the child's father on the child's birth certificate; or

(iii) the person is obligated to support the child under a written voluntary promise or by court order;

(d) while the child is under the age of majority, the person receives the child into the person's home and openly represents the child to be the person's natural child;

(e) the child's mother and the child's alleged father acknowledge the alleged father's paternity of the child in a paternity acknowledgment form that is provided by the department of public health and human services. The department of public health and human services shall accept and file the completed form. As a part of a voluntary acknowledgment process, the department of public health and human services shall make written and oral information available to the parents regarding the rights and responsibilities of acknowledging paternity. If another person is presumed under this section to be the child's father, acknowledgment may be effected only with the written consent of the presumed father or after the presumption has been rebutted. The presumption of paternity is created when the acknowledgment is filed with the department.

(f) the scientific evidence resulting from a blood test, whether ordered by a court or administrative agency of competent jurisdiction or agreed to by the parties, shows a 95% or higher statistical probability of paternity;

(g) the person is presumed to be the child's natural father under the laws of the state or Indian territory in which the child was born.

(2) An acknowledgment is binding on a parent who executes it, whether or not the parent is a minor.

(3) Except for presumptions of paternity that are conclusive or irrebuttable under subsections (1)(g) and (5), a presumption under this section may be rebutted:

(a) in an appropriate action by a preponderance of the evidence; or

(b) by scientific evidence resulting from a blood test that excludes the person as the child's natural parent.

(4) (a) A presumption of paternity established under this section is a sufficient basis for establishing a support order.

(b) If a presumption is later rebutted or set aside and the person is under an order to pay support for the child, the person may only be relieved of support installments that accrued from the date of the order declaring the presumption to be rebutted.

(5) (a) An acknowledgment of paternity under subsection (1)(e) may be rescinded by a signatory at any time within 60 days after it was signed by filing a notice of withdrawal with the department of public health and human services. The notice of withdrawal must include an affidavit attesting that a copy of the notice was provided to any parent who signed the acknowledgment form.

(b) Without need for ratification by court or administrative proceedings, an acknowledgment of paternity under subsection (1)(e) becomes, as a matter of law, an irrebuttable presumption of paternity on the earlier of the date:

(i) the acknowledgment is not timely rescinded as provided in subsection (5)(a); or

(ii) a court or administrative judgment, decree, or order is entered that establishes paternity or a support order, when that proceeding includes the signatory.

(c) An irrebuttable presumption of paternity under this subsection (5) has the same force and effect as a district court judgment adjudicating paternity and may only be set aside for fraud, duress, or material mistake of fact. The burden of proof is on the person seeking to set the presumption aside. Except for good cause, legal responsibilities arising from the paternity acknowledgment may not be stayed pending the outcome of an action to set aside the presumption.

History: En. 61-305 by Sec. 5, Ch. 512, L. 1975; R.C.M. 1947, 61-305; amd. Sec. 7, Ch. 70, L. 1995; amd. Sec. 80, Ch. 418, L. 1995; amd. Sec. 143, Ch. 546, L. 1995; amd. Sec. 86, Ch. 552, L. 1997.

Cross-References

Admissibility of paternity blood test from administrative paternity hearing, 40-5-234.

Effect of administrative order establishing paternity — state child support enforcement, 40-5-235.

Legitimacy of children born in wedlock, 40-6-201.

Legitimacy of children born after dissolution of marriage, 40-6-202.

Child legitimized by marriage of parents, 40-6-203.

Birth certificates, Title 50, ch. 15, part 2.

40-6-106. Artificial insemination. (1) If, under the supervision of a licensed physician and with the consent of the woman's husband, a wife is inseminated artificially with semen donated by a person who is not the husband, the husband is treated in law as if the husband were the natural father of a child conceived by artificial insemination. The husband's consent must be in writing and signed by the husband and the wife. The physician shall certify their signatures and the date of the insemination and file the husband's consent with the department of public health and human services, where it must be kept confidential and in a sealed file. However, the physician's failure to file the consent does not affect the father and child relationship. All papers and records pertaining to the insemination, whether part of the permanent record of a court or of a file held by the supervising physician or elsewhere, are subject to inspection only upon an order of the court for good cause shown.

(2) The donor of semen provided to a licensed physician for use in artificial insemination of a married woman other than the donor's wife is treated in law as if the donor is not the natural father of a child conceived by artificial insemination.

History: **En. 61-306 by Sec. 6, Ch. 512, L. 1975; R.C.M. 1947, 61-306; amd. Sec. 81, Ch. 418, L. 1995; amd. Sec. 144, Ch. 546, L. 1995.**

Cross-References

Legitimacy of children born in wedlock, 40-6-201.

Vital statistics — duties of Department, 50-15-103.

40-6-107. Determination of father and child relationship — who may bring action. (1) Any interested party may bring an action for the purpose of determining the existence or nonexistence of the father and child relationship presumed pursuant to 40-6-105.

(2) An action to determine the existence of the father and child relationship with respect to a child who has no presumed father under 40-6-105 may be brought by the child, the mother or personal representative of the child, the department of public health and human services or its appropriate local affiliate, the personal representative or a parent of the mother if the mother has died, a person alleged or alleging to be the father, or the personal representative or a parent of the alleged father if the alleged father has died or is a minor.

(3) Regardless of its terms, an agreement, other than an agreement approved by the court in accordance with 40-6-114(2), between an alleged or presumed father and the mother or child does not bar an action under this section.

(4) If an action under this section is brought before the birth of the child, all proceedings must be stayed until after the birth, except service of process and the taking of depositions to perpetuate testimony.

History: **En. 61-307 by Sec. 7, Ch. 512, L. 1975; R.C.M. 1947, 61-307; amd. Sec. 32, Ch. 609, L. 1987; amd. Sec. 145, Ch. 546, L. 1995.**

Cross-References

Depositions, Rule 27, M.R.Civ.P. (see Title 25, ch. 20).

Unborn children, 41-1-103.

Enforcement of minor's rights, 41-1-202.

UPC — personal representative, Title 72, ch. 3, part 6.

40-6-108. Statute of limitations. (1) An action may be commenced at any time for the purpose of declaring the existence or nonexistence of the father and child relationship presumed under 40-6-105(1)(a), (1)(b), or (1)(c).

(2) After the presumption has been rebutted, paternity of the child by another individual may be determined in the same action if the other individual has been made a party.

(3) An action to determine the existence or nonexistence of the father and child relationship as to a child who has no presumed father under 40-6-105:

(a) may not be brought by the child later than 2 years after the child attains the age of majority;

(b) may be brought by a state agency at any time after the first application is made under Title IV-D of the Social Security Act for services to the child and before the child attains the age of majority. This subsection is intended to apply retroactively, within the meaning of 1-2-109, to any child for whom a paternity action was barred or could have been barred by a shorter limitation period. However, in previously barred actions that are revived by this subsection, the father is not liable to the state agency for support of the child.

(4) The father's liability for a statutory debt created by the payment of public assistance is limited to the amount of assistance paid during the 2-year

period preceding commencement of the action. This subsection does not limit the subsequent accrual of a statutory debt.

(5) Section 40-6-107 and this section do not extend the time within which a right of inheritance or a right to a succession may be asserted beyond the time provided by law relating to distribution and closing of decedents' estates or to the determination of heirship or otherwise.

(6) After the conclusion of an adoption proceeding under Title 42, a further action to declare the existence or nonexistence of the father and child relationship of the adopted child may not be commenced, except as provided in 42-2-411.

History: En. 61-308 by Sec. 8, Ch. 512, L. 1975; R.C.M. 1947, 61-308; amd. Sec. 5, Ch. 33, L. 1979; amd. Sec. 1, Ch. 442, L. 1985; amd. Sec. 1, Ch. 129, L. 1987; amd. Sec. 1, Ch. 265, L. 1991; amd. Sec. 1, Ch. 373, L. 1993; amd. Sec. 165, Ch. 480, L. 1997.

Cross-References

Adult rights, Art. II, sec. 14, Mont. Const.

Rights of persons not adults, Art. II, sec. 15, Mont. Const.

When person entitled to bring action is under disability, 27-2-401.

Minors and adults defined, 41-1-101.

40-6-109. Jurisdiction — venue. (1) The district court has jurisdiction of an action brought under this part. The action may be joined with an action for dissolution, annulment, separate maintenance, support, or adoption.

(2) For purposes of an action brought under this part, personal jurisdiction is established in the courts of this state over an individual or the individual's guardian or conservator, if:

(a) the individual is personally served within this state in accordance with Rule 4B, Montana Rules of Civil Procedure;

(b) the individual submits to the jurisdiction of this state by consent, by entering a general appearance, or by filing a responsive document that has the effect of waiving any contest to personal jurisdiction;

(c) the individual resided with the child in this state;

(d) the individual resided in this state and provided prenatal expenses or support for the child;

(e) the child resides in this state as a result of the acts or directives of the individual;

(f) the individual engaged in sexual intercourse in this state and the child may have been conceived by that act of intercourse; or

(g) there is any other basis consistent with the constitutions of this state and the United States for the exercise of personal jurisdiction.

(3) The action may be brought in the county in which the child or the alleged father resides or is found or, if the father is deceased, in which proceedings for probate of the father's estate have been or could be commenced.

History: En. 61-309 by Sec. 9, Ch. 512, L. 1975; amd. Sec. 21, Ch. 33, L. 1977; R.C.M. 1947, 61-309; amd. Sec. 57, Ch. 328, L. 1993.

Cross-References

Residence — rules for determining, 1-1-215.

UPC — venue in probate proceedings, 72-1-203.

40-6-110. Parties. The child must be made a party to the action. A minor must be represented by the minor's general guardian or a guardian ad litem appointed by the court. The child's mother or father may not represent the child as guardian or otherwise. The court may not appoint the department of public health and human services or any of its staff as guardian ad litem for the child. The natural mother, each person presumed to be the father under 40-6-105, and each person alleged to be the natural father must be made parties or, if not subject to the jurisdiction of the court, must be given notice of the action in a manner prescribed by the court and must be given an opportunity to be heard. The court may align the parties.

History: En. 61-310 by Sec. 10, Ch. 512, L. 1975; R.C.M. 1947, 61-310; amd. Sec. 33, Ch. 609, L. 1987; amd. Sec. 3, Ch. 434, L. 1993; amd. Sec. 146, Ch. 546, L. 1995.

Cross-References

Jurisdiction of persons, Rule 4B, M.R.Civ.P. (see Title 25, ch. 20).

Infants or incompetent persons as parties, Rule 17(c), M.R.Civ.P. (see Title 25, ch. 20).

Joinder of persons needed for just adjudication, Rule 19, M.R.Civ.P. (see Title 25, ch. 20).

Enforcement of minor's rights, 41-1-202.

Appointment of guardian ad litem, 41-5-1411.

40-6-111. Pretrial proceedings. (1) As soon as practicable after an action to declare the existence or nonexistence of the father and child relationship has been brought, an informal hearing must be held. The court may order that the hearing be held before a referee. The public must be barred from the hearing. A record of the proceeding must be kept.

(2) Upon refusal of any witness, including a party, to testify under oath or produce evidence, the court may order the witness to testify under oath and produce evidence concerning all relevant facts. If the refusal is upon the ground that the testimony or evidence might tend to incriminate the witness, the court may grant the witness immunity from all criminal liability on account of the testimony or evidence the witness is required to produce. An order granting immunity bars prosecution of the witness for any offense shown in whole or in part by testimony or evidence that the witness is required to produce, except for perjury committed in the testimony. The refusal of a witness who has been granted immunity to obey an order to testify or produce evidence is a civil contempt of the court.

(3) Upon motion, a temporary support order may be issued at any time during a paternity action when there is clear and convincing evidence of paternity in the form of blood test results or other evidence. The temporary support order must be established according to the uniform child support guidelines adopted under 40-5-209.

History: En. 61-311 by Sec. 11, Ch. 512, L. 1975; R.C.M. 1947, 61-311; amd. Sec. 87, Ch. 552, L. 1997.

Cross-References

Self-incrimination and double jeopardy, Art. II, sec. 25, Mont. Const.

Subpoenas and enforcement — compelling testimony, 2-4-104.

Sittings of court — when private, 3-1-313.

Contempts, Title 3, ch. 1, part 5.

Perjury, 45-7-201.

40-6-112. Blood tests. (1) The court may, and upon request of a party shall, require the child, mother, or alleged father to submit to blood tests. The tests shall be performed by an expert qualified as an examiner of blood types, appointed by the court.

(2) The court, upon reasonable request by a party, shall order that independent tests be performed by other experts qualified as examiners of blood types.

(3) In all cases the court shall determine the number and qualifications of the experts.

History: En. 61-312 by Sec. 12, Ch. 512, L. 1975; R.C.M. 1947, 61-312.

Cross-References

Physical and mental examination of persons, Rule 35, M.R.Civ.P. (see Title 25, ch. 20).

Opinions and expert testimony, Art. VII, M.R.Ev. (see Title 26, ch. 10).

40-6-113. Evidence relating to paternity. Evidence relating to paternity may include:

(1) evidence of sexual intercourse between the mother and alleged father at any possible time of conception;

(2) an expert's opinion concerning the statistical probability of the alleged father's paternity based upon the duration of the mother's pregnancy;

(3) blood test results, weighted in accordance with evidence, if available, of the statistical probability of the alleged father's paternity;

(4) medical or anthropological evidence relating to the alleged father's paternity of the child based on tests performed by experts. If a man has been identified as a possible father of the child, the court may, and upon request of a party shall, require the child, the mother, and the man to submit to appropriate tests; and

(5) all other evidence relevant to the issue of paternity of the child.

History: En. 61-313 by Sec. 13, Ch. 512, L. 1975; R.C.M. 1947, 61-313.

Cross-References

Basis of opinion testimony by experts, Rule 703, M.R.Ev. (see Title 26, ch. 10).

Opinions on ultimate issue, Rule 704, M.R.Ev. (see Title 26, ch. 10).

40-6-114. Pretrial recommendations. (1) On the basis of the information produced at the pretrial hearing, the judge or referee conducting the hearing shall evaluate the probability of determining the existence or nonexistence of the father and child relationship in a trial and whether a judicial declaration of the relationship would be in the best interest of the child. On the basis of the evaluation, an appropriate recommendation for settlement shall be made to the parties, which may include any of the following:

(a) that the action be dismissed with or without prejudice;

(b) that the matter be compromised by an agreement among the alleged father, the mother, and the child, in which the father and child relationship is not determined but in which a defined economic obligation is undertaken by the alleged father in favor of the child and, if appropriate, in favor of the mother, subject to approval by the judge or referee conducting the hearing. In reviewing the obligation undertaken by the alleged father in a compromise agreement, the judge or referee conducting the hearing shall consider the best interest of the child in the light of the factors enumerated in 40-6-116(5), discounted by the improbability, as it appears to him, of establishing the alleged father's paternity or nonpaternity of the child in a trial of the action. In the best interest of the child, the court may order that the alleged father's identity be kept confidential. In that case, the court may designate a person or agency to receive from the alleged father and disburse on behalf of the child all amounts paid by the alleged father in fulfillment of obligations imposed on him.

(c) that the alleged father voluntarily acknowledge his paternity of the child.

(2) If the parties accept a recommendation made in accordance with subsection (1), judgment shall be entered accordingly.

(3) If a party refuses to accept a recommendation made under subsection (1) and blood tests have not been taken, the court shall require the parties to submit to blood tests, if practicable. Thereafter the judge or referee shall make an appropriate final recommendation. If a party refuses to accept the final recommendation, the action shall be set for trial.

(4) If the scientific evidence resulting from the blood tests conclusively shows that the defendant could not have been the father, then the instant action shall be dismissed.

(5) The guardian ad litem may accept or refuse to accept a recommendation under this section.

(6) The informal hearing may be terminated and the action set for trial if the judge or referee conducting the hearing finds unlikely that all parties would accept a recommendation he might make under subsection (1) or (3).

History: En. 61-314 by Sec. 14, Ch. 512, L. 1975; R.C.M. 1947, 61-314.

Cross-References

Guardian ad litem, 25-5-301.

Pretrial procedure — formulating issues — scheduling, Rule 16, M.R.Civ.P. (see Title 25, ch. 20).

Physical and mental examination of persons, Rule 35, M.R.Civ.P. (see Title 25, ch. 20).

Best interests of child, 40-4-212.

40-6-115. Civil action. (1) An action under this part is a civil action governed by the rules of civil procedure. The mother of the child and the alleged father are competent to testify and may be compelled to testify. Sections 40-6-111(2), 40-6-112, and 40-6-113 apply to all actions brought under this part.

(2) Testimony relating to sexual access to the mother by an unidentified person at any time or by an identified person at a time other than the probable time of conception of the child is inadmissible in evidence, unless offered by the mother.

(3) In an action against an alleged father, evidence offered by the alleged father with respect to a person who is not subject to the jurisdiction of the court concerning sexual intercourse with the mother at or about the probable time of conception of the child is admissible in evidence only if the alleged father has undergone and made available to the court blood tests, the results of which do not exclude the possibility of the alleged father's paternity of the child. A person who is identified and is subject to the jurisdiction of the court must be made a defendant in the action.

(4) If a blood test has been initially ordered under this part and a party objects to the blood test results, the objection must be filed within 20 days after service of the blood test results. If an objection is filed, and upon the alleged father's advance payment for additional testing, the court shall order an additional blood test. If no objection is made, the test results are admissible as evidence of paternity without the need for foundation testimony or other proof of authenticity or accuracy. This subsection does not limit the right of a party to contest the identity of persons submitting to testing.

(5) If the alleged father fails to answer or to appear at a scheduled hearing or for a scheduled blood test, the district court shall enter an order declaring the alleged father the legal father of the child. The district court may not enter an order under this section if there is more than one alleged father unless the

default applies to only one of them and all others have been excluded by the results of blood testing.

(6) Bills for pregnancy, childbirth, and paternity blood testing are admissible as evidence without third-party foundation testimony and are prima facie evidence of the amounts incurred.

History: En. 61-315 by Sec. 15, Ch. 512, L. 1975; R.C.M. 1947, 61-315; amd. Sec. 8, Ch. 70, L. 1995; amd. Sec. 88, Ch. 552, L. 1997.

Cross-References

Joinder of persons needed for just adjudication, Rule 19, M.R.Civ.P. (see Title 25, ch. 20).

Physical and mental examination of persons, Rule 35, M.R.Civ.P. (see Title 25, ch. 20).

Entry of judgment, Rule 58, M.R.Civ.P. (see Title 25, ch. 20).

40-6-116. Judgment or order. (1) The judgment or order of the court determining the existence or nonexistence of the parent and child relationship is determinative for all purposes.

(2) If the judgment or order of the court is at variance with the child's birth certificate, the court shall order that a substitute birth certificate be issued under 40-6-123.

(3) (a) The judgment or order may contain any other provision directed against the appropriate party to the proceeding concerning the custody and guardianship of the child, visitation privileges with the child, the furnishing of bond or other security for the payment of the judgment, or any other matter in the best interest of the child.

(b) Except when the financial responsibility of a responsible parent is in the process of being determined pursuant to the administrative procedure provided in 40-5-225, the judgment or order must contain a provision concerning the duty of child support.

(c) The judgment or order may direct the father to pay the reasonable expenses of the mother's pregnancy and confinement.

(4) (a) Support judgments or orders ordinarily must be for periodic payments, which may vary in amount.

(b) In the best interest of the child, a lump-sum payment or the purchase of an annuity may be ordered in lieu of periodic payments of support.

(c) The court may limit the father's liability for past support of the child to the proportion of the expenses already incurred that the court considers just.

(5) In determining the amount to be paid by a parent for support of the child and the period during which the duty of support is owed, a court enforcing the obligation of support shall consider all relevant facts, including:

(a) the needs of the child, including medical needs;

(b) the standard of living and circumstances of the parents;

(c) the relative financial means of the parents;

(d) the earning ability of the parents;

(e) the need and capacity of the child for education, including higher education;

(f) the age of the child;

(g) the financial resources and the earning ability of the child;

(h) the responsibility of the parents for the support of others;

(i) the value of services contributed by the custodial parent;

(j) the cost of day care for the child; and

(k) any custody arrangement that is ordered or decided upon.

(6) (a) Whenever a court issues or modifies an order concerning child support, the court shall determine the child support obligation by applying the standards in this section and the uniform child support guidelines adopted by the department of public health and human services pursuant to 40-5-209. The guidelines must be used in all cases, including cases in which the order is entered upon the default of a party and those in which the parties have entered into an agreement regarding the support amount. A verified representation of a defaulting parent's income, based on the best information available, may be used when a parent fails to provide financial information for use in applying the guidelines. The amount determined under the guidelines is presumed to be an adequate and reasonable support award, unless the court finds by clear and convincing evidence that the application of the standards and guidelines is unjust to the child or to any of the parties or is inappropriate in that particular case.

(b) If the court finds that the guideline amount is unjust or inappropriate in a particular case, it shall state its reasons for finding that the application of the standards and guidelines is unjust to the child or a party or is inappropriate in that particular case. Similar reasons must also be stated in a case in which the parties have agreed to a support amount that varies from the guideline amount. Findings that rebut and vary the guideline amount must include a statement of the amount of support that would have ordinarily been ordered under the guidelines.

(c) If the court does not order a parent owing a duty of support to a child to pay any amount for the child's support, the court shall state its reasons for not ordering child support.

(d) Child support obligations established under this section are subject to the registration and processing provisions of chapter 5, part 9.

(7) The judgment or order, whether temporary or final, concerning child support and each modification of a judgment or order for child support must include a medical support order as defined in 40-5-804.

(8) (a) Unless an exception is found under 40-5-315 or 40-5-411 and the exception is included in the support order, a support obligation established by judgment, decree, or order under this section, whether temporary or final, and each modification of an existing support obligation made under 40-6-118 must be enforced by immediate or delinquency income withholding, or both, under Title 40, chapter 5, part 3 or 4. A support order that omits the exception or that provides for a payment arrangement inconsistent with this section is nevertheless subject to withholding for the payment of support without need for an amendment to the support order or for any further action by the court.

(b) If a support order subject to income withholding is expressed in terms of a monthly obligation, the order may be annualized and withheld on a weekly or biweekly basis, corresponding to the obligor's regular pay period.

(c) If an obligor is excepted from paying support through income withholding, the support order must include as part of the order a requirement that whenever the case is receiving services under Title IV-D of the Social Security Act, support payments must be paid through the department of public health and human services as provided in 40-5-909.

(9) (a) If the district court establishes paternity or establishes or modifies a child support obligation, the judgment, decree, or order must include a provision requiring the parties to promptly file with the court and to update, as necessary, information on:

(i) identity of the party;

[(ii) social security number;]

(iii) residential and mailing addresses;

(iv) telephone number;

(v) driver's license number;

(vi) name, address, and telephone number of the party's employer; and

(vii) if the child is covered by a health or medical insurance plan, the name of the insurance carrier or health benefit plan, the policy identification number, the name of the persons covered, and any other pertinent information regarding coverage or, if the child is not covered, information as to the availability of coverage for the child through the party's employer.

(b) The order must further direct that in any subsequent child support enforcement action, upon sufficient showing that diligent effort has been made to ascertain the location of the party, the district court or the department of public health and human services, if the department is providing services under Title IV-D of the Social Security Act, may consider the due process requirements for notice and service of process to be met with respect to the party upon delivery of written notice by regular mail to the most recent address of the party or the party's employer's address reported to the court.

(10) Each district court judgment, decree, or order establishing a final child support obligation under this part and each modification of a final order for child support must contain a statement that the order is subject to review and modification by the department of public health and human services upon the request of the department or a party under 40-5-271 through 40-5-273 when the department is providing services under Title IV-D of the Social Security Act for the enforcement of the order.

[(11) The social security number of a person subject to a paternity determination under this part must be recorded in the records relating to the matter. The recordkeeper shall keep the social security number from this source confidential, except that the number may be provided to the department of public health and human services for use in administering Title IV-D of the Social Security Act.] *(Bracketed language terminates on occurrence of contingency—sec. 1, Ch. 27, L. 1999.)*

History: En. 61-316 by Sec. 16, Ch. 512, L. 1975; R.C.M. 1947, 61-316; amd. Sec. 2, Ch. 702, L. 1989; amd. Sec. 7, Ch. 266, L. 1991; amd. Sec. 2, Ch. 635, L. 1991; amd. Sec. 4, Ch. 294, L. 1993; amd. Sec. 21, Ch. 631, L. 1993; amd. Sec. 31, Ch. 504, L. 1995; amd. Sec. 147, Ch. 546, L. 1995; amd. Sec. 89, Ch. 552, L. 1997.

Compiler's Comments

Contingent Termination — Request for Federal Exemptions: Section 1, Ch. 27, L. 1999, revised sec. 104, Ch. 552, L. 1997, to contain the following contingent termination provisions and order that the department of public health and human services seek federal exemptions: "(1) [Sections 9, 11, 22 through 24, and 95] [37-1-307, 40-1-107, 40-4-105, 40-5-922, 40-5-924, and 61-5-107] and the bracketed language in [sections 1 through 3, 10, 25, 45, and 89] [40-4-204, 40-5-226, 40-5-901, 40-5-906, 40-5-907, 40-5-923, and 40-6-116] terminate on the date of the suspension if the federal government suspends federal payments to this state for this state's child support enforcement program and for this state's program relating to temporary assistance to needy families because of this state's failure to enact law as required by the federal Personal Responsibility and Work Opportunity Reconciliation Act of 1996.

(2) [Sections 9, 11, 22 through 24, and 95] [37-1-307, 40-1-107, 40-4-105, 40-5-922, 40-5-924, and 61-5-107] and the bracketed language in [sections 1 through 3, 10, 25, 45, and 89] [40-4-204, 40-5-226, 40-5-901, 40-5-906, 40-5-907, 40-5-923, and 40-6-116] terminate on the date that a final decision is rendered in federal court invalidating the child support provisions of the federal Personal Responsibility and Work Opportunity Reconciliation Act of 1996.

(3) If the director of the department of public health and human services certifies to the governor and the secretary of state in writing that one of the following provisions is no longer required by federal law because of repeal of or amendment to federal statutes that require that provision, the provision terminates on the date the certification takes effect:

(a) [section 9] [40-5-922];

(b) [section 11] [40-5-924];

(c) [sections 22 through 24] [37-1-307, 40-1-107, and 40-4-105];

(d) [section 95] [61-5-107];

(e) the bracketed provisions in [sections 1 through 3, 10, 25, 45, and 89] [40-4-204, 40-5-226, 40-5-901, 40-5-906, 40-5-907, 40-5-923, and 40-6-116].

(4) If the bracketed language in [sections 1 through 3, 10, 25, 45, and 89] [40-4-204, 40-5-226, 40-5-901, 40-5-906, 40-5-907, 40-5-923, and 40-6-116] terminates, the code commissioner is instructed to renumber subsections, adjust internal references, and correct grammar and arrangement." Amendment effective February 18, 1999.

Cross-References

Property exempt from execution — earnings of judgment debtor, 25-13-614.

Entry of judgment, Rule 58, M.R.Civ.P. (see Title 25, ch. 20).

Necessity determined by standard of living, 40-2-210.

Child support, 40-4-204.

Best interests of child, 40-4-212.

Parental contact, 40-4-217.

Enforcement of support, Title 40, ch. 5.

Obligations of parents for support and education of their children, 40-6-211.

Remedy when parent dies without providing for support of child, 40-6-213.

Parenting, services, and earnings of child, 40-6-221.

New birth certificate upon proof of legitimation, 50-15-207.

40-6-117. Enforcement of judgment or order. (1) If existence of the father and child relationship is declared or paternity or a duty of support has been acknowledged or adjudicated under this part or under prior law, the court may, except as provided in 40-5-909 and 40-6-116(8), order support payments to be made to the mother, the clerk of the court, or a person, corporation, or agency designated to administer them for the benefit of the child under the supervision of the court.

(2) Full faith and credit must be given to a determination of paternity made by any other state, whether presumed by law, established through voluntary acknowledgment, or established by administrative or judicial processes.

(3) Willful failure to obey the judgment or order of the court is a civil contempt of the court. All remedies for the enforcement of judgments apply.

(4) (a) A district court judgment, decree, or order that establishes or modifies a child support obligation must include a provision requiring the child support obligation to be paid, without need for further order of the court, to:

(i) the legal custodian of the minor child;

(ii) a person, organization, or agency to which the legal custodian voluntarily or involuntarily relinquishes actual physical custody of the child; or

(iii) any other person, organization, or agency entitled by law, assignment, or similar reason to receive or collect the child support obligation.

(b) If the department of public health and human services is providing services under Title IV-D of the Social Security Act, payment of support must be made through the department for distribution to the person, organization, or agency entitled to the payment.

(c) A judgment, decree, or order that omits the provision required by subsection (4)(a) is subject to the requirements of subsection (4)(a) without need for an amendment to the judgment, decree, or order or for any further action by the court.

History: En. 61-318 by Sec. 18, Ch. 512, L. 1975; R.C.M. 1947, 61-318; amd. Sec. 22, Ch. 631, L. 1993; amd. Sec. 9, Ch. 70, L. 1995; amd. Sec. 90, Ch. 552, L. 1997.

Cross-References

Contempts, Title 3, ch. 1, part 5.

Judgments — method of enforcement, Title 25, ch. 13, part 2.

Enforcement of order to pay money, 25-13-204.

Civil Liability, Remedies, and Limitations, Title 27.

Payment of maintenance or support to court, 40-4-206.

40-6-118. Modification of judgment or order. The court has continuing jurisdiction to modify or revoke a judgment or order:

(1) for future education and support; and

(2) with respect to matters listed in 40-6-116(3), 40-6-116(4), and 40-6-117(3), except that a court entering a judgment or order for the payment of a lump sum or the purchase of an annuity under 40-6-116(4) may specify that the judgment or order may not be modified or revoked.

History: En. 61-319 by Sec. 19, Ch. 512, L. 1975; R.C.M. 1947, 61-319; amd. Sec. 10, Ch. 70, L. 1995.

Cross-References

Child support, 40-4-204.

Modification and termination of provisions for maintenance, support, and property disposition, 40-4-208.

Obligations of parents for support and education of their children, 40-6-211.

40-6-119. Right to counsel — payment of counsel fees and costs — free transcript on appeal. (1) At the pretrial hearing and in further proceedings, any party may be represented by counsel. The court shall appoint counsel for a party who is financially unable to obtain counsel.

(2) The court may order reasonable fees of counsel, experts, and the child's guardian ad litem and other costs of the action and pretrial proceedings, including blood test costs, to be paid by the parties in proportions and at times determined by the court.

(3) If a party is financially unable to pay the cost of a transcript, the court shall furnish on request a transcript for purposes of appeal.

History: En. 61-320 by Sec. 20, Ch. 512, L. 1975; R.C.M. 1947, 61-320; amd. Sec. 1, Ch. 282, L. 1995.

Cross-References

Right to counsel, Art. II, sec. 24, Mont. Const.

Transcript of proceedings, 3-5-604.

40-6-120. Hearings and records — confidentiality. Notwithstanding any other law concerning public hearings and records, any hearing or trial held under this part shall be held in closed court without admittance of any person other than those necessary to the action or proceeding. All papers and records, other than the final judgment, pertaining to the action or proceeding, whether part of the permanent record of the court or of a file in any agency of the state or of any political subdivision or elsewhere, are subject to inspection only upon consent of the court and all interested persons or in exceptional cases only upon an order of the court for good cause shown.

History: En. 61-321 by Sec. 21, Ch. 512, L. 1975; R.C.M. 1947, 61-321.

Cross-References

Right to know, Art. II, sec. 9, Mont. Const.

Sittings of court — when private, 3-1-313.

40-6-121. Action to declare mother and child relationship. Any interested party may bring an action to determine the existence or nonexistence of a mother and child relationship. Insofar as practicable, the provisions of this part applicable to the father and child relationship apply.

History: En. 61-322 by Sec. 22, Ch. 512, L. 1975; R.C.M. 1947, 61-322.

40-6-122. Promise to render support. (1) Any promise in writing to furnish support for a child growing out of a supposed or alleged father and child relationship does not require consideration and is enforceable according to its terms, subject to 40-6-107(4).

(2) In the best interest of the child or the mother, the court may, and upon the promisor's request shall, order the promise to be kept in confidence and designate a person or agency to receive and disburse on behalf of the child all amounts paid in performance of the promise.

History: En. 61-323 by Sec. 23, Ch. 512, L. 1975; amd. Sec. 22, Ch. 33, L. 1977; R.C.M. 1947, 61-323.

Cross-References

Contracts that violate policy of law — exemption from responsibility, 28-2-702.

Restraints upon legal proceedings void, 28-2-708.

Consideration, Title 28, ch. 2, part 8.

Best interests of child, 40-4-212.

40-6-123. Birth records. (1) Upon order of a court of this state or upon request of a court of another state, the department of public health and human services shall prepare a substitute certificate of birth consistent with the findings of the court and shall substitute the new certificate for the original certificate of birth.

(2) The fact that the father and child relationship was declared after the child's birth may not be ascertainable from the new certificate, but the actual place and date of birth must be shown.

(3) The evidence upon which the new certificate was made and the original birth certificate must be kept in a sealed and confidential file and are subject to inspection only upon consent of the court and all interested persons or in exceptional cases only upon an order of the court for good cause shown.

History: En. 61-324 by Sec. 24, Ch. 512, L. 1975; R.C.M. 1947, 61-324; amd. Sec. 82, Ch. 418, L. 1995; amd. Sec. 148, Ch. 546, L. 1995.

Cross-References

Child of unknown parentage, 50-15-203.

Delayed or amended birth certificate, 50-15-204.

New birth certificate upon proof of legitimation, 50-15-207.

40-6-124. Repealed. Sec. 15, Ch. 530, L. 1981.

History: En. 61-328 by Sec. 1, Ch. 422, L. 1977; R.C.M. 1947, 61-328.

40-6-125 through 40-6-130. Repealed. Sec. 171, Ch. 480, L. 1997.

Compiler's Comments

Histories of Repealed Sections:

40-6-125. En. 61-329 by Sec. 2, Ch. 422, L. 1977; R.C.M. 1947, 61-329; amd. Sec. 4, Ch. 530, L. 1981; amd. Sec. 2, Ch. 1, Sp. L. 1981; amd. Sec. 1, Ch. 683, L. 1991; amd. Sec. 3, Ch. 458, L. 1995.

40-6-126. En. 61-330 by Sec. 3, Ch. 422, L. 1977; R.C.M. 1947, 61-330; amd. Sec. 83, Ch.

418, L. 1995; amd. Sec. 4, Ch. 458, L. 1995; amd. Sec. 149, Ch. 546, L. 1995.

40-6-127. En. 61-331 by Sec. 4, Ch. 422, L. 1977; R.C.M. 1947, 61-331.

40-6-128. En. 61-332 by Sec. 5, Ch. 422, L. 1977; R.C.M. 1947, 61-332; amd. Sec. 84, Ch. 418, L. 1995; amd. Sec. 150, Ch. 546, L. 1995.

40-6-129. En. 61-333 by Sec. 6, Ch. 422, L. 1977; R.C.M. 1947, 61-333.

40-6-130. En. 61-334 by Sec. 7, Ch. 422, L. 1977; R.C.M. 1947, 61-334.

40-6-131. Uniformity of application and construction. This part shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of this part among states enacting it.

History: En. 61-327 by Sec. 29, Ch. 512, L. 1975; R.C.M. 1947, 61-327.

40-6-132. Repealed. Sec. 5, Ch. 1, Sp. L. 1981.

History: En. Sec. 1, Ch. 530, L. 1981.

40-6-133. Repealed. Sec. 5, Ch. 1, Sp. L. 1981.

History: En. Sec. 2, Ch. 530, L. 1981.

40-6-134. Repealed. Sec. 5, Ch. 1, Sp. L. 1981.

History: En. Sec. 3, Ch. 530, L. 1981.

40-6-135. Repealed. Sec. 171, Ch. 480, L. 1997.

History: En. Sec. 1, Ch. 1, Sp. L. 1981; amd. Sec. 1, Ch. 225, L. 1987; amd. Sec. 2, Ch. 683, L. 1991; amd. Sec. 151, Ch. 546, L. 1995.

Part 2
Obligations of Parents

Part Cross-References

Mandatory child safety restraint systems, 61-9-419 through 61-9-423.

40-6-201. Legitimacy of children born in wedlock. All children born in wedlock are presumed to be legitimate.

History: En. Sec. 280, Civ. C. 1895; re-en. Sec. 3738, Rev. C. 1907; re-en. Sec. 5830, R.C.M. 1921; Cal. Civ. C. Sec. 193; Field Civ. C. Sec. 86; re-en. Sec. 5830, R.C.M. 1935; R.C.M. 1947, 61-101.

Cross-References

Presumption of legitimacy, 26-1-602.

Presumptions, Art. III, M.R.Ev. (see Title 26, ch. 10).

Birth — vital statistics, Title 50, ch. 15, part 2.

40-6-202. Legitimacy of children born after dissolution of marriage. All children of a woman who has been married, born within 10 months after the dissolution of her marriage, are presumed to be legitimate children of that marriage.

History: En. Sec. 281, Civ. C. 1895; re-en. Sec. 3739, Rev. C. 1907; re-en. Sec. 5831, R.C.M. 1921; Cal. Civ. C. Sec. 194; Based on Field Civ. C. Sec. 87; re-en. Sec. 5831, R.C.M. 1935; R.C.M. 1947, 61-102.

Cross-References

Complete list of conclusive presumptions, 26-1-601.

Presumption of legitimacy, 26-1-602.

Birth — vital statistics, Title 50, ch. 15, part 2.

40-6-203. Child legitimatized by marriage of parents. A child born before wedlock becomes legitimate by the subsequent marriage of its parents.

History: **En. Sec. 11, p. 410, Bannack Stat.; re-en. Sec. 11, p. 521, Cod. Stat. 1871; re-en. Sec. 864, 5th Div. Rev. Stat. 1879; re-en. Sec. 1425, 5th Div. Comp. Stat. 1887; amd. Sec. 302, Civ. C. 1895; re-en. Sec. 3760, Rev. C. 1907; re-en. Sec. 5852, R.C.M. 1921; Cal. Civ. C. Sec. 215; re-en. Sec. 5852, R.C.M. 1935; R.C.M. 1947, 61-123.**

Cross-References

Form of application, license, marriage certificate, and consent — names of children included, 40-1-107.

New birth certificate upon proof of legitimation, 50-15-207.

40-6-204 through 40-6-210 reserved.

40-6-211. Obligations of parents for the support and education of their children. The parent or parents of a child shall give the child support and education suitable to the child's circumstances.

History: **En. Sec. 283, Civ. C. 1895; re-en. Sec. 3741, Rev. C. 1907; re-en. Sec. 5833, R.C.M. 1921; Cal. Civ. C. Sec. 196; Field Civ. C. Sec. 89; re-en. Sec. 5833, R.C.M. 1935; amd. Sec. 21, Ch. 293, L. 1975; R.C.M. 1947, 61-104; amd. Sec. 30, Ch. 343, L. 1997.**

Cross-References

Earnings and accumulations of married persons, 40-2-205.

Earnings and accumulations of married persons when separated, 40-2-206.

Work and labor of married person, 40-2-207.

Individual property of married person — how far liable, 40-2-209.

Necessity determined by standard of living, 40-2-210.

Nonsupport, 45-5-621.

Endangering welfare of children, 45-5-622.

40-6-212. Allowance to parent. The proper court may direct an allowance to be made to the parent of a child out of the child's property for the past or future support and education of the child, on such conditions as may be proper, whenever such direction is for the child's benefit.

History: **En. Sec. 288, Civ. C. 1895; re-en. Sec. 3746, Rev. C. 1907; re-en. Sec. 5838, R.C.M. 1921; Cal. Civ. C. Sec. 201; Field Civ. C. Sec. 92; re-en. Sec. 5838, R.C.M. 1935; amd. Sec. 14, Ch. 33, L. 1977; R.C.M. 1947, 61-109.**

Cross-References

Duty of child to support indigent parents, 40-6-301.

40-6-213. Remedy when parent dies without providing for support of child. If a parent chargeable with the support of a child dies leaving the child chargeable to the county and leaving an estate sufficient for the child's support, the county commissioners of the county may claim provision for the child's support from the parent's estate by civil action and for this purpose may have the same remedies as any creditors against that estate and against the heirs, devisees, and the next of kin of the parent.

History: **En. Sec. 292, Civ. C. 1895; re-en. Sec. 3750, Rev. C. 1907; re-en. Sec. 5842, R.C.M. 1921; Cal. Civ. C. Sec. 205; Based on Field Civ. C. Sec. 96; re-en. Sec. 5842, R.C.M. 1935; amd. Sec. 15, Ch. 33, L. 1977; R.C.M. 1947, 61-113.**

Cross-References

Child support, 40-4-204.

Modification and termination of support, 40-4-208.

UPC — estates — creditors' claims, Title 72, ch. 3, part 8.

40-6-214. Reciprocal duties of parents and children in maintaining each other. It is the duty of the father, the mother, and the children of any poor person who is unable to maintain himself by work to maintain such person to the extent of their ability. The promise of an adult child to pay for necessaries previously furnished to such parent is binding.

History: En. Sec. 293, Civ. C. 1895; re-en. Sec. 3751, Rev. C. 1907; re-en. Sec. 5843, R.C.M. 1921; Cal. Civ. C. Sec. 206; Field Civ. C. Sec. 97; re-en. Sec. 5843, R.C.M. 1935; R.C.M. 1947, 61-114.

Cross-References

Earnings and accumulations of married person, 40-2-205.

Earnings and accumulations of married person when separated, 40-2-206.

Work and labor of married person, 40-2-207.

Individual property of married person — how far liable, 40-2-209.

Necessity determined by standard of living, 40-2-210.

Duty of child to support indigent parents, 40-6-301.

Minor cannot disaffirm contract for necessaries, 41-1-305.

40-6-215. When parent liable for necessaries supplied to child. If a parent neglects to provide articles necessary for his child under his charge, according to his circumstances, a third person may in good faith supply such necessaries and recover the reasonable value thereof from the parent.

History: En. Sec. 294, Civ. C. 1895; re-en. Sec. 3752, Rev. C. 1907; re-en. Sec. 5844, R.C.M. 1921; Cal. Civ. C. Sec. 207; Field Civ. C. Sec. 98; re-en. Sec. 5844, R.C.M. 1935; R.C.M. 1947, 61-115.

Cross-References

Earnings and accumulations of married person, 40-2-205.

Earnings and accumulations of married person when separated, 40-2-206.

Work and labor of married person, 40-2-207.

Individual property of married person — how far liable, 40-2-209.

Necessity determined by standard of living, 40-2-210.

Minor cannot disaffirm contract for necessaries, 41-1-305.

Parents liable to Department for public assistance payments, 53-4-248.

40-6-216. When parent not liable for support furnished child. A parent is not bound to compensate the other parent or a relative for the voluntary support of his child, without an agreement for compensation, or to compensate a stranger for the support of a child who has abandoned the parent without just cause.

History: En. Sec. 295, Civ. C. 1895; re-en. Sec. 3753, Rev. C. 1907; re-en. Sec. 5845, R.C.M. 1921; Cal. Civ. C. Sec. 208; Field Civ. C. Sec. 99; re-en. Sec. 5845, R.C.M. 1935; R.C.M. 1947, 61-116.

Cross-References

Liability for acts or debts of spouse, 40-2-106.

Individual property of married person — how far liable, 40-2-209.

Necessity determined by standard of living, 40-2-210.

Minor cannot disaffirm contract for necessaries, 41-1-305.

40-6-217. Married person not bound for support of spouse's children by former marriage. A married person is not bound to support his spouse's children by a former marriage; but if he receives them into his family and supports them, it is presumed that he does so as a parent and, where such is the case, they are not liable to him for their support nor he to them for their services.

History: En. Sec. 296, Civ. C. 1895; re-en. Sec. 3754, Rev. C. 1907; re-en. Sec. 5846, R.C.M. 1921; Cal. Civ. C. Sec. 209; Field Civ. C. Sec. 100; re-en. Sec. 5846, R.C.M. 1935; amd. Sec. 22, Ch. 293, L. 1975; R.C.M. 1947, 61-117.

Cross-References

Debts of spouse contracted before marriage, 40-2-208.

40-6-218. Compensation and support of person after attaining majority. Where a person, after attaining majority, continues to serve and to be supported by the parent, neither party is entitled to compensation, in the absence of an agreement therefor.

History: **En. Sec. 297, Civ. C. 1895; re-en. Sec. 3755, Rev. C. 1907; re-en. Sec. 5847, R.C.M. 1921; Cal. Civ. C. Sec. 210; Field Civ. C. Sec. 101; re-en. Sec. 5847, R.C.M. 1935; amd. Sec. 16, Ch. 33, L. 1977; R.C.M. 1947, 61-118.**

Cross-References

Minors and adults defined, 41-1-101.

40-6-219 and 40-6-220 reserved.

40-6-221. Parenting, services, and earnings of child. The father and mother of an unmarried minor child are equally entitled to the parenting, services, and earnings of the child. If either parent is dead or unable or refuses to exercise parenting or has abandoned the family, the other parent is entitled to the parenting, services, and earnings of the child, unless care of the child is determined otherwise pursuant to 40-4-221.

History: **En. Sec. 284, Civ. C. 1895; re-en. Sec. 3742, Rev. C. 1907; amd. Sec. 1, Ch. 61, L. 1915; re-en. Sec. 5834, R.C.M. 1921; Cal. Civ. C. Sec. 197; Based on Field Civ. C. Sec. 90; re-en. Sec. 5834, R.C.M. 1935; amd. Sec. 26, Ch. 512, L. 1975; amd. Sec. 13, Ch. 33, L. 1977; R.C.M. 1947, 61-105; amd. Sec. 5, Ch. 127, L. 1979; amd. Sec. 31, Ch. 343, L. 1997.**

Cross-References

Best interests of child, 40-4-212.

Minor cannot disaffirm contract for necessaries, 41-1-305.

Child labor, Title 41, ch. 2.

40-6-222. Repealed. Sec. 39, Ch. 343, L. 1997.

History: **En. Sec. 285, Civ. C. 1895; re-en. Sec. 3743, Rev. C. 1907; re-en. Sec. 5835, R.C.M. 1921; Cal. Civ. C. Sec. 198; re-en. Sec. 5835, R.C.M. 1935; R.C.M. 1947, 61-106.**

40-6-223. Repealed. Sec. 39, Ch. 343, L. 1997.

History: **En. Sec. 286, Civ. C. 1895; re-en. Sec. 3744, Rev. C. 1907; re-en. Sec. 5836, R.C.M. 1921; Cal. Civ. C. Sec. 199; re-en. Sec. 5836, R.C.M. 1935; R.C.M. 1947, 61-107.**

40-6-224. Repealed. Sec. 39, Ch. 343, L. 1997.

History: **En. Sec. 301, Civ. C. 1895; re-en. Sec. 3759, Rev. C. 1907; re-en. Sec. 5851, R.C.M. 1921; Cal. Civ. C. Sec. 214; Field Civ. C. Sec. 106; re-en. Sec. 5851, R.C.M. 1935; amd. Sec. 17, Ch. 33, L. 1977; R.C.M. 1947, 61-122.**

40-6-225 through 40-6-230 reserved.

40-6-231. Repealed. Sec. 39, Ch. 343, L. 1997.

History: **En. Sec. 300, Civ. C. 1895; re-en. Sec. 3758, Rev. C. 1907; re-en. Sec. 5850, R.C.M. 1921; Cal. Civ. C. Sec. 213; Field Civ. C. Sec. 104; re-en. Sec. 5850, R.C.M. 1935; R.C.M. 1947, 61-121.**

40-6-232. Parental control over property of child. The parent, as such, has no control over the property of the child.

History: **En. Sec. 289, Civ. C. 1895; re-en. Sec. 3747, Rev. C. 1907; re-en. Sec. 5839, R.C.M. 1921; Cal. Civ. C. Sec. 202; Field Civ. C. Sec. 93; re-en. Sec. 5839, R.C.M. 1935; R.C.M. 1947, 61-110.**

Cross-References

Rights of persons not adults, Art. II, sec. 15, Mont. Const.

Enforcement of minor's rights, 41-1-202.

Delegation of power by minors forbidden, 41-1-301.

40-6-233. Remedy for parental abuse. The abuse of parental authority is the subject of judicial cognizance in a civil action brought by the child or by its relative within the third degree or by the county commissioners of the county where the child resides. When the abuse is established, the child may be freed from the dominion of the parent and the duty of support and education enforced. A parent or guardian of a child has the right to give the child medicine prescribed for the child, and exercise of the right is not an abuse of parental authority.

History: **En. Sec. 290, Civ. C. 1895; re-en. Sec. 3748, Rev. C. 1907; re-en. Sec. 5840, R.C.M. 1921; Cal. Civ. C. Sec. 203; Based on Field Civ. C. Sec. 94; re-en. Sec. 5840, R.C.M. 1935; R.C.M. 1947, 61-111; amd. Sec. 1, Ch. 528, L. 1995.**

Cross-References

Child abuse, neglect, and dependency, Title 41, ch. 3.

Endangering welfare of children, 45-5-622.

Sexual abuse of children, 45-5-625.

40-6-234. When parental authority ceases. The authority of the parent ceases:

(1) upon the appointment, by a court, of a guardian of the person of a child;
(2) upon the marriage of a child; or
(3) upon its attaining majority.

History: **En. Sec. 291, Civ. C. 1895; re-en. Sec. 3749, Rev. C. 1907; re-en. Sec. 5841, R.C.M. 1921; Cal. Civ. C. Sec. 204; Field Civ. C. Sec. 95; re-en. Sec. 5841, R.C.M. 1935; R.C.M. 1947, 61-112.**

Cross-References

Marriage, Title 40, ch. 1.

Best interests of child, 40-4-212.

Minors and adults defined, 41-1-101.

Dispositional hearing — abuse, neglect, and dependency, 41-3-406.

Limited emancipation at age 16, 41-3-408.

UPC — guardians of minors, Title 72, ch. 5, part 2.

40-6-235. Parent may relinquish services and custody of child. The parent, whether solvent or insolvent, may relinquish to the child the right of controlling him and receiving his earnings. Abandonment by the parent is presumptive evidence of such relinquishment.

History: **En. Sec. 298, Civ. C. 1895; re-en. Sec. 3756, Rev. C. 1907; re-en. Sec. 5848, R.C.M. 1921; Cal. Civ. C. Sec. 211; Field Civ. C. Sec. 102; re-en. Sec. 5848, R.C.M. 1935; R.C.M. 1947, 61-119.**

Cross-References

Service of summons — how abandonment established, 41-5-1404.

Endangering welfare of children, 45-5-622.

40-6-236. Wages of minors. The wages of a minor employed in service may be paid him until the parent or guardian entitled thereto gives the employer notice that he claims such wages.

History: **En. Sec. 299, Civ. C. 1895; re-en. Sec. 3757, Rev. C. 1907; re-en. Sec. 5849, R.C.M. 1921; Cal. Civ. C. Sec. 212; Based on Field Civ. C. Sec. 103; re-en. Sec. 5849, R.C.M. 1935; R.C.M. 1947, 61-120.**

Cross-References

Payment of wages generally, 39-3-204.

Child labor, Title 41, ch. 2, part 1.

40-6-237. Destruction of property by minor — liability of parents. Any municipal corporation, county, city, town, school district, or department of the state of Montana, any person, or any religious organization whether incorporated or unincorporated is entitled to recover damages in a civil action in an amount not to exceed $2,500 in a court of competent jurisdiction from the parents of any person under the age of 18 years, living with the parents, who shall maliciously or willfully destroy property, real, personal, or mixed, belonging to such municipal corporation, county, city, town, school district, department of the state of Montana, person, or religious organization.

History: **En. Sec. 1, Ch. 195, L. 1957; amd. Sec. 1, Ch. 227, L. 1977; R.C.M. 1947, 61-112.1; amd. Sec. 1, Ch. 560, L. 1981.**

Cross-References

Duties and sanctions — suspension and expulsion of pupils, 20-5-201.

Montana Youth Court Act — purpose, 41-5-102.

Criminal mischief, 45-6-101.

Application of minors for drivers' licenses — imputed liability, 61-5-108.

Liability of parent or guardian for minor's damage to public accommodation, 70-6-514.

40-6-238. Limitation on amount of recovery. The recovery shall be limited to the actual damages in an amount not to exceed $2,500 in addition to taxable court costs and a reasonable attorney's fee to be set by the court not to exceed $100. The right to recover attorney fees as provided by this section is limited to a person bringing an action under 40-6-237.

History: **En. Sec. 2, Ch. 195, L. 1957; amd. Sec. 1, Ch. 178, L. 1971; amd. Sec. 2, Ch. 227, L. 1977; R.C.M. 1947, 61-112.2; amd. Sec. 2, Ch. 560, L. 1981.**

Cross-References

Duties and sanctions — suspension and expulsion of pupils, 20-5-201.

Attorney fees, Title 25, ch. 10, part 3.

Right to compensatory damages, 27-1-202.

Damages to be reasonable, 27-1-302.

Liability of parent or guardian for minor's damage to public accommodation, 70-6-514.

Part 3

Obligations of Children

40-6-301. Duty of child to support indigent parents. (1) It is the duty of every adult child, having the financial ability, to furnish and provide necessary food, clothing, shelter, medical attendance, and burial, entombment, or cremation costs for an indigent parent, unless, in the judgment of the court or jury, the child is excused by reason of intemperance, indolence, immorality, or profligacy of the parent.

(2) If a county pays for burial, entombment, or cremation costs under 53-3-116, the county may seek reimbursement under this part, if applicable.

History: **En. Sec. 1, Ch. 42, L. 1915; re-en. Sec. 5853, R.C.M. 1921; re-en. Sec. 5853, R.C.M. 1935; R.C.M. 1947, 61-124; amd. Sec. 1, Ch. 435, L. 1993.**

Cross-References

Reciprocal duties of parents and children in maintaining each other, 40-6-214.

Minor cannot disaffirm contract for necessaries, 41-1-305.

40-6-302. Failure to support — misdemeanor. Any person violating the provisions of 40-6-301 shall be deemed guilty of a misdemeanor.

History: **En. Sec. 2, Ch. 42, L. 1915; re-en. Sec. 5854, R.C.M. 1921; re-en. Sec. 5854, R.C.M. 1935; R.C.M. 1947, 61-125.**

Cross-References

Reciprocal duties of parents and children in maintaining each other, 40-6-214.

Classification of offenses, 45-1-201.

Misdemeanor defined, 45-2-101.

Nonsupport, 45-5-621.

40-6-303. Civil action to enforce duty to support. A civil suit may be instituted and maintained for the enforcement of the provisions of 40-6-301 by any such child, where there is more than one adult child, or by the parent to whom such support is due or by the county attorney, and in case there is more than one such child, the court or the jury upon the hearing is authorized and empowered to apportion the expenses of such support between the adult children, and the court shall enter judgment in accordance with such finding and apportionment; provided, that such civil action shall not be construed as barring the arrest and conviction of such person for misdemeanor.

History: **En. Sec. 3, Ch. 42, L. 1915; re-en. Sec. 5855, R.C.M. 1921; re-en. Sec. 5855, R.C.M. 1935; R.C.M. 1947, 61-126.**

Cross-References

Reciprocal duties of parents and children in maintaining each other, 40-6-214.

CHAPTER 7

UNIFORM CHILD CUSTODY JURISDICTION AND ENFORCEMENT ACT

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40-7-313. Recognition and enforcement.
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40-7-316. Role of law enforcement.
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Chapter Compiler's Comments

Application and Construction: Section 42, Ch. 91, L. 1999, provided: "In applying and construing this chapter, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it."

Transitional Provision: Section 44, Ch. 91, L. 1999, provided: "A motion or other request for relief made in a child custody proceeding or to enforce a child custody determination that was commenced before [the effective date of this act] [October 1, 1999] is governed by the law in effect at the time the motion or other request was made."

Chapter Cross-References

Adoption, Title 42.

Part 1
General Provisions

Part Cross-References

Jurisdiction — commencement of parenting proceedings, 40-4-211.

Custodial interference, 45-5-304.

40-7-101. Short title. This chapter may be cited as the "Uniform Child Custody Jurisdiction and Enforcement Act".

History: En. 61-401 by Sec. 1, Ch. 537, L. 1977; R.C.M. 1947, 61-401; amd. Sec. 3, Ch. 91, L. 1999.

Compiler's Comments

1999 Amendment: Chapter 91 after "Jurisdiction" inserted "and Enforcement". Amendment effective October 1, 1999.

40-7-102. Repealed. Sec. 43, Ch. 91, L. 1999.

History: En. 61-402 by Sec. 2, Ch. 537, L. 1977; R.C.M. 1947, 61-402.

40-7-103. Definitions. As used in this chapter, the following definitions apply:

(1) "Abandoned" means left without provision for reasonable and necessary care or supervision.

(2) "Child" means an individual who has not attained 18 years of age.

(3) (a) "Child custody determination" means a judgment, decree, or other order of a court providing for the legal custody, physical custody, or visitation with respect to a child. The term includes a permanent, a temporary, an initial, and a modification order.

(b) The term does not include an order relating to child support or other monetary obligation of an individual.

(4) (a) "Child custody proceeding" means a proceeding in which legal custody, physical custody, or visitation with respect to a child is an issue. The term includes a proceeding for divorce, separation, neglect, abuse, dependency, guardianship, paternity, termination of parental rights, and protection from domestic violence, in which the issue may appear.

(b) The term does not include a proceeding involving juvenile delinquency, contractual emancipation, or enforcement under part 3 of this chapter.

(5) "Commencement" means the filing of the first pleading in a proceeding.

(6) "Court" means an entity authorized under the law of a state to establish, enforce, or modify a child custody determination.

(7) "Home state" means the state in which a child lived with a parent or a person acting as parent for at least 6 consecutive months immediately before the commencement of a child custody proceeding. In the case of a child less than 6 months of age, the term means the state in which the child lived from birth with any of the persons mentioned. A period of temporary absence of any of the mentioned persons is part of the period.

(8) "Initial determination" means the first child custody determination concerning a particular child.

(9) "Issuing court" means the court that makes a child custody determination for which enforcement is sought under this chapter.

(10) "Issuing state" means the state in which a child custody determination is made.

(11) "Modification" means a child custody determination that changes, replaces, supersedes, or is otherwise made after a previous determination concerning the same child, whether or not it is made by the court that made the previous determination.

(12) "Person" includes a government, a governmental subdivision, an agency, an instrumentality, or any other legal or commercial entity.

(13) "Person acting as a parent" means a person, other than a parent, who:

(a) has physical custody of the child or has had physical custody for a period of 6 consecutive months, including any temporary absence, within 1 year immediately before the commencement of a child custody proceeding; and

(b) has been awarded legal custody by a court or claims a right to legal custody under the law of this state.

(14) "Physical custody" means the physical care and supervision of a child.

(15) "State" means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States.

(16) "Tribe" means an Indian tribe or band or Alaskan Native village that is recognized by federal law or formally acknowledged by a state.

(17) "Warrant" means an order issued by a court authorizing law enforcement officers to take physical custody of a child.

History: En. 61-403 by Sec. 3, Ch. 537, L. 1977; R.C.M. 1947, 61-403; amd. Sec. 4, Ch. 91, L. 1999.

Compiler's Comments

1999 Amendment: Chapter 91 inserted definitions of abandoned, child, child custody determination, child custody proceeding, commencement, court, issuing court, issuing state, person, tribe, and warrant; deleted definition of contestant that read: ""Contestant" means a person, including a parent, who claims a right to custody or visitation rights with respect to a child";

deleted definition of custody determination that read: ""Custody determination" means a court decision and court orders and instructions providing for the custody of a child, including visitation rights. It does not include a decision relating to child support or any other monetary obligation of any person"; deleted definition of custody proceeding that read: ""Custody proceeding" includes proceedings in which a custody determination is one of several issues, such as an action for divorce or separation, and includes issues of custody in adoption proceedings. A "custody proceeding" is not a proceeding pursuant to Title 41, chapter 3 or 5"; deleted definition of decree or custody decree that read: ""Decree" or "custody decree" means a custody determination contained in a judicial decree or order made in a custody proceeding and includes an initial decree and a modification decree"; in definition of home state in first sentence after "child" deleted "immediately preceding the time involved" and at end inserted "immediately before the commencement of a child custody proceeding" and in third sentence at beginning substituted "A period" for "Periods" and at end before "period" deleted "6-month or other"; substituted definition of initial determination for definition of initial decree that read: ""Initial decree" means the first custody decree concerning a particular child"; substituted definition of modification for definition of modification decree that read: ""Modification decree" means a custody decree which modifies or replaces a prior decree, whether made by the court which rendered the prior decree or by another court"; substituted definition of person acting as a parent for definition of person acting as parent that read: ""Person acting as parent" means a person other than a parent who has physical custody of a child and who has either been awarded custody by a court or claims a right to custody"; in definition of physical custody substituted "means the physical care and supervision of a child" for "means actual possession and control of a child"; substituted present definition of state for former definition that read: ""State" means any state, territory, or possession of the United States, the Commonwealth of Puerto Rico, and the District of Columbia"; and made minor changes in style. Amendment effective October 1, 1999.

40-7-104. Repealed. Sec. 43, Ch. 91, L. 1999.

History: En. 61-404 by Sec. 4, Ch. 537, L. 1977; R.C.M. 1947, 61-404.

40-7-105. Notice — opportunity to be heard — joinder. (1) Before a child custody determination is made under this chapter, notice and opportunity to be heard in accordance with the standards of 40-7-106 must be given to all persons entitled to notice under the law of this state as in child custody proceedings between residents of this state, any parent whose parental rights have not been previously terminated, and any person who has physical custody of the child.

(2) This chapter does not govern the enforceability of a child custody determination made without notice or an opportunity to be heard.

(3) The obligation to join a party and the right to intervene as a party in a child custody proceeding under this chapter are governed by the law of this state as in child custody proceedings between residents of this state.

History: En. 61-405 by Sec. 5, Ch. 537, L. 1977; R.C.M. 1947, 61-405; amd. Sec. 5, Ch. 91, L. 1999.

Compiler's Comments

1999 Amendment: Chapter 91 in (1) substituted present language concerning notice in a child custody determination for former language that read: "Before making a decree under this chapter, reasonable notice and opportunity to be heard shall be given to the contestants, any parent whose parental rights have not been previously terminated, and any person who has physical custody of the child. If any of these persons are outside this state, notice and opportunity to be heard shall be given pursuant to 40-7-106"; inserted (2) regarding the enforceability of a child custody determination made without notice; and inserted (3) concerning the law governing the obligation or right of a person to intervene in a child custody determination. Amendment effective October 1, 1999.

Cross-References

Jurisdiction — commencement of parenting proceedings, 40-4-211.

Modification of parenting plan, 40-4-219.

40-7-106. Notice to persons outside state. (1) Notice required for the exercise of jurisdiction when a person is outside this state may be given in a manner prescribed by the law of this state for the service of process or by the law of the state in which the service is made. Notice must be given in a manner reasonably calculated to give actual notice but may be by publication, if other means are ineffective.

(2) Proof of service may be made in the manner prescribed by the law of this state or by the law of the state in which the service is made.

(3) Notice is not required for the exercise of jurisdiction with respect to a person who submits to the jurisdiction of the court.

History: En. 61-406 by Sec. 6, Ch. 537, L. 1977; R.C.M. 1947, 61-406; amd. Sec. 6, Ch. 91, L. 1999.

Compiler's Comments

1999 Amendment: Chapter 91 in (1) substituted present language concerning the manner of giving notice for former language that read: "(1) Notice required for the exercise of jurisdiction over a person outside this state shall be given in a manner reasonably calculated to give actual notice and may be:

(a) by personal delivery outside this state in the manner prescribed for service of process within this state;

(b) in the manner prescribed by the law of the place in which the service is made for service of process in that place in an action in any of its courts of general jurisdiction;

(c) by any form of mail addressed to the person to be served and requesting a receipt; or

(d) as directed by the court, including publication, if other means of notification are ineffective"; deleted former (2) that read: "(2) Notice under this section shall be served, mailed, or delivered or last published at least 10 days before any hearing in this state"; in (3) substituted language concerning proof of service for former (3) that read: "(3) Proof of service outside this state may be made by affidavit of the individual who made the service or in the manner prescribed by the law of this state, the order pursuant to which the service is made, or the law of the place in which the service is made. If service is made by mail, proof may be a receipt signed by the addressee or other evidence of delivery to the addressee"; in (3) substituted "required for the exercise of jurisdiction with respect to a person who" for "required if a person"; and made minor changes in style. Amendment effective October 1, 1999.

Cross-References

Jurisdiction of persons, Rule 4B, M.R.Civ.P. (see Title 25, ch. 20).

Proof of service, Rule 4D(8), M.R.Civ.P. (see Title 25, ch. 20).

Jurisdiction — commencement of parenting proceedings, 40-4-211.

40-7-107. Simultaneous proceedings. (1) Except as otherwise provided in 40-7-204, a court of this state may not exercise its jurisdiction under 40-7-105, 40-7-107 through 40-7-110, 40-7-112, and 40-7-201 through 40-7-203 if at the time of commencement of the proceeding a proceeding concerning the custody of the child had been previously commenced in a court of another state having jurisdiction substantially in conformity with this chapter unless the proceeding has been terminated or is stayed by the court of the other state because a court of this state is a more convenient forum under 40-7-108.

(2) Except as otherwise provided in 40-7-204, a court of this state, before hearing a child custody proceeding, shall examine the court documents and other information supplied by the parties pursuant to 40-7-110. If the court determines that a child custody proceeding was previously commenced in a court in another state having jurisdiction substantially in accordance with this chapter, the court of this state shall stay its proceeding and communicate with the court of the other state. If the court of the state having jurisdiction substantially in accordance with this chapter does not determine that the court of this state is a more appropriate forum, the court of this state shall dismiss the proceeding.

(3) In a proceeding to modify a child custody determination, a court of this state shall determine whether a proceeding to enforce the determination has been commenced in another state. If a proceeding to enforce a child custody determination has been commenced in another state, the court may:

(a) stay the proceeding for modification pending the entry of an order of a court of the other state enforcing, staying, denying, or dismissing the proceeding for enforcement;

(b) enjoin the parties from continuing with the proceeding for enforcement; or

(c) proceed with the modification under conditions that it considers appropriate.

History: En. 61-407 by Sec. 7, Ch. 537, L. 1977; R.C.M. 1947, 61-407; amd. Sec. 7, Ch. 91, L. 1999.

Compiler's Comments

1999 Amendment: Chapter 91 substituted present language concerning the exercise of jurisdiction by a court of this state if a proceeding concerning the custody of the child has been previously commenced in another state for former language that read: "(1) A court of this state may not exercise its jurisdiction under this chapter if at the time of filing the petition a proceeding concerning the custody of the child was pending in a court of another state exercising jurisdiction substantially in conformity with this chapter unless the proceeding is stayed by the court of the other state because this state is a more appropriate forum or for other reasons.

(2) Before hearing the petition in a custody proceeding, the court shall examine the pleadings and other information supplied by the parties under 40-7-110 and shall consult the child custody registry established under 40-7-117 concerning the pendency of proceedings with respect to the child in other states. If the court has reason to believe that proceedings may be pending in another state, it shall direct an inquiry to the state court administrator or other appropriate official of the other state.

(3) If the court is informed during the course of the proceeding that a proceeding concerning the custody of the child was pending in another state before the court assumed jurisdiction, it shall stay the proceeding and communicate with the court in which the other proceeding is pending to the end that the issue may be litigated in the more appropriate forum and that information be exchanged in accordance with 40-7-120 through 40-7-123. If a court of this state has made a custody decree before being informed of a pending proceeding in a court of another state, it shall immediately inform that court of the fact. If the court is informed that a proceeding was commenced in another state after it assumed jurisdiction, it shall likewise inform the other court to the end that the issues may be litigated in the more appropriate forum." Amendment effective October 1, 1999.

Cross-References

Effect of judgment or final order — when conclusive, 26-3-201.

Effect of judicial record of another state, 26-3-203.

Jurisdiction — commencement of parenting proceedings, 40-4-211.

40-7-108. Inconvenient forum. (1) A court of this state that has jurisdiction under this chapter to make a child custody determination may decline to exercise its jurisdiction at any time if it determines that it is an inconvenient forum under the circumstances and that a court of another state is a more appropriate forum. The issue of inconvenient forum may be raised upon the court's own motion, request of another court, or motion of a party.

(2) Before determining whether it is an inconvenient forum, a court of this state shall consider whether it is appropriate that a court of another state exercise jurisdiction. For this purpose, the court shall allow the parties to submit information and shall consider all relevant factors, including:

(a) whether domestic violence has occurred and is likely to continue in the future and which state could best protect the parties and the child;

(b) the length of time that the child has resided outside this state;

(c) the distance between the court in this state and the court in the state that would assume jurisdiction;

(d) the relative financial circumstances of the parties;

(e) any agreement of the parties as to which state should assume jurisdiction;

(f) the nature and location of the evidence required to resolve the pending litigation, including testimony of the child;

(g) the ability of the court of each state to decide the issue expeditiously and the procedures necessary to present the evidence; and

(h) the familiarity of the court of each state with the facts and issues in the pending litigation.

(3) If a court of this state determines that it is an inconvenient forum and that a court of another state is a more appropriate forum, it shall stay the proceedings upon condition that a child custody proceeding be promptly commenced in another designated state and may impose any other condition that the court considers just and proper.

(4) A court of this state may decline to exercise its jurisdiction under this chapter if a child custody determination is incidental to an action for divorce or another proceeding while still retaining jurisdiction over the divorce or other proceeding.

History: En. 61-408 by Sec. 8, Ch. 537, L. 1977; R.C.M. 1947, 61-408; amd. Sec. 8, Ch. 91, L. 1999.

Compiler's Comments

1999 Amendment: Chapter 91 substituted present language pertaining to the determination by a court of this state of whether it is an inconvenient forum for former language that read: "(1) A court which has jurisdiction under this chapter to make an initial or modification decree may decline to exercise its jurisdiction any time before making a decree if it finds that it is an inconvenient forum to make a custody determination under the circumstances of the case and that a court of another state is a more appropriate forum.

(2) A finding of inconvenient forum may be made upon the court's own motion or upon motion of a party or a guardian ad litem or other representative of the child.

(3) In determining if it is an inconvenient forum, the court shall consider if it is in the interest of the child that another state assume jurisdiction. For this purpose it may take into account the following factors, among others:

(a) if another state is or recently was the child's home state;

(b) if another state has a closer connection with the child and his family or with the child and one or more of the contestants;

(c) if substantial evidence concerning the child's present or future care, protection, training, and personal relationships is more readily available in another state;

(d) if the parties have agreed on another forum which is no less appropriate; and

(e) if the exercise of jurisdiction by a court of this state would contravene any of the purposes stated in 40-7-102.

(4) Before determining whether to decline or retain jurisdiction, the court may communicate with a court of another state and exchange information pertinent to the assumption of jurisdiction by either court with a view to assuring that jurisdiction will be exercised by the more appropriate court and that a forum will be available to the parties.

(5) If the court finds that it is an inconvenient forum and that a court of another state is a more appropriate forum, it may dismiss the proceedings or it may stay the proceedings upon condition that a custody proceeding be promptly commenced in another named state or upon any other conditions which may be just and proper, including the condition that a moving party stipulate his consent and submission to the jurisdiction of the other forum.

(6) The court may decline to exercise its jurisdiction under this chapter if a custody determination is incidental to an action for divorce or another proceeding while retaining jurisdiction over the divorce or other proceeding.

(7) If it appears to the court that it is clearly an inappropriate forum, it may require the party who commenced the proceedings to pay, in addition to the costs of the proceedings in this state, necessary travel and other

expenses, including attorneys' fees, incurred by other parties or their witnesses. Payment is to be made to the clerk of the court for remittance to the proper party.

(8) Upon dismissal or stay of proceedings under this section the court shall inform the court found to be the more appropriate forum of this fact or, if the court which would have jurisdiction in the other state is not certainly known, transmit the information to the court administrator or other appropriate official for forwarding to the appropriate court.

(9) Any communication received from another state informing this state of a finding of inconvenient forum because a court of this state is the more appropriate forum shall be filed in the custody registry of the appropriate court. Upon assuming jurisdiction, the court of this state shall inform the original court of this fact." Amendment effective October 1, 1999.

Cross-References

Change of venue, Title 25, ch. 2, part 2.

Allowable costs, Title 25, ch. 10, part 2.

Attorney fees, Title 25, ch. 10, part 3.

Effect of other judicial orders — when disputable presumption created, 26-3-202.

Hearings in parenting proceedings, 40-4-216.

40-7-109. Jurisdiction declined by reason of conduct. (1) Except as otherwise provided in 40-7-202, if a court of this state has jurisdiction under this chapter because a person invoking the jurisdiction has engaged in unjustifiable conduct, the court shall decline to exercise jurisdiction unless:

(a) the parents and all persons acting as parents have acquiesced in the exercise of jurisdiction;

(b) a court of the state otherwise having jurisdiction under 40-7-139, 40-7-140, and 40-7-201 determines that this state is a more appropriate forum under 40-7-108; or

(c) no other state would have jurisdiction under 40-7-201 through 40-7-203.

(2) If a court of this state declines to exercise its jurisdiction pursuant to subsection (1), it may fashion an appropriate remedy to ensure the safety of the child and prevent a repetition of the wrongful conduct, including staying the proceeding until a child custody proceeding is commenced in a court having jurisdiction under 40-7-201 through 40-7-203.

(3) If a court dismisses a petition or stays a proceeding because it declines to exercise its jurisdiction pursuant to subsection (1), it shall charge the party invoking the jurisdiction of the court with necessary and reasonable expenses, including costs, communication expenses, attorney fees, investigative fees, expenses for witnesses, travel expenses, and child care during the course of the proceedings, unless the party from whom fees are sought establishes that the award would be clearly inappropriate. The court may not assess fees, costs, or expenses against this state except as otherwise provided by law other than this chapter.

History: En. 61-409 by Sec. 9, Ch. 537, L. 1977; R.C.M. 1947, 61-409; amd. Sec. 9, Ch. 91, L. 1999.

Compiler's Comments

1999 Amendment: Chapter 91 inserted present language concerning a court of this state declining to take jurisdiction due to unjustifiable conduct on the part of the person invoking jurisdiction for former language that read: "(1) If the petitioner for an initial decree has wrongfully taken the child from another state or has engaged in similar reprehensible conduct, the court may decline to exercise jurisdiction if this is just and proper under the circumstances.

(2) Unless required in the interest of the child, the court may not exercise its jurisdiction to modify a custody decree of another state if the petitioner, without consent of the person entitled to custody, has improperly removed the child from the physical custody of the person entitled to custody or has improperly retained the child after a visit or other temporary relinquishment of physical custody. If the petitioner has violated any other provision of a custody decree of another state, the court may decline to exercise its jurisdiction

if this is just and proper under the circumstances.

(3) In appropriate cases a court dismissing a petition under this section may charge the petitioner with necessary travel and other expenses, including attorneys' fees, incurred by other parties or their witnesses." Amendment effective October 1, 1999.

Cross-References

Costs, Title 25, ch. 10, parts 1 and 2.
Attorney fees, Title 25, ch. 10, part 3.
Best interests of child, 40-4-212.
Modification of parenting plan, 40-4-219.
Custodial interference, 45-5-304.

40-7-110. Information to be submitted to court. (1) In a child custody proceeding, each party, in its first pleading or in an attached affidavit, shall give information, if reasonably ascertainable, under oath as to the child's present address, the places where the child has lived during the last 5 years, and the names and present addresses of the persons with whom the child has lived during that period. The pleading or affidavit must state whether the party:

(a) has participated, as a party or witness or in any other capacity, in any other proceeding concerning the custody of or visitation with the child and, if so, identify the court, the case number of the proceeding, and the date of the child custody determination, if any;

(b) knows of any proceeding that could affect the current proceeding, including proceedings for enforcement and proceedings relating to domestic violence, protective orders, termination of parental rights, and adoptions, and, if so, identify the court, the case number, and the nature of the proceeding; and

(c) knows the name and address of any person who is not a party to the proceeding who has physical custody of the child or who claims rights of legal custody or physical custody of, or visitation with, the child and, if so, the party shall provide the names and addresses of those persons.

(2) If the information required by subsection (1) is not furnished, the court, upon motion of a party or its own motion, may stay the proceeding until the information is furnished.

(3) If the declaration as to any of the items described in subsections (1)(a) through (1)(c) is in the affirmative, the declarant shall give additional information under oath as required by the court. The court may examine the parties under oath as to details of the information furnished and other matters pertinent to the court's jurisdiction and the disposition of the case.

(4) Each party has a continuing duty to inform the court of any proceeding in this or any other state that could affect the current proceeding.

History: En. 61-410 by Sec. 10, Ch. 537, L. 1977; R.C.M. 1947, 61-410; amd. Sec. 10, Ch. 91, L. 1999.

Compiler's Comments

1999 Amendment: Chapter 91 in (1) at beginning of first sentence substituted "In a child custody proceeding, each party" for "Each party in a custody proceeding" and near middle after "information" inserted "if reasonably ascertainable" and in second sentence after "affidavit" substituted "must state" for "each party shall further declare under oath"; in (1)(a) near beginning after "other" substituted "proceeding" for "litigation", after "custody of" inserted "or visitation with", after "child" deleted "in this or any other state", and inserted "and, if so, identify the court, the case number of the proceeding, and the date of the child custody determination, if any"; in (1)(b) substituted present language concerning knowledge of other proceedings that could affect a current proceeding for former language that read: "he has information of any custody proceeding concerning the child pending in a court of this or any other state"; in (1)(c) at beginning after "knows" inserted "the name and address", near middle after "claims" substituted "rights of legal custody or physical custody of" for "to have custody", and after "child" inserted "and, if so, the party shall provide the names and addresses of those persons"; inserted (2) providing for a stay of the proceedings until required information is furnished; in (4) near middle substituted "proceeding" for "custody proceeding concerning the child" and at end after "state" substituted "that could affect the current proceeding" for "of which he obtained information during this proceeding"; and made minor changes in style. Amendment effective October 1, 1999.

Cross-References

Effect of judgment or final order — when conclusive, 26-3-201.

Effect of judicial record of another state, 26-3-203.

Jurisdiction — commencement of parenting proceedings, 40-4-211.

Affidavit practice, 40-4-220.

40-7-111. Repealed. Sec. 43, Ch. 91, L. 1999.

History: En. 61-411 by Sec. 11, Ch. 537, L. 1977; R.C.M. 1947, 61-411.

40-7-112. Appearance of parties and child. (1) A court of this state may order a party to a child custody proceeding who is in this state to appear before the court personally with or without the child. The court may order any person who is in this state and who has physical custody or control of the child to appear physically with the child.

(2) If a party to a child custody proceeding whose presence is desired by the court is outside this state, the court may order that a notice given pursuant to 40-7-106 include a statement directing the party to appear personally with or without the child and declaring that failure to appear may result in a decision adverse to the party.

(3) The court may enter any orders necessary to ensure the safety of the child and of any person ordered to appear under this section.

(4) If a party to a child custody proceeding who is outside this state is directed to appear under subsection (2) or desires to appear personally before the court with or without the child, the court may require another party to pay reasonable and necessary travel and other expenses of the party so appearing and of the child.

History: En. 61-412 by Sec. 12, Ch. 537, L. 1977; R.C.M. 1947, 61-412; amd. Sec. 11, Ch. 91, L. 1999.

Compiler's Comments

1999 Amendment: Chapter 91 in (1) substituted language regarding a court ordering a party to appear with or without the child in a custody proceeding for former language that read: "(1) The court may order any party to the proceeding who is in this state to appear personally before the court. If that party has physical custody of the child, the court may order that he appear personally with the child"; in (2) near beginning before "proceeding" inserted "a child custody"; inserted (3) authorizing a court to enter orders necessary for the safety of persons appearing before the court; in (4) near beginning before "proceeding" inserted "a child custody", near middle after "pay" substituted "reasonable and necessary travel and other expenses" for "to the clerk of the court travel and other necessary expenses", and at end after "child" deleted "if this is just and proper under the circumstances"; and made minor changes in style. Amendment effective October 1, 1999.

Cross-References

Hearings — parenting plan proceedings, 40-4-216.

40-7-113. Repealed. Sec. 43, Ch. 91, L. 1999.

History: En. 61-413 by Sec. 13, Ch. 537, L. 1977; R.C.M. 1947, 61-413.

40-7-114. Repealed. Sec. 43, Ch. 91, L. 1999.

History: En. 61-414 by Sec. 14, Ch. 537, L. 1977; R.C.M. 1947, 61-414.

40-7-115. Repealed. Sec. 43, Ch. 91, L. 1999.

History: En. 61-415 by Sec. 15, Ch. 537, L. 1977; R.C.M. 1947, 61-415.

40-7-116. Repealed. Sec. 43, Ch. 91, L. 1999.

History: En. 61-416 by Sec. 16, Ch. 537, L. 1977; R.C.M. 1947, 61-416.

40-7-117. Repealed. Sec. 43, Ch. 91, L. 1999.

History: En. 61-417 by Sec. 17, Ch. 537, L. 1977; R.C.M. 1947, 61-417.

40-7-118. Repealed. Sec. 43, Ch. 91, L. 1999.

History: En. 61-418 by Sec. 18, Ch. 537, L. 1977; R.C.M. 1947, 61-418.

40-7-119. Taking testimony in another state. (1) In addition to other procedures available to a party, a party to a child custody proceeding may offer testimony of witnesses who are located in another state, including testimony of the parties and the child, by deposition or other means allowable in this state for testimony taken in another state. The court on its own motion may order that the testimony of a person be taken in another state and may prescribe the manner in which and the terms upon which the testimony is taken.

(2) A court of this state may permit an individual residing in another state to be deposed or to testify by telephone, audiovisual means, or other electronic means before a designated court or at another location in that state. A court of this state shall cooperate with courts of other states in designating an appropriate location for the deposition or testimony.

(3) Documentary evidence that is transmitted from another state to a court of this state by technological means that do not produce an original writing may not be excluded from evidence on an objection based on the means of transmission.

History: En. 61-419 by Sec. 19, Ch. 537, L. 1977; R.C.M. 1947, 61-419; amd. Sec. 12, Ch. 91, L. 1999.

Compiler's Comments

1999 Amendment: Chapter 91 in (1) near beginning after "available to a party" substituted "a party to a child custody proceeding may offer testimony of witnesses who are located in another state" for "any party to the proceeding or a guardian ad litem or other representative of the child may adduce testimony of witnesses"; inserted (2) allowing a deposition of a person in another state to testify by telephone, audiovisual, or electronic means; inserted (3) allowing for an objection to documentary evidence transmitted from another state by technological means; and made minor changes in style. Amendment effective October 1, 1999.

Cross-References

Depositions, Rules 26 through 32, M.R.Civ.P. (see Title 25, ch. 20).

UPC — powers and duties of guardian of minor, 72-5-231.

40-7-120. Repealed. Sec. 43, Ch. 91, L. 1999.

History: En. 61-420 by Sec. 20, Ch. 537, L. 1977; R.C.M. 1947, 61-420.

40-7-121. Repealed. Sec. 43, Ch. 91, L. 1999.

History: En. 61-421 by Sec. 21, Ch. 537, L. 1977; R.C.M. 1947, 61-421.

40-7-122. Repealed. Sec. 43, Ch. 91, L. 1999.

History: En. 61-422 by Sec. 22, Ch. 537, L. 1977; R.C.M. 1947, 61-422.

40-7-123. Repealed. Sec. 43, Ch. 91, L. 1999.

History: En. 61-423 by Sec. 23, Ch. 537, L. 1977; R.C.M. 1947, 61-423.

40-7-124. Repealed. Sec. 43, Ch. 91, L. 1999.

History: En. 61-424 by Sec. 24, Ch. 537, L. 1977; R.C.M. 1947, 61-424.

40-7-125. Priority. If a question of existence or exercise of jurisdiction under this chapter is raised in a child custody proceeding, the question, upon request of a party, must be given priority on the calendar and handled expeditiously.

History: En. 61-425 by Sec. 25, Ch. 537, L. 1977; R.C.M. 1947, 61-425; amd. Sec. 13, Ch. 91, L. 1999.

Compiler's Comments

1999 Amendment: Chapter 91 substituted reference to a child custody proceeding for former reference to a custody proceeding; and made minor changes in style. Amendment effective October 1, 1999.

Cross-References

Parenting plan proceedings to receive priority, 40-4-216.

40-7-126 through 40-7-133 reserved.

40-7-134. Proceedings governed by other law. This chapter does not govern an adoption proceeding or a proceeding pertaining to the authorization of emergency medical care for a child.

History: En. Sec. 14, Ch. 91, L. 1999.

Compiler's Comments

Effective Date: This section is effective October 1, 1999.

40-7-135. Application to Indian tribes. (1) A child custody proceeding that pertains to an Indian child as defined in the Indian Child Welfare Act, 25 U.S.C. 1901, et seq., is not subject to this chapter to the extent that it is governed by the Indian Child Welfare Act.

(2) A court of this state shall treat a tribe as if it were a state of the United States for the purpose of applying 40-7-101, 40-7-103, 40-7-105 through 40-7-110, 40-7-112, 40-7-119, 40-7-125, 40-7-134 through 40-7-140, and part 2 of this chapter.

(3) A child custody determination made by a tribe under factual circumstances in substantial conformity with the jurisdictional standards of this chapter must be recognized and enforced under part 3 of this chapter.

History: En. Sec. 15, Ch. 91, L. 1999.

Compiler's Comments

Effective Date: This section is effective October 1, 1999.

40-7-136. International application. (1) A court of this state shall treat a foreign country as if it were a state of the United States for the purpose of applying 40-7-101, 40-7-103, 40-7-105 through 40-7-110, 40-7-112, 40-7-119, 40-7-125, 40-7-134 through 40-7-140, and part 2 of this chapter.

(2) A child custody determination made in a foreign country under factual circumstances in substantial conformity with the jurisdictional standards of this chapter must be recognized and enforced under part 3 of this chapter.

(3) A court of this state need not apply this chapter if the child custody law of a foreign country violates fundamental principles of human rights.

History: En. Sec. 16, Ch. 91, L. 1999.

Compiler's Comments

Effective Date: This section is effective October 1, 1999.

40-7-137. Binding force of child custody determination. A child custody determination made by a court of this state that had jurisdiction under this chapter binds all persons who have been served in accordance with the laws of this state or notified in accordance with 40-7-106 or who have submitted to the jurisdiction of the court, and who have been given an opportunity to be heard. As to those persons, the determination is conclusive as to all decided issues of law and fact except to the extent that the determination is modified.

History: En. Sec. 17, Ch. 91, L. 1999.

Compiler's Comments

Effective Date: This section is effective October 1, 1999.

40-7-138. Appearance and limited immunity. (1) A party to a child custody proceeding who is not subject to personal jurisdiction in this state and who is a responding party under 40-7-105, 40-7-107 through 40-7-110, 40-7-112, and part 2 of this chapter, a party in a proceeding to modify a child custody determination under 40-7-105, 40-7-107 through 40-7-110, 40-7-112, and part 2 of this chapter, or a petitioner in a proceeding to enforce or register a child custody determination under part 3 of this chapter may appear and participate in the proceeding without submitting to personal jurisdiction over the party for another proceeding or purpose.

(2) A party is not subject to personal jurisdiction in this state solely by being physically present for the purpose of participating in a proceeding under this chapter. If a party is subject to personal jurisdiction in this state on a basis other than physical presence, the party may be served with process in this state. If a party present in this state is subject to the jurisdiction of another state, service of process allowable under the laws of that state may be accomplished in this state.

(3) The immunity granted by this section does not extend to civil litigation based on acts unrelated to the participation in a proceeding under this chapter committed by an individual while present in this state.

History: En. Sec. 18, Ch. 91, L. 1999.

Compiler's Comments

Effective Date: This section is effective October 1, 1999.

40-7-139. Communication between courts. (1) A court of this state may communicate with a court in another state concerning a proceeding arising under this chapter.

(2) The court may allow the parties to participate in the communication. If the parties are not able to participate in the communication, they must be given the opportunity to present facts and legal arguments before a decision on jurisdiction is made.

(3) Communication between courts on schedules, calendars, court records, and similar matters may occur without informing the parties. A record need not be made of the communication.

(4) Except as otherwise provided in subsection (3), a record must be made of a communication under this section. The parties must be informed promptly of the communication and granted access to the record.

(5) For the purposes of this section, "record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form. A record includes notes or transcripts of a court reporter who listened to a conference call between the courts, an electronic recording of a telephone call, a memorandum or an electronic record of the communication between the courts, or a memorandum or an electronic record made by a court after the communication.

History: En. Sec. 19, Ch. 91, L. 1999.

Compiler's Comments

Effective Date: This section is effective October 1, 1999.

40-7-140. Cooperation between courts — preservation of records. (1) A court of this state may request the appropriate court of another state to:

(a) hold an evidentiary hearing;

(b) order a person to produce or give evidence pursuant to procedures of that state;

(c) order that an evaluation be made with respect to the custody of a child involved in a pending proceeding;

(d) forward to the court of this state a certified copy of the transcript of the record of the hearing, the evidence otherwise presented, and any evaluation prepared in compliance with the request; and

(e) order a party to a child custody proceeding or any person having physical custody of the child to appear in the proceeding with or without the child.

(2) Upon request of a court of another state, a court of this state may hold a hearing or enter an order described in subsection (1).

(3) Travel and other necessary and reasonable expenses incurred under subsections (1) and (2) may be assessed against the parties according to the law of this state.

(4) A court of this state shall preserve the pleadings, orders, decrees, records of hearings, evaluations, and other pertinent records with respect to a child custody proceeding until the child attains 18 years of age. Upon appropriate request by a court or law enforcement official of another state, the court shall forward a certified copy of those records.

History: En. Sec. 20, Ch. 91, L. 1999.

Compiler's Comments

Effective Date: This section is effective October 1, 1999.

Part 2
Jurisdiction

Part Compiler's Comments

Effective Date: This part is effective October 1, 1999.

40-7-201. Initial child custody jurisdiction. (1) Except as otherwise provided in 40-7-204, a court of this state has jurisdiction to make an initial child custody determination only if:

(a) this state is the home state of the child on the date of the commencement of the proceeding or was the home state of the child within 6 months before the commencement of the proceeding and the child is absent from this state but a parent or person acting as a parent continues to live in this state;

(b) a court of another state does not have jurisdiction under subsection (1)(a), or a court of the home state of the child has declined to exercise jurisdiction on the ground that this state is the more appropriate forum under 40-7-108 or 40-7-109, and:

(i) the child and the child's parents, or the child and at least one parent or a person acting as a parent, have a significant connection with this state other than mere physical presence; and

(ii) substantial evidence is available in this state concerning the child's care, protection, training, and personal relationships;

(c) all courts having jurisdiction under subsection (1)(a) or (1)(b) have declined to exercise jurisdiction on the ground that a court of this state is the more appropriate forum to determine the custody of the child under 40-7-108 or 40-7-109; or

(d) no state would have jurisdiction under subsection (1)(a), (1)(b), or (1)(c).

(2) Subsection (1) is the exclusive jurisdictional basis for making a child custody determination by a court of this state.

(3) Physical presence of, or personal jurisdiction over, a party or a child is not necessary or sufficient to make a child custody determination.

History: **En. Sec. 21, Ch. 91, L. 1999.**

40-7-202. Exclusive, continuing jurisdiction. (1) Except as otherwise provided in 40-7-204, a court of this state that has made a child custody determination consistent with 40-7-201 or 40-7-203 has exclusive, continuing jurisdiction over the determination until:

(a) a court of this state determines that neither the child, the child and one parent, nor the child and a person acting as a parent have a significant connection with this state and that substantial evidence is no longer available in this state concerning the child's care, protection, training, and personal relationships; or

(b) a court of this state or a court of another state determines that neither the child, a parent, nor any person acting as a parent presently resides in this state.

(2) A court of this state that has exclusive, continuing jurisdiction under this section may decline to exercise jurisdiction if the court determines that it is an inconvenient forum under 40-7-108.

(3) A court of this state that has made a child custody determination and does not have exclusive, continuing jurisdiction under this section may modify that determination only if it has jurisdiction to make an initial determination under 40-7-201.

History: **En. Sec. 22, Ch. 91, L. 1999.**

40-7-203. Jurisdiction to modify determination. Except as otherwise provided in 40-7-204, a court of this state may not modify a child custody determination made by a court of another state unless a court of this state has jurisdiction to make an initial determination under 40-7-201(1)(a) or (1)(b) and:

(1) the court of the other state determines it no longer has exclusive, continuing jurisdiction under 40-7-202 or that a court of this state would be a more convenient forum under 40-7-108; or

(2) a court of this state or a court of the other state determines that the child, the child's parents, and any person acting as a parent do not presently reside in the other state.

History: **En. Sec. 23, Ch. 91, L. 1999.**

40-7-204. Temporary emergency jurisdiction. (1) A court of this state has temporary emergency jurisdiction if the child is present in this state and the child has been abandoned or it is necessary in an emergency to protect the child because the child, or a sibling or parent of the child, is subjected to or threatened with mistreatment or abuse.

(2) If there is no previous child custody determination that is entitled to be enforced under this chapter and a child custody proceeding has not been commenced in a court of a state having jurisdiction under 40-7-201 through 40-7-203, a child custody determination made under this section remains in effect until an order is obtained from a court of a state having jurisdiction under 40-7-201 through 40-7-203. If a child custody proceeding has not been or is not commenced in a court of a state having jurisdiction under 40-7-201 through 40-7-203, a child custody determination made under this section becomes a final determination if it so provides and this state becomes the home state of the child.

(3) If there is a previous child custody determination that is entitled to be enforced under this chapter or a child custody proceeding has been commenced in a court of a state having jurisdiction under 40-7-201 through 40-7-203, any order issued by a court of this state under this section must specify in the order a period of time that the court considers adequate to allow the person seeking an order to obtain an order from the state having jurisdiction under 40-7-201 through 40-7-203. The order issued in this state remains in effect until an order is obtained from the other state within the period specified or until the period expires.

(4) A court of this state that has been asked to make a child custody determination under this section, upon being informed that a child custody proceeding has been commenced in, or a child custody determination has been made by, a court of a state having jurisdiction under 40-7-201 through 40-7-203, shall immediately communicate with the other court. A court of this state that is exercising jurisdiction pursuant to 40-7-201 through 40-7-203, upon being informed that a child custody proceeding has been commenced in, or a child custody determination has been made by, a court of another state under a statute similar to this section, shall immediately communicate with the court of that state. The purpose of the communication is to resolve the emergency, to protect the safety of the parties and the child, and to determine a period for the duration of the temporary order.

History: En. Sec. 24, Ch. 91, L. 1999.

Part 3
Enforcement

Part Compiler's Comments

Effective Date: This part is effective October 1, 1999.

40-7-301. Definitions. In this part:

(1) "Petitioner" means a person who seeks enforcement of an order for the return of a child under the Hague Convention on the Civil Aspects of International Child Abduction or enforcement of a child custody determination.

(2) "Respondent" means a person against whom a proceeding has been commenced for enforcement of an order for return of a child under the Hague

Convention on the Civil Aspects of International Child Abduction or enforcement of a child custody determination.

History: **En. Sec. 25, Ch. 91, L. 1999.**

40-7-302. Enforcement under Hague convention. Under this part, a court of this state may enforce an order for the return of the child that was made under the Hague Convention on the Civil Aspects of International Child Abduction as if it were a child custody determination.

History: **En. Sec. 26, Ch. 91, L. 1999.**

40-7-303. Duty to enforce. (1) A court of this state shall recognize and enforce a child custody determination of a court of another state if the latter court exercised jurisdiction in substantial conformity with this chapter or the determination was made under factual circumstances meeting the jurisdictional standards of this chapter and the determination has not been modified in accordance with this chapter.

(2) A court of this state may utilize any remedy available under other law of this state to enforce a child custody determination made by a court of another state. The procedure provided by this part does not affect the availability of other remedies to enforce a child custody determination.

History: **En. Sec. 27, Ch. 91, L. 1999.**

40-7-304. Temporary visitation. (1) A court of this state that does not have jurisdiction to modify a child custody determination may issue a temporary order enforcing:

(a) a visitation schedule made by a court of another state; or

(b) the visitation provisions of a child custody determination of another state that does not provide for a specific visitation schedule.

(2) If a court of this state makes an order under subsection (1)(b), it shall specify in the order a period of time that it considers adequate to allow the petitioner to obtain an order from a court having jurisdiction under the criteria specified in 40-7-105, 40-7-107 through 40-7-110, 40-7-112, and part 2 of this chapter. The order remains in effect until an order is obtained from the other court or the period expires.

History: **En. Sec. 28, Ch. 91, L. 1999.**

40-7-305. Registration of child custody determination. (1) A child custody determination issued by a court of another state may be registered in this state, with or without a simultaneous request for enforcement, by sending to district court in this state:

(a) a letter or other document requesting registration;

(b) two copies, including one certified copy, of the determination sought to be registered and a statement under penalty of perjury that to the best of the knowledge and belief of the person seeking registration, the order has not been modified; and

(c) the name and address of the person seeking registration and any parent or person acting as a parent who has been awarded custody or visitation in the child custody determination sought to be registered.

(2) On receipt of the documents required by subsection (1), the registering court shall:

(a) cause the determination to be filed as a foreign judgment, together with one copy of any accompanying documents and information, regardless of their form; and

(b) serve notice upon the persons named pursuant to subsection (1)(c) and provide them with an opportunity to contest the registration in accordance with this section.

(3) The notice required by subsection (2)(b) must state that:

(a) a registered determination is enforceable as of the date of the registration in the same manner as a determination issued by a court of this state;

(b) a hearing to contest the validity of the registered determination must be requested within 20 days after service of notice; and

(c) failure to contest the registration will result in confirmation of the child custody determination and preclude further contest of that determination with respect to any matter that could have been asserted.

(4) A person seeking to contest the validity of a registered order shall request a hearing within 20 days after service of the notice. At that hearing, the court shall confirm the registered order unless the person contesting registration establishes that:

(a) the issuing court did not have jurisdiction under 40-7-105, 40-7-107 through 40-7-110, 40-7-112, and part 2 of this chapter;

(b) the child custody determination sought to be registered has been vacated, stayed, or modified by a court having jurisdiction to do so under 40-7-105, 40-7-107 through 40-7-110, 40-7-112, and part 2 of this chapter; or

(c) the person contesting registration was entitled to notice, but notice was not given in accordance with the standards of 40-7-106, in the proceedings before the court that issued the order for which registration is sought.

(5) If a timely request for a hearing to contest the validity of the registration is not made, the registration is confirmed as a matter of law and the person requesting registration and all persons served must be notified of the confirmation.

(6) Confirmation of a registered order, whether by operation of law or after notice and hearing, precludes further contest of the order with respect to any matter that could have been asserted at the time of registration.

History: En. Sec. 29, Ch. 91, L. 1999.

40-7-306. Enforcement of registered determination. (1) A court of this state may grant any relief normally available under the law of this state to enforce a registered child custody determination made by a court of another state.

(2) A court of this state shall recognize and enforce, but may not modify, except in accordance with 40-7-105, 40-7-107 through 40-7-110, 40-7-112, and part 2 of this chapter, a registered child custody determination of a court of another state.

History: En. Sec. 30, Ch. 91, L. 1999.

40-7-307. Simultaneous proceedings. If a proceeding for enforcement under this part is commenced in a court of this state and the court determines that a proceeding to modify the determination is commenced in a court of another state having jurisdiction to modify the determination under 40-7-105, 40-7-107 through 40-7-110, 40-7-112, and part 2 of this chapter, the enforcing court shall immediately communicate with the modifying court. The proceeding for enforcement continues unless the enforcing court, after consultation with the modifying court, stays or dismisses the proceeding.

History: En. Sec. 31, Ch. 91, L. 1999.

40-7-308. Expedited enforcement of child custody determination. (1) A petition under this part must be verified. Certified copies of all orders sought to be enforced and of any order confirming registration must be attached to the petition. A copy of a certified copy of an order may be attached instead of the original.

(2) A petition for enforcement of a child custody determination must state:

(a) whether the court that issued the determination identified the jurisdictional basis that it relied upon in exercising jurisdiction and, if so, what the basis was;

(b) whether the determination for which enforcement is sought has been vacated, stayed, or modified by a court whose decision must be enforced under this chapter or federal law and, if so, identify the court, the case number of the proceeding, and the action taken;

(c) whether any proceeding has been commenced that could affect the current proceeding, including proceedings relating to domestic violence, protective orders, termination of parental rights, and adoptions, and if so, identify the court, the case number, and the nature of the proceeding;

(d) the present physical address of the child and the respondent, if known;

(e) whether relief in addition to the immediate physical custody of the child and attorney fees is sought, including a request for assistance from law enforcement officials and, if so, the relief sought; and

(f) if the child custody determination has been registered and confirmed under 40-7-305, the date and place of registration.

(3) Upon the filing of a petition, the court shall issue an order directing the respondent to appear in person with or without the child at a hearing and may enter any order necessary to ensure the safety of the parties and the child. The hearing must be held on the next judicial day after service of the order unless that date is impossible. In that event, the court shall hold the hearing on the first judicial day possible. The court may extend the date of hearing at the request of the petitioner.

(4) The order must state the time and place of the hearing and must advise the respondent that at the hearing, the court will order the delivery of the child and the payment of fees, costs, and expenses under 40-7-312 and may set an additional hearing to determine whether further relief is appropriate, unless the respondent appears and establishes that:

(a) the child custody determination has not been registered and confirmed under 40-7-305 and that:

(i) the issuing court did not have jurisdiction under 40-7-105, 40-7-107 through 40-7-110, 40-7-112, and part 2 of this chapter;

(ii) the child custody determination for which enforcement is sought has been vacated, stayed, or modified by a court having jurisdiction to do so under 40-7-105, 40-7-107 through 40-7-110, 40-7-112, and part 2 of this chapter or federal law; or

(iii) the respondent was entitled to notice, but notice was not given in accordance with the standards of 40-7-106, in the proceedings before the court that issued the order for which enforcement is sought; or

(b) the child custody determination for which enforcement is sought was registered and confirmed under 40-7-305, but has been vacated, stayed, or modified by a court of a state having jurisdiction to do so under 40-7-105, 40-7-107 through 40-7-110, 40-7-112, and part 2 of this chapter or federal law.

History: **En. Sec. 32, Ch. 91, L. 1999.**

40-7-309. Service of petition and order. Except as otherwise provided in 40-7-311, the petition and order must be served, by any method authorized by the law of this state, upon the respondent and any person who has physical custody of the child.

History: **En. Sec. 33, Ch. 91, L. 1999.**

40-7-310. Hearing and order. (1) Unless the court issues a temporary emergency order pursuant to 40-7-204, upon a finding that a petitioner is entitled to the physical custody of the child immediately, the court shall order the child delivered to the petitioner unless the respondent establishes that:

(a) the child custody determination has not been registered and confirmed under 40-7-305 and that:

(i) the issuing court did not have jurisdiction under 40-7-105, 40-7-107 through 40-7-110, 40-7-112, and part 2 of this chapter;

(ii) the child custody determination for which enforcement is sought has been vacated, stayed, or modified by a court of a state having jurisdiction to do so under 40-7-105, 40-7-107 through 40-7-110, 40-7-112, and part 2 of this chapter or federal law; or

(iii) the respondent was entitled to notice, but notice was not given in accordance with the standards of 40-7-106, in the proceedings before the court that issued the order for which enforcement is sought; or

(b) the child custody determination for which enforcement is sought was registered and confirmed under 40-7-305, but has been vacated, stayed, or modified by a court of a state having jurisdiction to do so under 40-7-105, 40-7-107 through 40-7-110, 40-7-112, and part 2 of this chapter or federal law.

(2) The court shall award the fees, costs, and expenses authorized under 40-7-312 and may grant additional relief, including a request for the assistance of law enforcement officials, and may set a further hearing to determine whether additional relief is appropriate.

(3) If a party called to testify refuses to answer on the ground that the testimony may be self-incriminating, the court may draw an adverse inference from the refusal.

(4) A privilege against disclosure of communications between spouses and a defense of immunity based on the relationship of husband and wife or parent and child may not be invoked in a proceeding under this part.

History: **En. Sec. 34, Ch. 91, L. 1999.**

40-7-311. Warrant to take physical custody of child. (1) Upon the filing of a petition seeking enforcement of a child custody determination, the petitioner may file a verified application for the issuance of a warrant to take physical custody of the child if the child is imminently likely to suffer serious physical harm or to be removed from this state.

(2) If the court, upon the testimony of the petitioner or other witness, finds that the child is imminently likely to suffer serious physical harm or to be removed from this state, it may issue a warrant to take physical custody of the child. The petition must be heard on the next judicial day after the warrant is executed unless that date is impossible. In that event, the court shall hold the hearing on the first judicial day possible. The application for the warrant must include the statements required by 40-7-308(2).

(3) A warrant to take physical custody of a child must:

(a) recite the facts upon which a conclusion of imminent serious physical harm or removal from the jurisdiction is based;

(b) direct law enforcement officers to take physical custody of the child immediately; and

(c) provide for the placement of the child, pending final relief.

(4) The respondent must be served with the petition, warrant, and order immediately after the child is taken into physical custody.

(5) A warrant to take physical custody of a child is enforceable throughout this state. If the court finds on the basis of the testimony of the petitioner or other witness that a less intrusive remedy is not effective, it may authorize law enforcement officers to enter private property to take physical custody of the child. If required by exigent circumstances of the case, the court may authorize law enforcement officers to make a forcible entry at any hour.

(6) The court may impose conditions upon placement of a child to ensure the appearance of the child and the child's custodian.

History: En. Sec. 35, Ch. 91, L. 1999.

40-7-312. Costs, fees, and expenses. (1) The court shall award the prevailing party, including a state, necessary and reasonable expenses incurred by or on behalf of the party, including costs, communication expenses, attorney fees, investigative fees, expenses for witnesses, travel expenses, and child care during the course of the proceedings, unless the party from whom fees or expenses are sought establishes that the award would be clearly inappropriate.

(2) The court may not assess fees, costs, or expenses against a state unless authorized by law other than this chapter.

History: En. Sec. 36, Ch. 91, L. 1999.

40-7-313. Recognition and enforcement. A court of this state shall accord full faith and credit to an order issued by another state and consistent with this chapter that enforces a child custody determination by a court of another state unless the order has been vacated, stayed, or modified by a court having jurisdiction to do so under 40-7-105, 40-7-107 through 40-7-110, 40-7-112, and part 2 of this chapter.

History: En. Sec. 37, Ch. 91, L. 1999.

40-7-314. Appeals. An appeal may be taken from a final order in a proceeding under this part. Unless the court enters a temporary emergency order under 40-7-204, the enforcing court may not stay an order enforcing a child custody determination pending appeal.

History: En. Sec. 38, Ch. 91, L. 1999.

40-7-315. Role of prosecutor. (1) In a case arising under this chapter or involving the Hague Convention on the Civil Aspects of International Child Abduction, the prosecutor may take any lawful action, including resorting to a proceeding under this part or any other available civil proceeding, to locate a child, obtain the return of a child, or enforce a child custody determination if there is:

(a) an existing child custody determination;

(b) a request to do so from a court in a pending child custody proceeding;

(c) a reasonable belief that a criminal statute has been violated; or

(d) a reasonable belief that the child has been wrongfully removed or retained in violation of the Hague Convention on the Civil Aspects of International Child Abduction.

(2) A prosecutor acts on behalf of the court and may not represent any party to a child custody determination.

History: En. Sec. 39, Ch. 91, L. 1999.

40-7-316. Role of law enforcement. At the request of a prosecutor acting under 40-7-315, a law enforcement officer may take any lawful action reasonably necessary to locate a child or a party and to assist a prosecutor with responsibilities under 40-7-315.

History: En. Sec. 40, Ch. 91, L. 1999.

40-7-317. Costs and expenses. If the respondent is not the prevailing party, the court may assess against the respondent all direct expenses and costs incurred by the prosecutor and law enforcement officers under 40-7-315 or 40-7-316.

History: En. Sec. 41, Ch. 91, L. 1999.

CHAPTER 8

ADOPTION

(Repealed. Sec. 171, Ch. 480, L. 1997)

Chapter Compiler's Comments

Histories of Repealed Sections:

40-8-101. En. Sec. 17, Ch. 240, L. 1957; R.C.M. 1947, 61-217; amd. Sec. 5, Ch. 530, L. 1981.

40-8-102. En. Sec. 16, Ch. 240, L. 1957; R.C.M. 1947, 61-216.

40-8-103. En. Sec. 1, Ch. 240, L. 1957; R.C.M. 1947, 61-201; amd. Sec. 6, Ch. 530, L. 1981; amd. Sec. 3, Ch. 1, Sp. L. 1981; amd. Sec. 34, Ch. 609, L. 1987; amd. Sec. 7, Ch. 684, L. 1991; amd. Sec. 1, Ch. 275, L. 1995; amd. Sec. 152, Ch. 546, L. 1995.

40-8-104. En. Sec. 2, Ch. 240, L. 1957; R.C.M. 1947, 61-202; amd. Sec. 7, Ch. 530, L. 1981.

40-8-105. En. 61-218 by Sec. 6, Ch. 199, L. 1961; R.C.M. 1947, 61-218.

40-8-106. En. Sec. 3, Ch. 240, L. 1957; amd. Sec. 15, Ch. 240, L. 1971; amd. Sec. 22, Ch. 94, L. 1973; R.C.M. 1947, 61-203.

40-8-107. En. Sec. 4, Ch. 240, L. 1957; R.C.M. 1947, 61-204.

40-8-108. En. Sec. 10, Ch. 530, L. 1981.

40-8-109. En. Sec. 11, Ch. 530, L. 1981; amd. Sec. 4, Ch. 1, Sp. L. 1981; amd. Sec. 1, Ch. 277, L. 1987; amd. Sec. 3, Ch. 18, L. 1989; amd. Sec. 1, Ch. 539, L. 1989; amd. Sec. 3, Ch. 683, L. 1991; amd. Sec. 1, Ch. 684, L. 1991.

40-8-110. En. Sec. 2, Ch. 539, L. 1989; amd. Sec. 153, Ch. 546, L. 1995.

40-8-111. En. Sec. 5, Ch. 240, L. 1957; amd. Sec. 2, Ch. 199, L. 1961; amd. Sec. 48, Ch. 121, L. 1974; amd. Sec. 27, Ch. 512, L. 1975; R.C.M. 1947, 61-205; amd. Sec. 6, Ch. 33, L. 1979; amd. Sec. 8, Ch. 530, L. 1981; amd. Sec. 11, Ch. 609, L. 1987; amd. Sec. 2, Ch. 439, L. 1993; amd. Sec. 1, Ch. 369, L. 1995; amd. Sec. 5, Ch. 458, L. 1995; amd. Sec. 154, Ch. 546, L. 1995.

40-8-112. En. Sec. 6, Ch. 240, L. 1957; R.C.M. 1947, 61-206.

40-8-113. En. Sec. 7, Ch. 240, L. 1957; R.C.M. 1947, 61-207; amd. Sec. 9, Ch. 530, L. 1981.

40-8-114. En. Sec. 1, Ch. 682, L. 1991.

40-8-115. En. Sec. 2, Ch. 684, L. 1991.

40-8-116. En. Sec. 3, Ch. 684, L. 1991.

40-8-117. En. Sec. 4, Ch. 684, L. 1991.

40-8-118 through 40-8-120 reserved.

40-8-121. En. Sec. 8, Ch. 240, L. 1957; amd. Sec. 48, Ch. 121, L. 1974; amd. Sec. 18, Ch.

33, L. 1977; R.C.M. 1947, 61-208; amd. Sec. 12, Ch. 530, L. 1981; amd. Sec. 2, Ch. 277, L. 1987; amd. Sec. 11, Ch. 609, L. 1987; amd. Sec. 1, Ch. 233, L. 1989; amd. Sec. 155, Ch. 546, L. 1995.

40-8-122. En. Sec. 9, Ch. 240, L. 1957; amd. Sec. 48, Ch. 121, L. 1974; amd. Sec. 2, Ch. 495, L. 1975; R.C.M. 1947, 61-209; amd. Sec. 13, Ch. 530, L. 1981; amd. Sec. 3, Ch. 277, L. 1987; amd. Sec. 1, Ch. 406, L. 1987.

40-8-123. En. Sec. 10, Ch. 240, L. 1957; amd. Sec. 3, Ch. 199, L. 1961; R.C.M. 1947, 61-210; amd. Sec. 14, Ch. 530, L. 1981; amd. Sec. 4, Ch. 277, L. 1987.

40-8-124. En. Sec. 11, Ch. 240, L. 1957; amd. Sec. 4, Ch. 199, L. 1961; amd. Sec. 1, Ch. 2, L. 1963; amd. Sec. 48, Ch. 121, L. 1974; amd. Sec. 19, Ch. 33, L. 1977; R.C.M. 1947, 61-211; amd. Sec. 5, Ch. 277, L. 1987; amd. Sec. 11, Ch. 609, L. 1987; amd. Sec. 156, Ch. 546, L. 1995.

40-8-125. En. Sec. 12, Ch. 240, L. 1957; amd. Sec. 1, Ch. 102, L. 1965; R.C.M. 1947, 61-212; amd. Sec. 1, Ch. 582, L. 1989.

40-8-126. En. Sec. 13, Ch. 240, L. 1957; amd. Sec. 18, Ch. 121, L. 1974; R.C.M. 1947, 61-213; amd. Sec. 3, Ch. 228, L. 1981; amd. Sec. 35, Ch. 609, L. 1987; amd. Sec. 2, Ch. 275, L. 1995; (12)En. Sec. 3, Ch. 275, L. 1995; amd. Sec. 22, Ch. 515, L. 1995; amd. Sec. 157, Ch. 546, L. 1995.

40-8-127. En. Sec. 14, Ch. 240, L. 1957; amd. Sec. 20, Ch. 33, L. 1977; R.C.M. 1947, 61-214.

40-8-128. En. Sec. 15, Ch. 240, L. 1957; R.C.M. 1947, 61-215.

40-8-129 through 40-8-134 reserved.

40-8-135. En. Sec. 1, Ch. 18, L. 1989; amd. Sec. 5, Ch. 684, L. 1991.

40-8-136. En. Sec. 2, Ch. 18, L. 1989; amd. Sec. 6, Ch. 684, L. 1991.

40-8-201. En. Sec. 1, Ch. 229, L. 1947; R.C.M. 1947, 61-139.

40-8-202. En. Sec. 2, Ch. 229, L. 1947; amd. Sec. 5, Ch. 199, L. 1961; R.C.M. 1947, 61-140; amd. Sec. 2, Ch. 406, L. 1987.

CHAPTER 9

GRANDPARENT-GRANDCHILD CONTACT

Part 1 — General Provisions

40-9-101. Application of Montana Rules of Civil Procedure.
40-9-102. Grandparent-grandchild contact.

Part 1
General Provisions

40-9-101. Application of Montana Rules of Civil Procedure. (1) Except as otherwise provided, the Montana Rules of Civil Procedure apply to all proceedings under this section and 40-9-102.

(2) A proceeding for grandparent-grandchild contact under this section and 40-9-102 must be entitled, "In re the grandparent-grandchild contact of......"

(3) The initial pleading in all proceedings under this section and 40-9-102 must be denominated a petition. A responsive pleading must be denominated a response. Other pleadings must be denominated as provided in the Montana Rules of Civil Procedure.

History: En. Sec. 1, Ch. 17, L. 1979; amd. Sec. 32, Ch. 343, L. 1997.

Cross-References

Montana Rules of Civil Procedure, Title 25, ch. 20.

40-9-102. Grandparent-grandchild contact. (1) Except as provided in subsection (5), the district court may grant to a grandparent of a child reasonable rights to contact with the child, including but not limited to rights regarding a child who is the subject of, or as to whom a disposition has been made during, an administrative or court proceeding under Title 41 or this title. The department of public health and human services must be given notice of a petition for grandparent-grandchild contact regarding a child who is the subject of, or as to whom a disposition has been made during, an administrative or court proceeding under Title 41 or this title.

(2) Grandparent-grandchild contact granted under this section may be granted only upon a finding by the court, after a hearing, that the contact would be in the best interest of the child.

(3) A person may not petition the court under this section more often than once every 2 years unless there has been a significant change in the circumstances of:

(a) the child;

(b) the child's parent, guardian, or custodian; or

(c) the child's grandparent.

(4) The court may appoint an attorney to represent the interests of a child with respect to grandparent-grandchild contact when the interests are not adequately represented by the parties to the proceeding.

(5) This section does not apply if the child has been adopted by a person other than a stepparent or a grandparent. Grandparent-grandchild contact granted under this section terminates upon the adoption of the child by a person other than a stepparent or a grandparent.

History: En. Sec. 2, Ch. 17, L. 1979; amd. Sec. 1, Ch. 616, L. 1983; amd. Sec. 1, Ch. 18, L. 1991; amd. Sec. 158, Ch. 546, L. 1995; amd. Sec. 33, Ch. 343, L. 1997.

Cross-References

Best interests of child, 40-4-212.
Parental contact, 40-4-217.

CHAPTERS 10 THROUGH 14

RESERVED

CHAPTER 15

PARTNER AND FAMILY MEMBER ASSAULT, SEXUAL ASSAULT, AND STALKING SAFETY AND PROTECTION OF VICTIMS

Part 1 — General Provisions

40-15-101. Purpose.
40-15-102. Eligibility for order of protection.
40-15-103. Notice of rights when partner or family member assault is suspected.
40-15-104 through 40-15-109 reserved.
40-15-110. Partner and family member assault intervention and treatment fund account.

Part 2 — Order of Protection

40-15-201. Temporary order of protection.
40-15-202. Order of protection — hearing — evidence.
40-15-203. Attorney general to provide forms.
40-15-204. Written orders of protection.

Part 3 — Jurisdiction, Venue, and Appeal—Registration of Orders

40-15-301. Jurisdiction and venue.
40-15-302. Appeal to district court — order to remain in effect.
40-15-303. Registration of orders.

Chapter Cross-References

Justices' Courts — civil jurisdiction, 3-10-301.

Temporary restraining order, 40-4-121.

Temporary order for maintenance or support, temporary injunction, or temporary restraining order — jurisdiction and venue, 40-4-123.

Partner or family member assault — penalty, 45-5-206.

Basis for arrest without warrant — arrest of primary aggressor, 46-6-311.

Domestic violence provisions, Title 46, ch. 6, part 6.

Bail schedule — acceptance by peace officer, 46-9-302.

Misdemeanor probation offices — officers — costs, 46-23-1005.

Part 1

General Provisions

40-15-101. Purpose. The purpose of this chapter is to promote the safety and protection of all victims of partner and family member assault, victims of sexual assault, and victims of stalking.

History: **En. Sec. 21, Ch. 350, L. 1995.**

40-15-102. Eligibility for order of protection. (1) A person may file a petition for an order of protection if:

(a) the petitioner is in reasonable apprehension of bodily injury by the petitioner's partner or family member as defined in 45-5-206; or

(b) the petitioner is a victim of one of the following offenses committed by a partner or family member:

(i) assault as defined in 45-5-201;
(ii) aggravated assault as defined in 45-5-202;
(iii) intimidation as defined in 45-5-203;
(iv) partner or family member assault as defined in 45-5-206;
(v) criminal endangerment as defined in 45-5-207;
(vi) negligent endangerment as defined in 45-5-208;
(vii) assault on a minor as defined in 45-5-212;
(viii) assault with a weapon as defined in 45-5-213;
(ix) unlawful restraint as defined in 45-5-301;
(x) kidnapping as defined in 45-5-302;
(xi) aggravated kidnapping as defined in 45-5-303; or
(xii) arson as defined in 45-6-103.

(2) A victim of stalking as defined in 45-5-220, incest as defined in 45-5-507, sexual assault as defined in 45-5-502, or sexual intercourse without

consent as defined in 45-5-503 is eligible for an order of protection against the offender regardless of the petitioner's relationship to the offender.

(3) A parent, guardian ad litem, or other representative of the petitioner may file a petition for an order of protection on behalf of a minor petitioner against the petitioner's abuser. At its discretion, a court may appoint a guardian ad litem for a minor petitioner.

(4) A guardian must be appointed for a minor respondent when required by Rule 17(c), Montana Rules of Civil Procedure, or by 25-31-602. An order of protection is effective against a respondent regardless of the respondent's age.

(5) A petitioner is eligible for an order of protection whether or not:

(a) the petitioner reports the abuse to law enforcement;

(b) charges are filed; or

(c) the petitioner participates in a criminal prosecution.

(6) If a petitioner is otherwise entitled to an order of protection, the length of time between the abusive incident and the petitioner's application for an order of protection is irrelevant.

History: En. Sec. 22, Ch. 350, L. 1995; amd. Sec. 1, Ch. 432, L. 1999.

Compiler's Comments

1999 Amendment: Chapter 432 inserted (1)(b)(vii) concerning assault on a minor; inserted (1)(b)(viii) concerning assault with a weapon; and made minor changes in style. Amendment effective October 1, 1999.

40-15-103. Notice of rights when partner or family member assault is suspected. (1) Whenever a patient seeks health care and the health care provider suspects that partner or family member assault has occurred, the health care provider, outside the presence of the suspected offender, may advise the suspected victim of the availability of a shelter or other services in the community and give the suspected victim immediate notice of any legal rights and remedies available. The notice must include furnishing the suspected victim with a copy of the following statement:

"The city or county attorney's office can file criminal charges against the offender if the offender committed the offense of partner or family member assault.

In addition to the criminal charges filed by the state of Montana, you are entitled to the civil remedies listed below.

You may go to court and file a petition requesting any of the following orders for relief:

(1) an order of protection that prohibits the offender from threatening to hurt you or hurting you;

(2) an order of protection that directs the offender to leave your home and prohibits the offender from having any contact with you;

(3) an order of protection that prevents the offender from transferring any property except in the usual course of business;

(4) an order of protection that prohibits the offender from being within 1,500 feet or other appropriate distance of you, any named family member, and your worksite or other specified place;

(5) an order of protection that gives you possession of necessary personal property;

(6) an order of protection that prohibits the offender from possessing or using the firearm used in the assault.

If you file a petition in district court, the district court may order all of the above and may award custody of your minor children to you or the other parent. The district court may order visitation of your children between the parents. The district court may order the offender to pay support payments to you if the offender has a legal obligation to pay you support payments.

The forms that you need to obtain an order of protection are at ______________. You may call ____________ at _______________ for additional information about an order of protection.

You may file a petition in district court at ____________.

You may be eligible for restitution payments from the offender (the offender would repay you for costs that you have had to pay as a result of the assault) or for crime victims compensation payments (a fund administered by the state of Montana for innocent victims of crime). You may call ____________ at _____________ for additional information about restitution or crime victims compensation.

The following agencies may be able to give you additional information or emergency help. (List telephone numbers and addresses of agencies other than shelters with secret locations and a brief summary of services that are available.)"

(2) Partner or family member assault may be suspected by health care workers in circumstances in which a patient repeatedly seeks health care for trauma type injuries or a patient gives an explanation for injuries that is not consistent with the injuries that are observed.

(3) For purposes of this section, "health care provider" has the meaning provided in 50-16-504.

History: En. Sec. 20, Ch. 350, L. 1995.

40-15-104 through 40-15-109 reserved.

40-15-110. Partner and family member assault intervention and treatment fund account. (1) There is a partner and family member assault intervention and treatment fund account in the state special revenue fund in the state treasury. The money in the account is allocated to the department of public health and human services to fund services to victims of partner or family member assault, as provided in subsections (2) and (3).

(2) The department shall distribute the money in the account, as provided in subsection (3), to agencies that provide direct services to victims of partner or family member assault, including but not limited to shelters, crisis lines, safe homes, and victim's counseling providers. A service provider is eligible to receive money under this section for services provided to a victim of partner or family member assault, whether or not the victim seeks or receives services within the criminal justice system.

(3) A service provider that provides direct services to victims of partner or family member assault shall apply to the department for distribution of money under this section. The department shall evaluate a provider's eligibility to receive money under this section based on available money, the needs of the provider, whether the provider includes programs focused on prevention of partner and family member assault, the quality of services provided by the provider, the need for services in the community, and the need for improved or continuing services in the community.

History: **En. Sec. 9, Ch. 484, L. 1997.**

Compiler's Comments

Termination Provision Repealed: Section 3, Ch. 311, L. 1999, repealed sec. 14, Ch. 484, L. 1997, which terminated this section June 30, 1999.

Part 2
Order of Protection

Part Cross-References

Dissolution or separation proceedings — temporary order or injunction, 40-4-121.

40-15-201. Temporary order of protection. (1) A petitioner may seek a temporary order of protection from a court listed in 40-15-301. The petitioner shall file a sworn petition that states that the petitioner is in reasonable apprehension of bodily injury or is a victim of one of the offenses listed in 40-15-102, has a relationship to the respondent if required by 40-15-102, and is in danger of harm if the court does not issue a temporary order of protection immediately.

(2) Upon a review of the petition and a finding that the petitioner is in danger of harm if the court does not act immediately, the court shall issue a temporary order of protection that grants the petitioner appropriate relief. The temporary order of protection may include any or all of the following orders:

(a) prohibiting the respondent from threatening to commit or committing acts of violence against the petitioner and any designated family member;

(b) prohibiting the respondent from harassing, annoying, disturbing the peace of, telephoning, contacting, or otherwise communicating, directly or indirectly, with the petitioner, any named family member, any other victim of this offense, or a witness to the offense;

(c) prohibiting the respondent from removing a child from the jurisdiction of the court;

(d) directing the respondent to stay 1,500 feet or other appropriate distance away from the petitioner, the petitioner's residence, the school or place of employment of the petitioner, or any specified place frequented by the petitioner and by any other designated family or household member;

(e) removing and excluding the respondent from the residence of the petitioner, regardless of ownership of the residence;

(f) prohibiting the respondent from possessing or using the firearm used in the assault;

(g) prohibiting the respondent from transferring, encumbering, concealing, or otherwise disposing of any property except in the usual course of business or for the necessities of life and, if so restrained, requiring the respondent to notify the petitioner, through the court, of any proposed extraordinary expenditures made after the order is issued;

(h) directing the transfer of possession and use of the residence, an automobile, and other essential personal property, regardless of ownership of the residence, automobile, or essential personal property, and directing an appropriate law enforcement officer to accompany the petitioner to the residence to ensure that the petitioner safely obtains possession of the residence, automobile, or other essential personal property or to supervise the petitioner's or respondent's removal of essential personal property;

(i) directing the respondent to complete violence counseling, which may include alcohol or chemical dependency counseling or treatment, if appropriate;

(j) directing other relief considered necessary to provide for the safety and welfare of the petitioner or other designated family member.

(3) If the petitioner has fled the parties' residence, notice of the petitioner's new residence must be withheld, except by order of the court for good cause shown.

(4) The court may, without requiring prior notice to the respondent, issue an immediate temporary order of protection for up to 20 days if the court finds, on the basis of the petitioner's sworn petition or other evidence, that harm may result to the petitioner if an order is not issued before the 20-day period for responding has elapsed.

History: En. Sec. 23, Ch. 350, L. 1995.

Cross-References

Partner or family member assault — seizure of weapon, 46-6-603.

40-15-202. Order of protection — hearing — evidence. (1) A hearing must be conducted within 20 days from the date that the court issues a temporary order of protection. The hearing date may be continued at the request of either party for good cause or by the court. If the hearing date is continued, the temporary order of protection must remain in effect until the court conducts a hearing. At the hearing, the court shall determine whether good cause exists for the temporary order of protection to be continued, amended, or made permanent.

(2) The respondent may request an emergency hearing before the end of the 20-day period by filing an affidavit that demonstrates that the respondent has an urgent need for the emergency hearing. An emergency hearing must be set within 3 working days of the filing of the affidavit.

(3) The order of protection may not be made mutually effective by the court. The respondent may obtain an order of protection from the petitioner only by filing an application for an order of protection and following the procedure described in this chapter.

(4) (a) Except as provided in subsection (4)(b), evidence concerning a victim's sexual conduct is not admissible in a hearing under this section.

(b) Evidence of a victim's past sexual conduct with the offender or evidence of specific instances of the victim's sexual activity to show the origin of semen, pregnancy, or disease may be admitted in a hearing under this section only if that sexual conduct is at issue in the hearing.

(5) If a respondent proposes to offer evidence subject to subsection (4)(b), the trial judge shall order a separate hearing to determine whether the proposed evidence is admissible under subsection (4)(b).

History: En. Sec. 24, Ch. 350, L. 1995; amd. Sec. 3, Ch. 484, L. 1997; amd. Sec. 1, Ch. 311, L. 1999.

Compiler's Comments

1999 Amendment: Chapter 311 inserted second and third sentences in (1) authorizing continuation of hearing date at request of either party for good cause or by court and, if continued, providing that temporary order of protection remains in effect until court hearing; and made minor changes in style. Amendment effective April 15, 1999.

40-15-203. Attorney general to provide forms. The attorney general shall prepare uniform sample instructions, petition forms, and order forms for temporary orders of protection and for orders of protection. The attorney general shall distribute samples of the instructions, petitions, and forms to the clerk of the district court in each county and to justices', municipal, and city courts. The clerk of the district court, justices of the peace, and municipal and city court judges shall make forms available to the public at no charge.

History: En. Sec. 25, Ch. 350, L. 1995.

40-15-204. Written orders of protection. (1) The court may, on the basis of the respondent's history of violence, the severity of the offense at issue, and the evidence presented at the hearing, determine that to avoid further injury or harm, the petitioner needs permanent protection. The court may order that the order of protection remain in effect permanently.

(2) In a dissolution proceeding, the district court may, upon request, issue either an order of protection for an appropriate period of time or a permanent order of protection.

(3) An order of protection may include all of the relief listed in 40-15-201, when appropriate.

(4) An order of protection may include restraining the respondent from any other named family member who is a minor. If this restriction is included, the respondent must be restrained from having contact with the minor for an appropriate time period as directed by the court or permanently if the court finds that the minor was a victim of abuse, a witness to abuse, or endangered by the environment of abuse.

(5) An order of protection issued under this section may continue for an appropriate time period as directed by the court or be made permanent under subsection (1), (2), or (4). The order may be terminated upon the petitioner's request that the order be dismissed.

(6) An order of protection must include a section that indicates whether there are any other civil or criminal actions pending involving the parties, a brief description of the action, and the court in which the action is filed.

(7) An amendment to a temporary order of protection or to an order of protection is effective only after it has been served in writing on the opposing party.

(8) There is no cost to file a petition for an order of protection or for service of an order of protection.

(9) Any temporary order of protection or order of protection must conspicuously bear the following:

"Violation of this order is a criminal offense under 45-5-220 or 45-5-626 and may carry penalties of up to $10,000 in fines and up to a 5-year jail sentence.

This order is issued by the court, and the respondent is forbidden to do any act listed in the order, even if invited by the petitioner or another person. This order may be amended only by further order of this court or another court that assumes jurisdiction over this matter."

History: En. Sec. 26, Ch. 350, L. 1995; amd. Sec. 1, Ch. 186, L. 1997.

Part 3

Jurisdiction, Venue, and Appeal — Registration of Orders

40-15-301. Jurisdiction and venue. (1) District courts, justices' courts, municipal courts, and city courts have concurrent jurisdiction to hear and issue orders under 40-15-201.

(2) When a dissolution of marriage or parenting action involving the parties is pending in district court, a person may file a petition for an order of protection in a justice's, municipal, or city court only if the district court judge assigned to that case is unavailable or if the petitioner, to escape further abuse, left the county where the abuse occurred. The petitioner shall provide a copy of relevant district court documents to the justice's, municipal, or city court, along with the petition. The justice of the peace, municipal court judge, or city court judge shall immediately certify the pleadings to the original district court after signing an order of protection under this subsection. The district court shall conduct the hearing unless both parties and both courts agree that the hearing may be conducted in the court of limited jurisdiction. If the district court is unable to conduct a hearing within 20 days of receipt of the certified pleadings, it shall conduct a hearing within 45 days of the receipt of the pleadings, unless the hearing is continued at the request of either party for good cause or by the court. If the hearing is continued, the order of protection must remain in effect until the court conducts the hearing.

(3) If one of the parties to an order of protection files for dissolution of marriage or files a parenting action after the order of protection is filed but before the hearing is conducted, the hearing must be conducted in the court in which the order of protection was filed. Either party may appeal or remove the matter to the district court prior to or after the hearing. If the district court is unable to conduct a hearing within 20 days of receipt of the certified pleadings, the district court shall conduct a hearing within 45 days of receipt of the pleadings. The hearing may be continued at the request of either party for good cause or by the court. If the hearing is continued, the order of protection must remain in effect until the court conducts the hearing.

(4) An action brought under this chapter may be filed in the county where the petitioner currently or temporarily resides, the county where the respondent resides, or the county where the abuse occurred. There is no minimum length of residency required to file a petition under this chapter.

(5) The right to petition for relief may not be denied because the petitioner has vacated the residence or household to avoid abuse.

(6) An order of protection issued under this section is effective throughout the state. Courts and law enforcement officials shall give full faith and credit to all orders of protection issued within the state.

(7) A certified copy of an order of protection from another state, along with proof of service, may be filed in a Montana court with jurisdiction over orders of protection in the county where the petitioner resides. If properly filed in Montana, an order of protection issued in another state must be enforced in the same manner as an order of protection issued in Montana.

History: En. Sec. 27, Ch. 350, L. 1995; amd. Sec. 2, Ch. 311, L. 1999.

Compiler's Comments

1999 Amendment: Chapter 311 in (2) at beginning of first sentence substituted "dissolution of marriage or parenting action" for "divorce or custody action", inserted fourth sentence requiring court to conduct hearing unless both parties and courts agree hearing may be conducted in limited jurisdiction court, in fifth sentence substituted "shall" for "may" and after "receipt" inserted "of the pleadings, unless the hearing is continued at the request of either party for good cause or by the court", and inserted sixth sentence requiring order of protection to remain in effect until hearing if hearing continued; inserted (3) providing procedure when one party to protection order files for dissolution of marriage of parenting action after filing of protection order but before occurrence of hearing; and made minor changes in style. Amendment effective April 15, 1999.

40-15-302. Appeal to district court — order to remain in effect. (1) An order issued by a justice's court, municipal court, or city court pursuant to 40-15-201 is immediately reviewable by the district judge upon the filing of a notice of appeal. The district judge may affirm, dissolve, or modify an order of a justice's court, municipal court, or city court made pursuant to 40-15-201 or 40-15-204.

(2) A case in which an order has been issued by a justice's court, municipal court, or city court pursuant to 40-15-201 or 40-15-204 may be removed to district court upon filing of a notice of removal.

(3) If a temporary order of protection or an order of protection issued by a court of limited jurisdiction is appealed or removed to an appellate court, the order continues in full force and effect unless modified by the appellate court.

History: En. Sec. 28, Ch. 350, L. 1995; amd. Sec. 4, Ch. 484, L. 1997.

40-15-303. Registration of orders. (1) The clerk of court, justice of the peace, municipal court judge, or city court judge shall, within 24 hours of receiving proof of service of an order under 40-15-201, 40-15-204, or 40-15-301, mail a copy of the order or any extension, modification, or termination of the order, along with a copy of the proof of service, to the appropriate law enforcement agencies designated in the order.

(2) Law enforcement agencies shall establish procedures, using an existing system for warrant verification, to ensure that peace officers at the scene of an alleged violation of an order of protection are informed of the existence and terms of the order.

History: En. Sec. 29, Ch. 350, L. 1995.

TITLE 41

MINORS

Ch.
1. Rights and Obligations of Minors.
2. Child Labor.
3. Child Abuse and Neglect.
4. Interstate Placement of Children.
5. Youth Court Act.
6. Interstate Compact on Juveniles.
7. Montana Family Policy Act.

CHAPTER 1

RIGHTS AND OBLIGATIONS OF MINORS

Part 1 — Minority

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Chapter Cross-References

Rights of persons not adults, Art. II, sec. 15, Mont. Const.

Residence of minors, 1-1-215.

Youth centers — recreational facilities, 7-16-4103, 7-16-4104, 7-16-4108.

Curfew for minors, 7-32-2302.

Minor beneficiaries under PERS, 19-2-801 through 19-2-803.

Care of children of deceased police officers and firefighters, Title 19, ch. 9, 18.

Education of children, Title 20.

Minor under 12 years of age required to wear personal flotation device, 23-2-521.

Minors not to engage in parimutuel betting, gambling, bingo, raffles, or sports pools, 23-4-301.

Liability of minor for own torts, 27-1-711.

Civil liability of parent for shoplifting by minor, 27-1-718.

Banking law relating to minors, 32-1-107, 32-1-444.

Savings and loan shares held by minors, 32-2-418.

Minors' interests in credit union shares, 32-3-504, 32-3-506.

Insurance law relating to minors, 33-15-103, 33-15-401, 33-15-502, 33-20-115, 33-20-1111, 33-22-212, 33-22-304, 33-22-604.

Uniform Interstate Family Support Act, Title 40, ch. 5, part 1.

Administrative enforcement of support for dependent children, Title 40, ch. 5, parts 2 through 4.

Medical support order enforcement, Title 40, ch. 5, part 8.

Parent and child, Title 40, ch. 6.

Uniform Child Custody Jurisdiction Act, Title 40, ch. 7.

Adoption, Title 42.

Missing Children Act of 1985, Title 44, ch. 2, part 5.

Offenses against the family, Title 45, ch. 5, part 6.

Specific limit on justification for age discrimination, 49-2-403.

Day-care facilities — Montana Child Care Act, Title 52, ch. 2, part 7.

Operation of vehicles by minors, 61-5-106 through 61-5-109, 61-5-112, 61-5-202, 61-5-217, 61-5-304.

Child safety restraint law, 61-9-419 through 61-9-423.

Property law relating to minors, 70-1-404, 70-1-420, 70-1-422, 70-6-514.

Guardianship, Title 72, ch. 5.

Montana Uniform Transfers to Minors Act, Title 72, ch. 26.

Hunter safety instruction required, 87-2-105.

Youth trapping license, 87-2-605.

No fishing license required for minor under 15 years of age, 87-2-805.

Fishing license exception for angler educational events and activities, 87-2-808.

Part 1
Minority

Part Cross-References

Age of majority, Art. II, sec. 14, Mont. Const.

Missing Children Act of 1985, Title 44, ch. 2, part 5.

41-1-101. Minors and adults defined. (1) Minors are:

(a) males under 18 years of age;

(b) females under 18 years of age.

(2) All other persons are adults.

History: En. Secs. 10, 12, Civ. C. 1895; re-en. Secs. 3584, 3586, Rev. C. 1907; re-en. Sec. 5673, R.C.M. 1921; Cal. Civ. C. Sec. 25; Field Civ. C. Sec. 11; re-en. Sec. 5673, R.C.M. 1935; amd. Sec. 16, Ch. 240, L. 1971; amd. Sec. 23, Ch. 94, L. 1973; R.C.M. 1947, 64-101.

Cross-References

Adult rights, Art. II, sec. 14, Mont. Const.

Rights of persons not adults, Art. II, sec. 15, Mont. Const.

University students — minor defined, 20-25-501.

Civil liability of parent for shoplifting by minor, 27-1-718.

Who may contract, 28-2-201.

Agency — applicability of laws relating to capacity to contract, 28-10-704.

Montana Youth Court Act — adult and youth defined, 41-5-103.

Hard-to-place child defined, 42-10-103.

Missing Children Act of 1985, Title 44, ch. 2, part 5.

Child safety restraint law, 61-9-419 through 61-9-423.

41-1-102. Periods of minority — how calculated. The periods specified in 41-1-101 must be calculated from the first minute of the day on which persons are born to the same minute of the corresponding day completing the period of minority.

History: En. Sec. 11, Civ. C. 1895; re-en. Sec. 3585, Rev. C. 1907; re-en. Sec. 5674, R.C.M. 1921; Cal. Civ. C. Sec. 26; re-en. Sec. 5674, R.C.M. 1935; R.C.M. 1947, 64-102.

Cross-References

Compensation and support of person after attaining majority, 40-6-218.

When parental authority ceases, 40-6-234.

Who may not be personal representative, 72-3-501.

41-1-103. Unborn children. A child conceived but not yet born is to be deemed an existing person, so far as may be necessary for its interests in the event of its subsequent birth.

History: En. Sec. 13, Civ. C. 1895; re-en. Sec. 3587, Rev. C. 1907; re-en. Sec. 5675, R.C.M. 1921; Cal. Civ. C. Sec. 29; Field Civ. C. Sec. 12; re-en. Sec. 5675, R.C.M. 1935; R.C.M. 1947, 64-103.

Cross-References

Legitimacy of children born after dissolution of marriage, 40-6-202.

Abortion, Title 50, ch. 20.

Afterborn heirs, 72-2-118.

Part 2
Civil Actions Concerning Minors

Part Cross-References

Owner's civil liability for negligent operation of boat, 23-2-505.

Montana Rules of Civil Procedure relating to children, Rules 17(c), 27(a)(2), and 40, M.R.Civ.P. (see Title 25, ch. 20).

Suits on behalf of minors, 27-1-323, 27-1-512, 27-1-514.

Minors allowed to make marriage settlements, 40-2-315.

Uniform Parentage Act, Title 40, ch. 6, part 1.

41-1-201. Liability of minors for wrongs — exemplary damages. A minor is civilly liable for a wrong done by him but is not liable in exemplary damages unless at the time of the act he was capable of knowing that it was wrongful.

History: En. Sec. 24, Civ. C. 1895; re-en. Sec. 3598, Rev. C. 1907; re-en. Sec. 5686, R.C.M. 1921; Cal. Civ. C. Sec. 41; re-en. Sec. 5686, R.C.M. 1935; R.C.M. 1947, 64-113(part).

Cross-References

Pupils — duties and sanctions, 20-5-201.

Civil liability of owner for negligent operation of boat, 23-2-505.

When punitive damages allowed, 27-1-221.

Civil liability of parent for shoplifting by minor, 27-1-718.

Destruction of property by minor — liability of parents, 40-6-237.

41-1-202. Enforcement of minor's rights. A minor may enforce his rights by civil action or other legal proceedings in the same manner as a person of full age, except that a guardian must conduct the same.

History: En. Sec. 25, Civ. C. 1895; re-en. Sec. 3599, Rev. C. 1907; re-en. Sec. 5687, R.C.M. 1921; Cal. Civ. C. Sec. 42; Field Civ. C. Sec. 25; re-en. Sec. 5687, R.C.M. 1935; R.C.M. 1947, 64-114.

Cross-References

Appointment of guardian ad litem, 25-5-301.

Right of minor to bring civil action or other proceeding, 27-1-511.

Action by parent or guardian for injury to child or ward, 27-1-512.

Who may sue for whose seduction, 27-1-514.

Statute of limitations — when person entitled to bring action is under disability, 27-2-401.

Uniform Parentage Act, Title 40, ch. 6, part 1.

Delegation of powers by parent or guardian, 72-5-103.

Guardians of minors, Title 72, ch. 5, part 2.

Protection of property of minors and persons under disability, Title 72, ch. 5, part 4.

Part 3
Power to Contract

Part Cross-References

Who may contract, 28-2-201.

Contracts in restraint of marriage generally void — exception for minors, 28-2-706.

Agency, 28-10-104, 28-10-704.

Power to contract — purchase of insurance by minors, 33-15-103.

41-1-301. Delegation of power by minors forbidden. A minor cannot give a delegation of power.

History: En. Sec. 16, Civ. C. 1895; re-en. Sec. 3590, Rev. C. 1907; re-en. Sec. 5678, R.C.M. 1921; Cal. Civ. C. Sec. 33; Field Civ. C. Sec. 15; re-en. Sec. 5678, R.C.M. 1935; R.C.M. 1947, 64-105.

Cross-References

Who may appoint agent — who may be agent, 28-10-104.

Agency — applicability of laws relating to capacity to contract, 28-10-704.

41-1-302. Contracts of minors — disaffirmance. A minor may make a conveyance or other contract in the same manner as any other person, subject only to his power of disaffirmance under the provisions of this chapter and to the provisions of Title 40, chapter 1.

History: En. Sec. 17, Civ. C. 1895; re-en. Sec. 3591, Rev. C. 1907; re-en. Sec. 5679, R.C.M. 1921; Cal. Civ. C. Sec. 34; Field Civ. C. Sec. 16; re-en. Sec. 5679, R.C.M. 1935; R.C.M. 1947, 64-106.

Cross-References

Contracts by minors, 28-2-201.

Contracts in restraint of marriage generally void — exception for minors, 28-2-706.

Marriage settlement by minors, 40-2-315.

Obligations of children, Title 40, ch. 6, part 3.

41-1-303. Capacity of minors to borrow money for education. Any person who, being a minor, contracts to borrow money to defray the expenses of attending any college or university or other institution of higher education beyond high school shall have full legal capacity to act in his own behalf and shall have all the rights, powers, and privileges and be subject to the obligations of persons of full age with respect to any such contracts.

History: En. Sec. 1, Ch. 34, L. 1963; R.C.M. 1947, 64-106.1.

Cross-References

Resident student financial assistance program, Title 20, ch. 26.

Who may contract, 28-2-201.

Applicability of laws relating to capacity to contract — agency, 28-10-704.

Obligations of parents for support and education of their children, 40-6-211.

41-1-304. When minors may disaffirm. (1) Except as provided in subsection (2), in all cases other than those specified by 41-1-303, 41-1-305, and 41-1-306, the contract of a minor may, upon restoring the consideration to the party from whom it was received, be disaffirmed by the minor, either before the minor reaches majority or within a reasonable time afterwards, or, in case of the minor's death within that period, by the minor's heirs or personal representatives.

(2) A minor subject to the provisions of 31-1-115 is not required to restore any consideration received from the issuer of a credit card or similar loan advance access device that has not obtained the consent of the minor's parent or legal guardian before issuing the card or similar loan advance access device to the minor.

History: En. Sec. 18, Civ. C. 1895; re-en. Sec. 3592, Rev. C. 1907; re-en. Sec. 5680, R.C.M. 1921; Cal. Civ. C. Sec. 35; Field Civ. C. Sec. 17; re-en. Sec. 5680, R.C.M. 1935; R.C.M. 1947, 64-107; amd. Sec. 1, Ch. 29, L. 1979; amd. Sec. 2, Ch. 21, L. 1997.

Cross-References

Who may contract, 28-2-201.

Personal representative — power to recover property that is subject of void or voidable transfer, 72-3-614.

41-1-305. Minor cannot disaffirm contract for necessaries. A minor cannot disaffirm a contract, otherwise valid, to pay the reasonable value of things necessary for his support or that of his family, entered into by him when not under the care of a parent or guardian able to provide for him or them.

History: En. Sec. 19, Civ. C. 1895; re-en. Sec. 3593, Rev. C. 1907; re-en. Sec. 5681, R.C.M. 1921; Cal. Civ. C. Sec. 36; Field Civ. C. Sec. 18; re-en. Sec. 5681, R.C.M. 1935; R.C.M. 1947, 64-108(part).

Cross-References

Contracts of persons entirely without understanding, 28-2-202.

When person of unsound mind cannot disaffirm contract, 28-2-204.

Liability for acts or debts of spouse, 40-2-106.

Earnings and accumulations of married person, 40-2-205.

Necessity determined by standard of living, 40-2-210.

Reciprocal duties of parents and children in maintaining each other, 40-6-214.

When parent liable for necessaries supplied to child, 40-6-215.

Duty of child to support indigent parents, 40-6-301.

41-1-306. Minor cannot disaffirm certain obligations. A minor cannot disaffirm an obligation, otherwise valid, entered into by him under the express authority or direction of a statute or when he has been granted limited emancipation, including a specific right to enter into contracts, under 41-3-406 and 41-3-408.

History: En. Sec. 20, Civ. C. 1895; re-en. Sec. 3594, Rev. C. 1907; re-en. Sec. 5682, R.C.M. 1921; Cal. Civ. C. Sec. 37; Field Civ. C. Sec. 19; re-en. Sec. 5682, R.C.M. 1935; R.C.M. 1947, 64-109; amd. Sec. 6, Ch. 564, L. 1983.

Cross-References

Power to contract — purchase of insurance by minors, 33-15-103.

Marriage settlement by minors, 40-2-315.

Obligations of children, Title 40, ch. 6, part 3.

Discrimination — specific limits on justification, 49-2-403.

Part 4
Validity of Consent to Medical Treatment

Part Cross-References

Consent in general, Title 28, ch. 2, part 3.

Circumstances that affect validity of apparent consent, Title 28, ch. 2, part 4.

Health provisions relating to children, 50-1-202, 50-5-101, 50-15-101, 50-15-108, 50-15-109, 50-15-203, 50-15-302, 50-17-110, 50-30-201 through 50-30-220.

Medical assistance for children, 53-6-101, 53-6-104.

Treatment of persons with developmental disabilities, Title 53, ch. 20, part 1.

Treatment of seriously mentally ill, Title 53, ch. 21, part 1.

41-1-401. Health professional defined. Health professional as used in this part shall include only those persons licensed in Montana as physicians, psychiatrists, psychologists, or dentists.

History: En. 69-6105.1 by Sec. 6, Ch. 312, L. 1974; R.C.M. 1947, 69-6105.1.

Cross-References

Licensing — practice of medicine, Title 37, ch. 3, part 3.

Licensing — dentists, Title 37, ch. 4, part 3.

Licensing — psychologists, Title 37, ch. 17, part 3.

41-1-402. Validity of consent of minor for health services. (1) The consent to the provision of medical or surgical care or services by a hospital or public clinic or to the performance of medical or surgical care or services by a physician licensed to practice medicine in this state may be given by a minor who professes or is found to meet any of the following descriptions:

(a) a minor who is or was ever married or has had a child or graduated from high school or is emancipated;

(b) a minor who has been separated from the minor's parent, parents, or legal guardian for whatever reason and is providing self-support by whatever means;

(c) a minor who professes or is found to be pregnant or afflicted with any reportable communicable disease, including a sexually transmitted disease, or drug and substance abuse, including alcohol. This self-consent applies only to the prevention, diagnosis, and treatment of those conditions specified in this subsection. The self-consent in the case of pregnancy, a sexually transmitted disease, or drug and substance abuse also obliges the health professional, if the health professional accepts the responsibility for treatment, to counsel the minor or to refer the minor to another health professional for counseling.

(d) a minor who needs emergency care, including transfusions, without which the minor's health will be jeopardized. If emergency care is rendered, the parent, parents, or legal guardian must be informed as soon as practical except under the circumstances mentioned in this subsection (1).

(2) A minor who has had a child may give effective consent to health service for the child.

(3) A minor may give consent for health care for the minor's spouse if the spouse is unable to give consent by reason of physical or mental incapacity.

History: En. Sec. 1, Ch. 189, L. 1969; amd. Sec. 1, Ch. 312, L. 1974; amd. Sec. 23, Ch. 100, L. 1977; R.C.M. 1947, 69-6101; amd. Sec. 14, Ch. 440, L. 1989; amd. Sec. 188, Ch. 42, L. 1997.

Cross-References

When parental authority ceases, 40-6-234.

Emergency medical services, Title 50, ch. 6.

Sexually transmitted diseases, Title 50, ch. 18.

Pregnancy — serological testing, Title 50, ch. 19, part 1.

Parental Notice of Abortion Act, Title 50, ch. 20, part 2.

Mentally ill — voluntary admission of minors, 53-21-112.

Alcoholism and drug dependence, Title 53, ch. 24.

41-1-403. Release of information by physician. (1) A treating physician or other health professional may, but shall not be obligated to, inform the spouse, parent, custodian, or guardian of any such minor in the circumstances as enumerated in 41-1-402 of any treatment given or needed when:

(a) in the judgment of the health professional, severe complications are present or anticipated;

(b) major surgery or prolonged hospitalization is needed;

(c) failure to inform the parent, parents, or legal guardian would seriously jeopardize the safety and health of the minor patient, younger siblings, or the public;

(d) to inform them would benefit the minor's physical and mental health and family harmony; or

(e) the hospital desires a third-party commitment to pay for services rendered or to be rendered.

(2) Notification or disclosure to the spouse, parent, parents, or legal guardian by the health professional shall not constitute libel or slander, a violation of the right of privacy, a violation of the rule of privileged communication, or any other legal basis of liability. When the minor is found not to be pregnant or not afflicted with a sexually transmitted disease or not suffering from drug abuse or substance abuse, including alcohol, then no information with respect to any appointment, examination, test, or other health procedure shall be given to the parent, parents, or legal guardian, if they have not been already informed as permitted in this part, without the consent of the minor.

History: En. Sec. 2, Ch. 189, L. 1969; amd. Sec. 2, Ch. 312, L. 1974; R.C.M. 1947, 69-6102; amd. Sec. 15, Ch. 440, L. 1989.

Cross-References

Right of privacy, Art. II, sec. 10, Mont. Const.

Privileges, Art. V, M.R.Ev. (see Title 26, ch. 10).

Libel and slander, Title 27, ch. 1, part 8.

Criminal defamation, 45-8-212.

Confidentiality of health care information, Title 50, ch. 16, part 5.

Uniform Health Care Information Act, Title 50, ch. 16, part 5.

41-1-404. Financial responsibility of minor. Consent of the minor shall not be subject to later disaffirmance or revocation because of minority. The spouse, parent, parents, or legal guardian of a consenting minor shall not be liable for payment for such service unless the spouse, parent, parents, or legal guardian have expressly agreed to pay for such care. Minors so consenting for such health services shall thereby assume financial responsibility for the cost of said services, except those who are proven unable to pay and who receive the services in public institutions. If the minor is covered by health insurance, payment may be applied for services rendered.

History: En. Sec. 3, Ch. 189, L. 1969; amd. Sec. 3, Ch. 312, L. 1974; R.C.M. 1947, 69-6103.

Cross-References

Purchase of insurance by minors, 33-15-103.

Insurance claims and benefits, Title 33, ch. 15, part 5.

When parent not liable for support furnished child, 40-6-216.

Minor not to disaffirm certain obligations, 41-1-306.

41-1-405. Emergencies and special situations. (1) A health professional may render or attempt to render emergency service or first aid, medical, surgical, dental, or psychiatric treatment, without compensation, to any injured person or any person regardless of age who is in need of immediate health care when, in good faith, the professional believes that the giving of aid is the only alternative to probable death or serious physical or mental damage.

(2) A health professional may render nonemergency services to minors for conditions that will endanger the health or life of the minor if services would be delayed by obtaining consent from spouse, parent, parents, or legal guardian.

(3) Consent may not be required of a minor who does not possess the mental capacity or who has a physical disability that renders the minor incapable of giving consent and who has no known relatives or legal guardians, if a physician determines that the health service should be given.

(4) Self-consent of minors does not apply to sterilization or abortion, except as provided in Title 50, chapter 20, part 2.

History: En. Sec. 4, Ch. 189, L. 1969; amd. Sec. 4, Ch. 312, L. 1974; R.C.M. 1947, 69-6104; amd. Sec. 11, Ch. 469, L. 1995.

Cross-References

Limits on liability for emergency care rendered at scene of accident or emergency, 27-1-714.

Consent in general, Title 28, ch. 2, part 3.

Exemptions from licensing requirements — emergencies, 37-3-103.

Abortion, Title 50, ch. 20.

41-1-406. Psychiatric or psychological counseling under urgent circumstances. When executed by a minor, the consent to the providing of psychiatric or psychological counseling by a physician or psychologist licensed to practice in this state, under circumstances when the need for such counseling is urgent in the opinion of the physician or psychologist involved because of danger to the life, safety, or property of a minor or of other person or persons and the consent of the spouse, parent, custodian, or guardian of the minor cannot be obtained within a reasonable time to offset the danger to life or safety, shall be as valid and binding as if the minor had achieved majority. That is, such minor has the same legal capacity to act and the same legal obligations with regard to the giving of such consent as a person of full legal age and capacity, and such consent may not be subject to later disaffirmance by reason of such minority. The consent of no other person or persons (including but not limited to a spouse, parent, custodian, or guardian) is necessary in order to authorize the psychiatric or psychological counseling of such minor. However, no parent may be obligated for the cost of such counseling without his consent.

History: En. Sec. 1, Ch. 315, L. 1971; amd. Sec. 24, Ch. 100, L. 1977; R.C.M. 1947, 69-6106.

Cross-References

Consent in general, Title 28, ch. 2, part 3.

When parent not liable for support furnished child, 40-6-216.

Endangering welfare of children, 45-5-622.

41-1-407. Immunity and responsibility of psychologist, physician, or health care facility. (1) No physician, surgeon, dentist, or health or mental health care facility may be compelled against their best judgment to treat a minor on his own consent.

(2) Nothing contained in this section shall be construed to relieve any physician, surgeon, dentist, or health or mental health care facility from liability for negligence in the diagnosis and treatment rendered such minor.

(3) In any case arising under the provisions of 41-1-406, the physician or licensed psychologist who provides the psychiatric or psychological counseling services shall incur no civil or criminal liability by reason of having provided the counseling services, but such immunity shall not apply to any negligent acts or omissions.

History: (1), (2)En. Sec. 5, Ch. 189, L. 1969; amd. Sec. 5, Ch. 312, L. 1974; Sec. 69-6105, R.C.M. 1947; (3)En. Sec. 2, Ch. 315, L. 1971; Sec. 69-6107, R.C.M. 1947; R.C.M. 1947, 69-6105, 69-6107.

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CHAPTER 2

CHILD LABOR

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Part 1

Child Labor Standards Act

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Exclusions from minimum wage and overtime compensation provisions, 39-3-406.

Illegal discrimination, Title 49, ch. 2, part 3.

41-2-101. Repealed. Sec. 14, Ch. 391, L. 1993.

History: En. Sec. 1, Ch. 99, L. 1907; Sec. 1746, Rev. C. 1907; re-en. Sec. 3095, R.C.M. 1921; re-en. Sec. 3095, R.C.M. 1935; R.C.M. 1947, 10-201.

41-2-102. Short title. This part may be cited as the "Child Labor Standards Act".

History: En. Sec. 1, Ch. 391, L. 1993.

41-2-103. Definitions. As used in this part, the following definitions apply:

(1) "Agriculture" means:

(a) all aspects of farming, including the cultivation and tillage of the soil;

(b) (i) dairying; and

(ii) the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities, including commodities defined as agricultural commodities in the federal Agricultural Marketing Act (12 U.S.C. 1141j(g));

(c) the raising of livestock, bees, fur-bearing animals, or poultry; and

(d) any practices, including forestry or lumbering operations, performed by a farmer or on a farm as an incident to or in conjunction with farming operations, including preparation for market or delivery to storage, to market, or to carriers for transportation to market.

(2) "Department" means the department of labor and industry provided for in 2-15-1701.

(3) "Domestic service" means an occasional, irregular, or incidental nonhazardous occupational activity related to and conducted in or around a private residence, including but not limited to babysitting, pet sitting or similar household chore, and manual yard work. Domestic service specifically excludes industrial homework.

(4) (a) "Employed" or "employment" means an occupation engaged in, permitted, or suffered, with or without compensation in money or other valuable consideration, whether paid to the minor or to some other person, including but not limited to occupations as servant, agent, subagent, or independent contractor.

(b) The term does not include casual, community service, nonrevenue raising, uncompensated activities.

(5) "Employer" includes an individual, partnership, association, corporation, business trust, person, or group of persons acting directly or indirectly in the interest of an employer in relation to an employee.

(6) "Minor" means an individual under 18 years of age, except for an individual who:

(a) has received a high school diploma or has received a passing score on the general education development examination; or

(b) is 16 years of age or older and is enrolled in a registered state or federal apprenticeship program.

(7) "Occupation" means:

(a) an occupation, service, trade, business, or industry in which employees are employed;

(b) any branch or group of industries in which employees are employed; or

(c) any employment or class of employment in which employees are employed.

History: **En. Sec. 2, Ch. 391, L. 1993.**

41-2-104. Exemptions. The provisions of this part do not apply to a minor who is employed:

(1) in an agricultural occupation not otherwise prohibited by this part and who has received written consent from the minor's parents or a person standing in place of the parent who works on a farm or ranch where the parent or person is also employed;

(2) in domestic service or an agricultural pursuit performed outside school hours in connection with a home or a farm owned or operated by the minor's parent or by a person standing in place of the parent;

(3) by the parent or a person standing in place of the parent;

(4) during periods of school vacations on a campsite of a nonprofit corporation engaged in citizenship training and character building;

(5) as an actor, model, or performer;

(6) outside school hours by a homeowner in casual work usual to the home of the homeowner and not in connection with the homeowner's business, trade, or profession;

(7) by the legislature as a legislative aide or page;

(8) in the distribution or sale of or in the collection for newspapers, periodicals, or circulars; or

(9) as an official or referee for a nonprofit athletic organization. A minor who is under the age of 14 may not officiate at adult events or activities.

History: En. Sec. 3, Ch. 391, L. 1993; amd. Sec. 1, Ch. 89, L. 1995.

41-2-105. Prohibited employment of minors under fourteen years of age. Except as provided in 41-2-104, a minor who is under 14 years of age may not be employed in or in connection with an occupation.

History: En. Sec. 4, Ch. 391, L. 1993.

41-2-106. Prohibited employment of minors who are fourteen and fifteen years old. Unless otherwise exempted, a minor 14 or 15 years of age may not be employed in the prohibited occupations in 41-2-107 or in:

(1) a manufacturing occupation;

(2) a processing occupation, including but not limited to filleting fish, dressing poultry, cracking nuts, or laundering and drycleaning;

(3) an occupation that requires the performance of duties in a workroom or workplace where goods are manufactured, mined, or processed;

(4) the operation or tending of a hoisting apparatus or of power-driven machinery;

(5) an occupation in connection with:

(a) transporting persons or property by rail, highway, air, water, pipeline, or other means;

(b) warehousing and storage;

(c) communication and public utilities; or

(d) construction or repair;

(6) an occupation in a retail, food service, or gasoline establishment, including:

(a) work performed in or around a boiler or an engine room;

(b) work in connection with the maintenance or the repair of an establishment, machine, or equipment;

(c) outside window washing that involves working from windowsills and all work requiring the use of ladders, scaffolds, or their substitutes at a height of more than 20 feet;

(d) an occupation that involves operating, assembling, adjusting, cleaning, oiling, or repairing power-driven food slicers and grinders, food choppers and cutters, or bakery-type mixers;

(e) work in freezers and meat coolers and all work preparing meat for sale, except wrapping, scaling, labeling, weighing, pricing, and stacking when performed in other areas;

(f) loading or unloading goods to and from a truck, railroad car, or conveyor; or

(g) an occupation in a warehouse, except for office or clerical work;

(7) the following agricultural occupations, unless otherwise exempt or working as a student-learner pursuant to 41-2-109:

(a) felling, bucking, skidding, loading, or unloading timber with a butt diameter of more than 9 inches;

(b) repairing a building from a ladder or scaffold at a height of more than 20 feet;

(c) working inside:

(i) a fruit, forage, or grain storage structure designed to retain an oxygen-deficient or toxic atmosphere; or

(ii) an upright silo within 2 weeks after silage has been added or when a top unloading device is in operating position;

(d) handling or using agricultural chemicals classified as poisonous;

(e) handling or using a blasting agent, including but not limited to dynamite, black powder, sensitized ammonium nitrate, blasting caps, or primer cord; or

(f) transporting, transferring, or applying anhydrous ammonia.

History: En. Sec. 5, Ch. 391, L. 1993.

41-2-107. Prohibited employment of minors who are sixteen and seventeen years old. Unless working as an apprentice or student-learner under the provisions of 41-2-110, a minor 16 or 17 years of age may not be employed in or in connection with any of the following occupations:

(1) manufacturing or storing explosives or articles containing explosive components;

(2) logging and the operation of a sawmill, lath mill, or shingle mill;

(3) the operation of power-driven woodworking machines;

(4) an occupation involving exposure to a radioactive substance or ionizing radiation;

(5) the operation of a freight elevator, except for a freight elevator permitted for use under the child labor provisions of the federal Fair Labor Standards Act of 1938, or other power-driven hoisting apparatus;

(6) the operation of a power-driven metal forming, punching, and shearing machine;

(7) a mining occupation;

(8) slaughtering, meatpacking, meat processing, or rendering;

(9) the operation of a power-driven bakery machine;

(10) the operation of a power-driven paper products machine;

(11) the manufacture of brick, tile, or similar products;

(12) the operation of a circular saw, bandsaw, or guillotine shears;

(13) a wrecking or demolition operation;

(14) an excavation operation;

(15) a roofing operation;

(16) riding outside a motor vehicle to assist in transporting or delivering goods; and

(17) a coal mining operation.

History: En. Sec. 6, Ch. 391, L. 1993.

41-2-108. Employment of minors who are fourteen and fifteen years old. (1) Unless enrolled in and employed pursuant to a school supervised and school administered work experience or career exploration program pursuant to 41-2-115(2), a minor 14 or 15 years of age may not be employed in any occupation during school hours.

(2) A minor 14 or 15 years of age may be employed outside school hours in:

(a) the distribution or sale of or in the collection for newspapers, magazines, periodicals, or circulars; and

(b) the following occupations in retail, food service, and gasoline service establishments:

(i) office and clerical work, including the operation of an office machine;

(ii) cashiering, selling, modeling, art work, work in an advertising department, window trimming, and comparative shopping;

(iii) price marking and tagging by hand or by machine, assembling orders, packing, and shelving;

(iv) bagging and carrying out a customer's order;

(v) errand and delivery work by foot, bicycle, or public transportation;

(vi) cleanup work, including the use of a vacuum cleaner and a floor waxer, and maintenance of grounds, but not including the use of a power-driven mower or cutter;

(vii) kitchen work and other work involved in preparing and serving food and beverages, including the operation of machines and devices used in the performance of the work, which may include but are not limited to a dishwasher, toaster, dumbwaiter, popcorn popper, milkshake blender, and coffee grinder; or

(viii) work in connection with cars and trucks if confined to dispensing gasoline and oil; courtesy service; car cleaning, washing, and polishing; but not including work involving the use of a pit, a rack, or a lifting apparatus or involving the inflation of a tire mounted on a rim equipped with a removable ring.

History: En. Sec. 7, Ch. 391, L. 1993.

41-2-109. Exemptions from prohibited occupations in agriculture. (1) The prohibitions from employment in agricultural operations provided for in 41-2-106(7) do not apply to the employment of a student-learner who is 14 or 15 years of age if all of the following requirements are met:

(a) The student-learner is enrolled in a vocational education training program in agriculture under a recognized state or local educational authority or in a substantially similar program conducted by a private school.

(b) The student-learner is employed under a written agreement, providing that:

(i) the work is incidental to training;

(ii) the work is intermittent, for short periods of time, and under the direct and close supervision of a qualified and experienced person;

(iii) safety instruction is given by the school and correlated by the employer with on-the-job training; and

(iv) a schedule of organized and progressive work processes to be performed on the job has been prepared.

(c) The written agreement contains the name of the student-learner and is signed by the employer and by a person authorized to represent the educational authority or school.

(d) Copies of each agreement are kept on file both by the educational authority or school and by the employer.

(2) The prohibitions in 41-2-106(7) do not apply to the employment of a minor who is 14 or 15 years of age in those occupations in which the minor has successfully completed a work training program, including safety instruction and training in the use of machinery, under the 4-H program of the federal extension service, a program of the United States department of education, or a similar program if the safety program has been approved by the department and if the minor is employed outside school hours on the equipment for which the minor has been trained.

History: En. Sec. 8, Ch. 391, L. 1993.

41-2-110. Exemptions from prohibited employment of minors who are sixteen or seventeen years old. (1) The prohibitions in 41-2-107 do not apply to the employment of an apprentice or student-learner who is 16 or 17 years of age if the minor is employed under the following conditions:

(a) for an apprentice, if:

(i) the minor is employed in a craft recognized as an apprenticeable trade;

(ii) the work is incidental to the minor's training;

(iii) the work is intermittent, for short periods of time, and under the direct and close supervision of a journeyman as a necessary part of the apprentice training; and

(iv) the minor is registered by the bureau of apprenticeship and training of the United States department of labor as employed in accordance with the standards established by that bureau or is registered by the department as employed in accordance with the standards of the department;

(b) for a student-learner, if:

(i) the student-learner is enrolled in a course of study and training in a cooperative vocational training program under a recognized state or local educational authority or in a course of study in a substantially similar program conducted by a private school;

(ii) the student-learner is employed under a written agreement, providing that:

(A) the work of the student-learner is incidental to the student-learner's training;

(B) the work is intermittent, for short periods of time, and under the direct and close supervision of a qualified and experienced person;

(C) safety instruction is given by the school and correlated by the employer with on-the-job training; and

(D) a schedule of organized and progressive work processes to be performed on the job has been prepared;

(iii) the written agreement contains the name of the student-learner and is signed by the employer and the school coordinator or principal; and

(iv) copies of each agreement are kept on file both by the educational authority or school and by the employer.

(2) This exemption for the employment of student-learners may be revoked by the department in any situation if the department finds that reasonable precautions have not been observed for the safety of minors employed under the exemption.

(3) A high school graduate who is 16 or 17 years of age may be employed in an occupation in which the graduate has completed training as a student-learner as provided in this section.

History: En. Sec. 9, Ch. 391, L. 1993.

41-2-111. Repealed. Sec. 14, Ch. 391, L. 1993.

History: En. Sec. 2, Ch. 99, L. 1907; Sec. 1747, Rev. C. 1907; re-en. Sec. 3096, R.C.M. 1921; re-en. Sec. 3096, R.C.M. 1935; R.C.M. 1947, 10-202.

41-2-112. Repealed. Sec. 1, Ch. 241, L. 1989.

History: En. Sec. 3, Ch. 99, L. 1907; Sec. 1748, Rev. C. 1907; re-en. Sec. 3097, R.C.M. 1921; re-en. Sec. 3097, R.C.M. 1935; R.C.M. 1947, 10-203.

41-2-113. Repealed. Sec. 14, Ch. 391, L. 1993.

History: En. Sec. 4, Ch. 99, L. 1907; Sec. 1749, Rev. C. 1907; re-en. Sec. 3098, R.C.M. 1921; re-en. Sec. 3098, R.C.M. 1935; amd. Sec. 1, Ch. 100, L. 1977; R.C.M. 1947, 10-204.

41-2-114. Repealed. Sec. 14, Ch. 391, L. 1993.

History: En. Sec. 5, Ch. 99, L. 1907; Sec. 1750, Rev. C. 1907; re-en. Sec. 3099, R.C.M. 1921; re-en. Sec. 3099, R.C.M. 1935; amd. Sec. 2, Ch. 100, L. 1977; R.C.M. 1947, 10-205.

41-2-115. Working hours. (1) Unless otherwise exempt or as provided in subsection (2), a minor who is 14 or 15 years of age:

(a) may not be employed before 7 a.m. or after 7 p.m., except that the minor may be employed until 9 p.m. during periods outside the school year (June 1 through Labor Day, depending on local standards); or

(b) may not be employed more than:

(i) 3 hours on a school day;

(ii) 18 hours in a school week;

(iii) 8 hours on a nonschool day; or

(iv) 40 hours in a week in a nonschool week.

(2) A minor who is 14 or 15 years of age and who is enrolled in and employed pursuant to a school-supervised and school-administered work experience or career exploration program approved by the department or the office of public instruction may be employed up to 23 hours in 1 week when the program is in session, any portion of which may be during school hours.

History: En. Sec. 10, Ch. 391, L. 1993.

41-2-116. Enforcement — right to enter and inspect premises and records — subpoena power. The department shall enforce the provisions of this part and file a complaint against a person who violates the provisions of this part. The department may at any time enter and inspect any place or establishment governed by the provisions of this part and have access to employment records kept on file by the employer that may aid in the enforcement of this part. The department may subpoena documentary evidence relating to an investigation under this part.

History: En. Sec. 11, Ch. 391, L. 1993.

41-2-117. Power to adopt rules. The department shall adopt rules, including definitions of terms, to carry out the purposes of this part and to prevent the circumvention or evasion of this part.

History: En. Sec. 12, Ch. 391, L. 1993.

41-2-118. Penalties. An employer who violates any of the provisions of this part is guilty of a misdemeanor and is punishable as provided in 46-18-212. Each day during which a violation of this part continues constitutes a separate offense, and the employment of a minor in violation of this part constitutes, with respect to each minor employed, a separate offense.

History: En. Sec. 13, Ch. 391, L. 1993.

41-2-119 and 41-2-120 reserved.

41-2-121. Repealed. Sec. 14, Ch. 391, L. 1993.

History: En. Sec. 6, Ch. 99, L. 1907; Sec. 1751, Rev. C. 1907; re-en. Sec. 3100, R.C.M. 1921; re-en. Sec. 3100, R.C.M. 1935; R.C.M. 1947, 10-206.

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Chapter Cross-References

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Families Achieving Independence in Montana (FAIM) financial assistance program, Title 53, ch. 4, part 2.

Part 1
General

41-3-101. Declaration of policy. (1) It is the policy of the state of Montana to:

(a) ensure that all youth are afforded an adequate physical and emotional environment to promote normal development;

(b) compel in proper cases the parent or guardian of a youth to perform the moral and legal duty owed to the youth;

(c) achieve these purposes in a family environment whenever possible;

(d) preserve the unity and welfare of the family whenever possible;

(e) ensure that there is no forced removal of a child from the family based solely on an unsubstantiated allegation of abuse or neglect; and

(f) recognize that a child is entitled to assert the child's constitutional rights.

(2) It is the policy of this state to:

(a) protect, whenever possible, family unity;

(b) provide for the protection of children whose health and welfare are or may be adversely affected and further threatened by the conduct of those responsible for their care and protection;

(c) require a department social worker to interview the parents of a child to which a petition pertains, if they are reasonably available, before the state may file a petition for temporary investigative authority and protective services and to require that a judge may not issue an order granting the petition, except an order for immediate protection of the youth, until the parents, if they are reasonably available, are given the opportunity to appear before the judge or have their statements, if any, presented to the judge for consideration before an order is granted; and

(d) ensure that whenever removal of a child from the home is necessary, the child is entitled to maintain ethnic, cultural, and religious heritage whenever appropriate.

(3) It is intended that the mandatory reporting of abuse or endangerment cases by professional people and other community members to the appropriate authority will cause the protective services of the state to seek to prevent further abuses, protect and enhance the welfare of these children, and preserve family life whenever appropriate.

(4) In implementing the policy of this section, whenever it is necessary to remove a child from the child's home, the department shall, when it is in the best interests of the child and when the home is approved by the department, place the child with the child's extended family, including adult siblings, grandparents, great-grandparents, aunts, and uncles, prior to placing the child in an alternative protective or residential facility. Prior to approving a home, the department shall investigate whether anyone living in the home has been convicted of a crime involving serious harm to children.

History: (1)En. 10-1300 by Sec. 1, Ch. 328, L. 1974; Sec. 10-1300, R.C.M. 1947; (2)En. Sec. 1, Ch. 178, L. 1965; amd. Sec. 1, Ch. 292, L. 1973; Sec. 10-901, R.C.M. 1947; redes. 10-1303 by Sec. 14, Ch. 328, L. 1974; Sec. 10-1303, R.C.M. 1947; R.C.M. 1947, 10-1300, 10-1303; amd. Sec. 1, Ch. 543, L. 1979; amd. Sec. 1, Ch. 494, L. 1995; amd. Sec. 1, Ch. 564, L. 1995; amd. Sec. 1, Ch. 501, L. 1997; amd. Sec. 1, Ch. 566, L. 1999.

Compiler's Comments

1999 Amendment: Chapter 566 inserted (1)(f) relating to child's constitutional rights; and made minor changes in style. Amendment effective October 1, 1999.

Cross-References

Obligations of parents for support and education of their children, 40-6-211.

Remedy for parental abuse, 40-6-233.

When parental authority ceases, 40-6-234.

Use of force by parent, guardian, or teacher, 45-3-107.

Minimum 30-day sentence for certain sexual abuse crimes, 46-18-201.

41-3-102. Definitions. As used in this chapter, the following definitions apply:

(1) "Abandon", "abandoned", and "abandonment" mean:

(a) leaving a child under circumstances that make reasonable the belief that the parent does not intend to resume care of the child in the future;

(b) willfully surrendering physical custody for a period of 6 months and during that period not manifesting to the child and the person having physical custody of the child a firm intention to resume physical custody or to make permanent legal arrangements for the care of the child; or

(c) that the parent is unknown and has been unknown for a period of 90 days and that reasonable efforts to identify and locate the parent have failed.

(2) "A person responsible for a child's welfare" means:

(a) the child's parent, guardian, foster parent or an adult who resides in the same home in which the child resides;

(b) a person providing care in a day-care facility;

(c) an employee of a public or private residential institution, facility, home, or agency; or

(d) any other person responsible for the child's welfare in a residential setting.

(3) "Abused or neglected" means the state or condition of a child who has suffered child abuse or neglect.

(4) (a) "Adequate health care" means any medical care or nonmedical remedial health care recognized by an insurer licensed to provide disability insurance under Title 33, including the prevention of the withholding of medically indicated treatment or medically indicated psychological care permitted or authorized under state law.

(b) This chapter may not be construed to require or justify a finding of child abuse or neglect for the sole reason that a parent or legal guardian, due to religious beliefs, does not provide adequate health care for a child. However, this chapter may not be construed to limit the administrative or judicial authority of the state to ensure that medical care is provided to the child when there is imminent substantial risk of serious harm to the child.

(5) "Best interests of the child" means the physical, mental, and psychological conditions and needs of the child and any other factor considered by the court to be relevant to the child.

(6) "Child" or "youth" means any person under 18 years of age.

(7) (a) "Child abuse or neglect" means:

(i) actual harm to a child's health or welfare; or

(ii) substantial risk of harm to a child's health or welfare.

(b) The term includes actual harm or substantial risk of harm by the acts or omissions of a person responsible for the child's welfare.

(c) The term does not include self-defense, defense of others, or action taken to prevent the child from self-harm that does not constitute harm to a child's health or welfare.

(8) "Department" means the department of public health and human services provided for in 2-15-2201.

(9) "Harm to a child's health or welfare" means the harm that occurs whenever the parent or other person responsible for the child's welfare:

(a) inflicts or allows to be inflicted upon the child physical or psychological abuse or neglect;

(b) commits or allows to be committed sexual abuse or exploitation of the child;

(c) induces or attempts to induce a child into giving untrue testimony that the child or another child was abused or neglected by a parent or person responsible for the child's welfare;

(d) causes malnutrition or failure to thrive or otherwise fails to supply the child with adequate food or fails to supply clothing, shelter, education, or adequate health care, though financially able to do so or offered financial or other reasonable means to do so;

(e) exposes or allows the child to be exposed to an unreasonable risk to the child's health or welfare by failing to intervene or eliminate the risk; or

(f) abandons the child.

(10) "Limited emancipation" means a status conferred on a youth by a court in accordance with 41-3-406 under which the youth is entitled to exercise some but not all of the rights and responsibilities of a person who is 18 years of age or older.

(11) "Parent" means a biological or adoptive parent or stepparent.

(12) "Parent-child legal relationship" means the legal relationship that exists between a child and the child's birth or adoptive parents, as provided in Title 40, chapter 6, part 2, unless the relationship has been terminated by competent judicial decree as provided in 40-6-234, Title 42, or part 6 of this chapter.

(13) "Physical abuse" means an intentional act, an intentional omission, or gross negligence resulting in substantial skin bruising, internal bleeding, substantial injury to skin, subdural hematoma, burns, bone fractures, extreme pain, permanent or temporary disfigurement, impairment of any bodily organ or function, or death.

(14) "Psychological abuse or neglect" means severe maltreatment through acts or omissions that are injurious to the child's emotional, intellectual, or psychological capacity to function, including acts of violence against another person residing in the child's home.

(15) "Reasonable cause to suspect" means cause that would lead a reasonable person to believe that child abuse or neglect may have occurred or is occurring, based on all the facts and circumstances known to the person.

(16) "Residential setting" means an out-of-home placement where the child typically resides for longer than 30 days for the purpose of receiving food, shelter, security, guidance, and, if necessary, treatment.

(17) (a) "Sexual abuse" means the commission of sexual assault, sexual intercourse without consent, indecent exposure, deviate sexual conduct, sexual abuse, ritual abuse, or incest, as described in Title 45, chapter 5.

(b) Sexual abuse does not include any necessary touching of an infant's or toddler's genital area while attending to the sanitary or health care needs of that infant or toddler by a parent or other person responsible for the child's welfare.

(18) "Sexual exploitation" means allowing, permitting, or encouraging a child to engage in a prostitution offense, as described in 45-5-601 through 45-5-603, or allowing, permitting, or encouraging sexual abuse of children as described in 45-5-625.

(19) "Social worker" means an employee of the department who, before the employee's field assignment, has been educated or trained in a program of social work or a related field that includes cognitive and family systems treatment or who has equivalent verified experience or verified training in the investigation of child abuse, neglect, and endangerment. This definition does not apply to any provision of this code that is not in this chapter.

(20) "Treatment plan" means a written agreement between the department and the parent or guardian or a court order that includes action

that must be taken to resolve the condition or conduct of the parent or guardian that resulted in the need for protective services for the child. The treatment plan may involve court services, the department, and other parties, if necessary, for protective services.

(21) "Unfounded" means that after an investigation, the investigating person has determined that the reported abuse, neglect, or exploitation has not occurred.

(22) (a) "Withholding of medically indicated treatment" means the failure to respond to an infant's life-threatening conditions by providing treatment, including appropriate nutrition, hydration, and medication, that, in the treating physician's or physicians' reasonable medical judgment, will be most likely to be effective in ameliorating or correcting the conditions.

(b) The term does not include the failure to provide treatment, other than appropriate nutrition, hydration, or medication, to an infant when, in the treating physician's or physicians' reasonable medical judgment:

(i) the infant is chronically and irreversibly comatose;

(ii) the provision of treatment would:

(A) merely prolong dying;

(B) not be effective in ameliorating or correcting all of the infant's life-threatening conditions; or

(C) otherwise be futile in terms of the survival of the infant; or

(iii) the provision of treatment would be virtually futile in terms of the survival of the infant and the treatment itself under the circumstances would be inhumane. For purposes of this subsection (22), "infant" means an infant less than 1 year of age or an infant 1 year of age or older who has been continuously hospitalized since birth, who was born extremely prematurely, or who has a long-term disability. The reference to less than 1 year of age may not be construed to imply that treatment should be changed or discontinued when an infant reaches 1 year of age or to affect or limit any existing protections available under state laws regarding medical neglect of children 1 year of age or older.

(23) "Youth in need of care" means a youth who has been adjudicated or determined, after a hearing, to be or to have been abused or neglected.

History: En. 10-1301 by Sec. 2, Ch. 328, L. 1974; amd. Sec. 18, Ch. 100, L. 1977; R.C.M. 1947, 10-1301; amd. Sec. 2, Ch. 543, L. 1979; amd. Sec. 2, Ch. 511, L. 1981; amd. Sec. 31, Ch. 465, L. 1983; amd. Sec. 1, Ch. 564, L. 1983; amd. Sec. 1, Ch. 626, L. 1985; amd. Sec. 1, Ch. 463, L. 1987; amd. Sec. 36, Ch. 609, L. 1987; amd. Sec. 1, Ch. 474, L. 1989; amd. Sec. 1, Ch. 439, L. 1993; amd. Sec. 6, Ch. 458, L. 1995; amd. Sec. 2, Ch. 528, L. 1995; amd. Sec. 159, Ch. 546, L. 1995; amd. Sec. 2, Ch. 564, L. 1995; amd. Sec. 3, Ch. 514, L. 1997; amd. Secs. 2, 19(1), Ch. 516, L. 1997; amd. Sec. 2, Ch. 566, L. 1999.

Compiler's Comments

1999 Amendment: Chapter 566 inserted definition of abandon, abandoned, and abandonment; in definition of best interests of the child substituted "psychological conditions" for "emotional conditions"; in definition of child abuse or neglect in (a)(i) before "harm" inserted "actual", in (a)(ii) substituted "substantial risk of harm" for "threatened harm", and in (b) substituted "actual harm or substantial risk of harm" for "harm or threatened harm to a child's health or welfare"; deleted definition of emotional abuse that read: ""Emotional abuse" means injury to the emotional well-being or intellectual or psychological capacity of a child, as evidenced by an identifiable and substantial impairment of a child's physical, mental, or emotional ability to function"; in definition of harm to a child's health or welfare in (a) substituted "psychological abuse or neglect" for "emotional abuse", in (f) after "abandons the child" deleted "by leaving the child under circumstances that make reasonable the belief that the parent or other person does not intend to resume care of the child in the future or willfully surrenders physical custody for a period of 6 months and during that period does not manifest to the child and the person having physical custody of the child a firm intention to resume physical custody or to make permanent legal arrangements for the care of the child", and deleted former (g) that read: "(g) is unknown and has been unknown for a period of 90 days and reasonable efforts to identify and locate the parent or other person have failed"; in definition of limited emancipation after "court" deleted "after a dispositional hearing"; in definition of physical abuse after "means" inserted "an intentional act, an intentional omission, or gross negligence resulting in", before "burns" deleted "intentional", and after "death" deleted "if the injury or death is not accidental"; inserted definition of psychological abuse or neglect; in definition of sexual abuse inserted "sexual abuse, ritual abuse" and at end after "chapter 5" deleted "part 5"; in definition of social worker after "trained" deleted "or is receiving education or training"; deleted definition of threatened harm to a child's health or welfare that read: ""Threatened harm to a child's health or welfare" means substantial risk of harm to the child's health or welfare"; inserted definition of unfounded; in definition of youth in need of care substituted "who has been adjudicated or determined, after a hearing, to be or to have been abused or neglected" for "who is abused or neglected"; and made minor changes in style. Amendment effective October 1, 1999.

Cross-References

Admittance of child to school, 20-5-101.

Compulsory attendance and excuses, 20-5-103.

Limitations on liability for emergency care rendered by physician, 27-1-714.

Montana Medical Legal Panel Act, Title 27, ch. 6.

Medicine — regulation and licensing, Title 37, ch. 3.

Obligations of parents, Title 40, ch. 6, part 2.

Remedy for parental abuse, 40-6-233.

Parent allowed to relinquish services and custody of child, 40-6-235.

Sexual assault, 45-5-502.

Sexual intercourse without consent, 45-5-503.

Incest, 45-5-507.

Provisions generally applicable to sexual crimes, 45-5-511.

Aggravated promotion of prostitution, 45-5-603.

Nonsupport, 45-5-621.

Endangering welfare of children, 45-5-622.

Unlawful transactions with children, 45-5-623.

Unlawful possession of intoxicating substance by children, 45-5-624.

Obscenity, 45-8-201.

Criminal possession of dangerous drugs, 45-9-102.

Minimum 30-day sentence for certain sexual abuse crimes, 46-18-201.

Emergency medical services, Title 50, ch. 6.

Living wills, Title 50, ch. 9.

41-3-103. Jurisdiction and venue. (1) In all matters arising under this chapter, the youth court has concurrent jurisdiction with the district court over:

(a) a youth who is within the state of Montana for any purpose;

(b) a youth or other person subject to this chapter who under a temporary or permanent order of the court has voluntarily or involuntarily left the state or the jurisdiction of the court; or

(c) a person who is alleged to have abused or neglected a youth who is in the state of Montana for any purpose.

(2) Venue is determined pursuant to 41-5-204.

History: En. 10-1302 by Sec. 3, Ch. 328, L. 1974; R.C.M. 1947, 10-1302; amd. Sec. 7, Ch. 458, L. 1995.

Cross-References

District Court jurisdiction, Title 3, ch. 5, part 3.

Jurisdiction — commencement of parenting proceedings, 40-4-211.

Dispositional hearing, 41-3-406.

Priority of Youth Court hearings, 41-5-110.

Montana Youth Court — jurisdiction, 41-5-203.

41-3-104. Renumbered 41-3-1122. Sec. 31, Ch. 465, L. 1983.

41-3-105. Renumbered 41-3-1125. Sec. 31, Ch. 465, L. 1983.

41-3-106. Prosecution of offenders. (1) If the evidence indicates violation of the criminal code, it shall be the responsibility of the county attorney to file appropriate charges against the alleged offender.

(2) District court shall have original jurisdiction under this section.

History: En. 10-1322 by Sec. 12, Ch. 328, L. 1974; R.C.M. 1947, 10-1322.

Cross-References

District Court — original jurisdiction, 3-5-302.

County Attorney — prosecutorial duties, 7-4-2712.

Incest, 45-5-507.

Nonsupport, 45-5-621.

Endangering welfare of children, 45-5-622.

Sexual abuse of children, 45-5-625.

Criminal liability of parent or guardian for use of firearms by children under 14, 45-8-345.

Minimum 30-day sentence for certain sexual abuse crimes, 46-18-201.

41-3-107. Interagency cooperation. (1) To effectuate the purposes of this chapter, the department of public health and human services shall cooperate with and shall seek the cooperation and involvement of all appropriate public and private agencies, including health, education, social services, and law enforcement agencies; juvenile courts; and any other agency, organization, or program providing or concerned with human services related to the prevention, identification, or treatment of child abuse or neglect. The cooperation and involvement may not include joint case management but may include joint policy planning, public education, information services, staff development, and other training.

(2) The department shall enter into a cooperative agreement with other state agencies, as provided in 52-2-203, for the purpose of implementing this section.

History: En. Sec. 4, Ch. 543, L. 1979; amd. Sec. 12, Ch. 609, L. 1987; amd. Sec. 4, Ch. 655, L. 1991; amd. Sec. 160, Ch. 546, L. 1995.

Cross-References

Board of Public Education — powers and duties, 20-2-121.

Montana Youth Court Act — declaration of purpose, 41-5-102.

General powers and duties of Department of Public Health and Human Services, 50-1-202.

Duties of Department of Public Health and Human Services — child rehabilitation, 52-2-113.

Department of Public Health and Human Services to assist other agencies, 52-2-116.

41-3-108. Child protective teams. The county attorney, county commissioners, guardian ad litem, or department may convene one or more temporary or permanent interdisciplinary child protective teams. These teams may assist in assessing the needs of, formulating and monitoring a treatment plan for, and coordinating services to the child and the child's family. The supervisor of child protective services in a local service area or the supervisor's designee shall serve as the team's coordinator. Members must include:

(1) a social worker;

(2) a member of a local law enforcement agency;

(3) a representative of the medical profession;

(4) a representative of a public school system;

(5) a county attorney; and

(6) if an Indian child or children are involved, someone, preferably an Indian person, knowledgeable about Indian culture and family matters.

History: En. Sec. 5, Ch. 543, L. 1979; amd. Sec. 37, Ch. 609, L. 1987; amd. Sec. 1, Ch. 67, L. 1989; amd. Sec. 161, Ch. 546, L. 1995; amd. Sec. 3, Ch. 566, L. 1999.

Compiler's Comments

1999 Amendment: Chapter 566 near beginning of introductory clause inserted "county commissioners, guardian ad litem" and after "department" deleted "of public health and human services"; inserted (4) requiring representative of public school system on team; and made minor changes in style. Amendment effective October 1, 1999.

Cross-References

Educational goals and duties — recognition of Indian cultural heritage, Art. X, sec. 1(2), Mont. Const.

Disclosure of confidential child abuse records to child protective team, 41-3-205.

Duty to strengthen child welfare services, 52-2-112.

Department of Public Health and Human Services — child rehabilitation, 52-2-113.

41-3-109. Proceedings subject to Indian Child Welfare Act. If a proceeding under this chapter involves an Indian child, as defined in the Indian Child Welfare Act, 25 U.S.C. 1901, et seq., the proceeding is subject to the Indian Child Welfare Act.

History: En. Sec. 16, Ch. 516, L. 1997.

Part 2

Reports and Investigations

41-3-201. Reports. (1) When the professionals and officials listed in subsection (2) know or have reasonable cause to suspect, as a result of information they receive in their professional or official capacity, that a child is abused or neglected, they shall report the matter promptly to the department of public health and human services or its local affiliate.

(2) Professionals and officials required to report are:

(a) physician, resident, intern, or member of a hospital's staff engaged in the admission, examination, care, or treatment of persons;

(b) a nurse, osteopath, chiropractor, podiatrist, medical examiner, coroner, dentist, optometrist, or any other health or mental health professional;

(c) Christian Science practitioner and religious healers;

(d) school teachers, other school officials, and employees who work during regular school hours;

(e) a social worker, operator or employee of any registered or licensed day-care or substitute care facility, staff of a resource and referral grant program organized under 52-2-711 or of a child and adult food care program, or an operator or employee of a child-care facility;

(f) foster care, residential, or institutional worker;

(g) a peace officer or other law enforcement official;

(h) clergy; or

(i) a guardian ad litem or a court-appointed advocate who is authorized to investigate a report of alleged abuse or neglect.

(3) Any person may make a report under this section if the person knows or has reasonable cause to suspect that a child is abused or neglected.

(4) (a) Except as provided in subsection (4)(b) or (4)(c), a person listed in subsection (2) may not refuse to make a report as required in this section on the grounds of a physician-patient or similar privilege.

(b) A clergyperson or priest is not required to make a report under this section if:

(i) the knowledge or suspicion of the abuse or neglect came from a statement or confession made to the clergyperson or priest in that person's capacity as a clergyperson or priest;

(ii) the statement was intended to be a part of a confidential communication between the clergyperson or priest and a member of the clergyperson's or priest's church or congregation; and

(iii) the person who made the statement or confession does not consent to the disclosure by the clergyperson or priest.

(c) A clergyperson or priest is not required to make a report under this section if the communication is required to be confidential by canon law, church doctrine, or established church practice.

(5) The reports referred to under this section must contain:

(a) the names and addresses of the child and the child's parents or other persons responsible for the child's care;

(b) to the extent known, the child's age and the nature and extent of the child's injuries, including any evidence of previous injuries;

(c) any other information that the maker of the report believes might be helpful in establishing the cause of the injuries or showing the willful neglect and the identity of person or persons responsible for the injury or neglect; and

(d) the facts that led the person reporting to believe that the child has suffered injury or injuries or willful neglect, within the meaning of this chapter.

History: En. Sec. 2, Ch. 178, L. 1965; amd. Sec. 2, Ch. 292, L. 1973; Sec. 10-902, R.C.M. 1947; redes. 10-1304 by Sec. 14, Ch. 328, L. 1974; R.C.M. 1947, 10-1304; amd. Sec. 6, Ch. 543, L. 1979; amd. Sec. 3, Ch. 511, L. 1981; amd. Sec. 11, Ch. 609, L. 1987; amd. Sec. 1, Ch. 79, L. 1989; amd. Sec. 1, Ch. 785, L. 1991; amd. Sec. 8, Ch. 458, L. 1995; amd. Sec. 162, Ch. 546, L. 1995; amd. Sec. 4, Ch. 514, L. 1997.

Cross-References

Duties of teacher — nonpayment for failure to comply, 20-4-301.

Doctor-patient privilege, 26-1-805.

Adjudicatory hearing — temporary disposition, 41-3-404.

Department of Public Health and Human Services to assist other agencies, 52-2-116.

Standards for day care, 52-2-731.

41-3-202. Action on reporting. (1) Upon receipt of a report that a child is or has been abused or neglected, a social worker, the county attorney, or a peace officer shall promptly conduct a thorough investigation into the circumstances surrounding the allegations of abuse or neglect of the child. The investigation may include an investigation at the home of the child involved, the child's school or day-care facility, or any other place where the child is present and into all other nonfinancial matters that in the discretion of the investigator are relevant to the investigation. In conducting an investigation under this section, a social worker may not inquire into the financial status of the child's family or of any other person responsible for the child's care, except as necessary to ascertain eligibility for state or federal assistance programs or to comply with the provisions of 41-3-411.

(2) An initial investigation of alleged abuse or neglect may be conducted when an anonymous report is received. However, the investigation must within 48 hours develop independent, corroborative, and attributable information in order for the investigation to continue. Without the development of independent, corroborative, and attributable information, a child may not be removed from the home.

(3) The social worker is responsible for assessing the family and planning for the child. If the child is treated at a medical facility, the social worker, county attorney, or peace officer, consistent with reasonable medical practice, has the right of access to the child for interviews, photographs, and securing physical evidence and has the right of access to relevant hospital and medical records pertaining to the child. If a child interview is considered necessary, the social worker, county attorney, or peace officer may conduct an interview of the child. The interview may be conducted in the presence of the parent or guardian or an employee of the school or day-care facility attended by the child.

(4) Subject to 41-3-205(3), if the child's interview is audiotaped or videotaped, an unedited audiotape or videotape with audio track must be made available, upon request, for unencumbered review by the family.

(5) (a) If from the investigation the department has reasonable cause to suspect that the child suffered abuse or neglect, the department may provide protective services to the child pursuant to 41-3-301 and may provide protective services to any other child under the same care. The department shall:

(i) after interviewing the parent or guardian, if reasonably available, document its determination regarding abuse or neglect of a child; and

(ii) notify the child's family of its investigation and determination, unless the notification can reasonably be expected to result in harm to the child or other person.

(b) If from the investigation it is determined that the child has not suffered abuse or neglect and the initial report is determined to be unfounded, the department and the social worker, county attorney, or peace officer who conducted the investigation into the circumstances surrounding the allegations of abuse or neglect shall destroy all of their records concerning the report and the investigation. The destruction must be completed within 30 days of the determination that the child has not suffered abuse or neglect.

(6) The investigating social worker, within 60 days of commencing an investigation, shall also furnish a written report to the department and, upon request, to the family. Subject to subsection (5)(b), the department shall maintain a record system documenting investigations and determinations of child abuse and neglect cases.

(7) Any person reporting abuse or neglect that involves acts or omissions on the part of a public or private residential institution, home, facility, or agency is responsible for ensuring that the report is made to the department through its local office.

History: En. Sec. 3, Ch. 178, L. 1965; amd. Sec. 3, Ch. 292, L. 1973; Sec. 10-903, R.C.M. 1947; redes. 10-1305 by Sec. 14, Ch. 328, L. 1974; R.C.M. 1947, 10-1305; amd. Sec. 8, Ch. 543, L. 1979; amd. Sec. 3, Ch. 567, L. 1979; amd. Sec. 11, Ch. 609, L. 1987; amd. Sec. 1, Ch. 126, L. 1989; amd. Sec. 1, Ch. 329, L. 1993; amd. Sec. 1, Ch. 146, L. 1995; amd. Sec. 163, Ch. 546, L. 1995; amd. Sec. 3, Ch. 564, L. 1995; amd. Sec. 5, Ch. 514, L. 1997; amd. Sec. 3, Ch. 516, L. 1997; amd. Sec. 4, Ch. 566, L. 1999.

Compiler's Comments

1999 Amendment: Chapter 566 near beginning of (1) after "report" deleted "as required by 41-3-201"; in (3) at beginning of third sentence substituted "If a child interview is considered necessary" for "If considered appropriate by" and after "peace officer" substituted "may conduct an interview" for "conducting an interview of the child, an employee of the school attended by the child involved may participate in any interview" and inserted fourth sentence authorizing interview to be conducted in presence of parent, guardian, or employee of school or facility; in (4) at beginning inserted reference to 41-3-205(3) and in two places inserted reference to audiotape;

and made minor changes in style. Amendment effective October 1, 1999.

Cross-References

Remedy for parental abuse, 40-6-233.

Emergency protective service, 41-3-301.

Responsibility of providing protective services, 41-3-302.

Records and reports required of health care facilities — confidentiality, 50-5-106.

Child rehabilitation — duties of Department, 52-2-113.

41-3-203. Immunity from liability. (1) Anyone investigating or reporting any incident of child abuse or neglect under 41-3-201 or 41-3-202, participating in resulting judicial proceedings, or furnishing hospital or medical records as required by 41-3-202 is immune from any liability, civil or criminal, that might otherwise be incurred or imposed unless the person was grossly negligent or acted in bad faith or with malicious purpose or provided information knowing the information to be false.

(2) A person who provides information pursuant to 41-3-201 that is substantiated by the department or a person who uses information received pursuant to 41-3-205 that is substantiated by the department to refuse to hire or to discharge a prospective or current employee, volunteer, or other person who through employment or volunteer activities may have unsupervised contact with children is immune from civil liability unless the person acted in bad faith or with malicious purpose.

History: En. Sec. 4, Ch. 178, L. 1965; Sec. 10-904, R.C.M. 1947; redes. 10-1306 by Sec. 14, Ch. 328, L. 1974; R.C.M. 1947, 10-1306; amd. Sec. 9, Ch. 543, L. 1979; amd. Sec. 1, Ch. 181, L. 1993; amd. Sec. 9, Ch. 458, L. 1995; amd. Sec. 5, Ch. 566, L. 1999.

Compiler's Comments

1999 Amendment: Chapter 566 at end of (1) inserted "or provided information knowing the information to be false". Amendment effective October 1, 1999.

Cross-References

Immunity and responsibility of psychologist, physician, or health care facility, 41-1-407.

Records and reports required of health care facilities — confidentiality, 50-5-106.

41-3-204. Admissibility and preservation of evidence. (1) In any proceeding resulting from a report made pursuant to the provisions of this chapter or in any proceeding for which the report or its contents are sought to be introduced into evidence, the report or its contents or any other fact related to the report or to the condition of the child who is the subject of the report may not be excluded on the ground that the matter is or may be the subject of a privilege related to the examination or treatment of the child and granted in Title 26, chapter 1, part 8, except the attorney-client privilege granted by 26-1-803.

(2) A person or official required to report under 41-3-201 may take or cause to be taken photographs of the area of trauma visible on a child who is the subject of a report. The cost of photographs taken under this section must be paid by the department.

(3) When a person required to report under 41-3-201 finds visible evidence that a child has suffered abuse or neglect, the person shall include in the report either a written description or photographs of the evidence.

(4) A physician, either in the course of providing medical care to a minor or after consultation with child protective services, the county attorney, or a law enforcement officer, may require x-rays to be taken when, in the physician's professional opinion, there is a need for radiological evidence of suspected abuse or neglect. X-rays may be taken under this section without the permission of

the parent or guardian. The cost of the x-rays ordered and taken under this section must be paid by the county child protective service agency.

(5) All written, photographic, or radiological evidence gathered under this section must be sent to the local affiliate of the department at the time that the written confirmation report is sent or as soon after the report is sent as is possible. If a confirmation report is not made, the evidence and the initial report must be destroyed as provided in 41-3-202.

History: En. Sec. 5, Ch. 178, L. 1965; Sec. 10-905, R.C.M. 1947; redes. 10-1307 by Sec. 14, Ch. 328, L. 1974; R.C.M. 1947, 10-1307; amd. Sec. 10, Ch. 543, L. 1979; amd. Sec. 38, Ch. 609, L. 1987; amd. Sec. 2, Ch. 146, L. 1995; amd. Sec. 189, Ch. 42, L. 1997; amd. Sec. 6, Ch. 514, L. 1997; amd. Sec. 4, Ch. 516, L. 1997.

Cross-References

Contents of writings, recordings, and photographs, Art. X, M.R.Ev. (see Title 26, ch. 10).

Validity of consent of minor for health services, 41-1-402.

Responsibility of providing protective services, 41-3-302.

Evidence in cases involving sexual offenses, Title 46, ch. 15, part 4.

41-3-205. Confidentiality — disclosure exceptions. (1) The case records of the department and its local affiliate, the county welfare department, the county attorney, and the court concerning actions taken under this chapter and all records concerning reports of child abuse and neglect must be kept confidential except as provided by this section. Except as provided in subsections (4) and (5), a person who permits or encourages the unauthorized dissemination of the contents of case records is guilty of a misdemeanor.

(2) Records may be disclosed to a court for in camera inspection if relevant to an issue before it. The court may permit public disclosure if it finds disclosure to be necessary for the fair resolution of an issue before it.

(3) Records, including case notes, correspondence, evaluations, videotapes, and interviews, unless otherwise protected by this section or unless disclosure of the records is determined to be detrimental to the child or harmful to another person who is a subject of information contained in the records, may be disclosed to the following persons or entities in this state and any other state or country:

(a) a department, agency, or organization, including a federal agency, military enclave, or Indian tribal organization, that is legally authorized to receive, inspect, or investigate reports of child abuse or neglect and that otherwise meets the disclosure criteria contained in this section;

(b) a licensed youth care facility or a licensed child-placing agency that is providing services to the family or child who is the subject of a report in the records or to a person authorized by the department to receive relevant information for the purpose of determining the best interests of a child with respect to an adoptive placement;

(c) a health or mental health professional who is treating the family or child who is the subject of a report in the records;

(d) a parent, guardian, or person designated by a parent or guardian of the child who is the subject of a report in the records or other person responsible for the child's welfare, without disclosure of the identity of any person who reported or provided information on the alleged child abuse or neglect incident contained in the records;

(e) a child named in the records who was allegedly abused or neglected or the child's legal guardian or legal representative, including the child's guardian ad litem or attorney or a special advocate appointed by the court to represent a child in a pending case;

(f) the state protection and advocacy program as authorized by 42 U.S.C. 6042(a)(2)(B);

(g) approved foster and adoptive parents who are or may be providing care for a child;

(h) a person about whom a report has been made and that person's attorney, with respect to the relevant records pertaining to that person only and without disclosing the identity of the reporter or any other person whose safety may be endangered;

(i) an agency, including a probation or parole agency, that is legally responsible for the supervision of an alleged perpetrator of child abuse or neglect;

(j) a person, agency, or organization that is engaged in a bona fide research or evaluation project and that is authorized by the department to conduct the research or evaluation;

(k) the members of an interdisciplinary child protective team authorized under 41-3-108 or of a family group conference for the purposes of assessing the needs of the child and family, formulating a treatment plan, and monitoring the plan;

(l) the coroner or medical examiner when determining the cause of death of a child;

(m) a child fatality review team recognized by the department;

(n) a department or agency investigating an applicant for a license or registration that is required to operate a youth care facility, day-care facility, or child-placing agency;

(o) a person or entity who is carrying out background, employment-related, or volunteer-related screening of current or prospective employees or volunteers who have or may have unsupervised contact with children through employment or volunteer activities. A request for information under this subsection (3)(o) must be made in writing. Disclosure under this subsection (3)(o) is limited to information that indicates a risk to children, persons with developmental disabilities, or older persons posed by the person about whom the information is sought, as determined by the department.

(p) the news media if disclosure is limited to confirmation of factual information regarding how the case was handled and if disclosure does not violate the privacy rights of the child or the child's parent or guardian, as determined by the department;

(q) an employee of the department or other state agency if disclosure of the records is necessary for administration of programs designed to benefit the child;

(r) an agency of an Indian tribe or the relatives of an Indian child if disclosure of the records is necessary to meet requirements of the federal Indian Child Welfare Act;

(s) a youth probation officer who is working in an official capacity with the child who is the subject of a report in the records;

(t) a county attorney, peace officer, or attorney who is hired by or represents the department, if disclosure is necessary for the investigation, defense, or prosecution of a case involving child abuse or neglect;

(u) a foster care review committee established under 41-3-1115 or, when applicable, a local citizen review board established under Title 41, chapter 3, part 10;

(v) a school employee participating in an interview of a child by a social worker, county attorney, or peace officer, as provided in 41-3-202;

(w) a member of a county interdisciplinary child information team formed under the provisions of 52-2-211;

(x) members of a local interagency staffing group provided for in 52-2-203;

(y) a member of a youth placement committee formed under the provisions of 41-5-121; or

(z) a principal of a school or other employee of the school district authorized by the trustees of the district to receive the information with respect to a student of the district who is a client of the department.

(4) A person who is authorized to receive records under this section shall maintain the confidentiality of the records and may not disclose information in the records to anyone other than the persons described in subsection (3)(a). However, this subsection may not be construed to compel a family member to keep the proceedings confidential.

(5) A news organization or its employee, including a freelance writer or reporter, is not liable for reporting facts or statements made by an immediate family member under subsection (4) if the news organization, employee, writer, or reporter maintains the confidentiality of the child who is the subject of the proceeding.

(6) This section is not intended to affect the confidentiality of criminal court records or records of law enforcement agencies.

(7) Copies of records, evaluations, reports, or other evidence obtained or generated pursuant to this section that are provided to the parent, the guardian, or the parent or guardian's attorney must be provided without cost.

History: En. 10-1308 by Sec. 4, Ch. 328, L. 1974; R.C.M. 1947, 10-1308; amd. Sec. 11, Ch. 543, L. 1979; amd. Sec. 1, Ch. 287, L. 1987; amd. Sec. 39, Ch. 609, L. 1987; amd. Sec. 1, Ch. 110, L. 1989; amd. Sec. 2, Ch. 126, L. 1989; amd. Sec. 2, Ch. 510, L. 1991; amd. Sec. 5, Ch. 655, L. 1991; amd. Sec. 15, Ch. 610, L. 1993; amd. Sec. 10, Ch. 458, L. 1995; amd. Sec. 164, Ch. 546, L. 1995; amd. Sec. 4, Ch. 564, L. 1995; amd. Sec. 7, Ch. 514, L. 1997; amd. Sec. 5, Ch. 550, L. 1997; amd. Sec. 6, Ch. 566, L. 1999.

Compiler's Comments

1999 Amendment: Chapter 566 in (3) after "Records" inserted language regarding types of records and exempted records protected by this section and records whose disclosure would be detrimental to child or harmful to another; inserted (7) requiring copies to be provided without cost; and made minor changes in style. Amendment effective October 1, 1999.

Cross-References

Right to know, Art. II, sec. 9, Mont. Const.

Doctor-patient privilege, 26-1-805.

Confidential communications by student to employee of educational institution, 26-1-809.

Child protective teams, 41-3-108.

Foster Care Review Committee, 41-3-1115.

Youth Court — confidentiality of proceedings — records, 41-5-215 and 41-5-216.

Youth Court — preliminary investigation and disposition, 41-5-1201.

Classification of offenses, 45-1-201.

Misdemeanor defined, 45-2-101.

Misdemeanor — no penalty specified, 46-18-212.

41-3-206. Procedure in case of child's death. (1) A person or official required to report by law who has reasonable cause to suspect that a child has died as a result of child abuse or neglect shall report the person's suspicion to the appropriate medical examiner or law enforcement officer. Any other person who has reasonable cause to suspect that a child has died as a result of child abuse or neglect may report the person's suspicion to the appropriate medical examiner or law enforcement officer.

(2) The medical examiner or coroner shall investigate the report and submit findings, in writing, to the local law enforcement agency, the appropriate county attorney, the local child protective service, the family of the deceased child, and, if the person making the report is a physician, the physician.

History: En. Sec. 7, Ch. 543, L. 1979; amd. Sec. 5, Ch. 564, L. 1995.

Cross-References

Homicide, Title 45, ch. 5, part 1.

41-3-207. Penalty for failure to report. (1) Any person, official, or institution required by law to report known or suspected child abuse or neglect who fails to do so or who prevents another person from reasonably doing so is civilly liable for the damages proximately caused by such failure or prevention.

(2) Any person or official required by law to report known or suspected child abuse or neglect who purposely or knowingly fails to report known child abuse or neglect or purposely or knowingly prevents another person from doing so is guilty of a misdemeanor.

History: En. Sec. 15, Ch. 543, L. 1979; amd. Sec. 1, Ch. 367, L. 1985.

Cross-References

Damages, Title 27, ch. 1, part 2.

Measure of damages, Title 27, ch. 1, part 3.

Liability for negligence as well as willful acts, 27-1-701.

Misdemeanor — no penalty specified, 46-18-212.

41-3-208. Rulemaking authority. (1) The department of public health and human services shall adopt rules to govern the procedures used by department personnel in preparing and processing reports and in making investigations authorized by this chapter.

(2) The department may adopt rules to govern the disclosure of case records containing reports of child abuse and neglect.

History: En. Sec. 1, Ch. 567, L. 1979; amd. Sec. 31, Ch. 465, L. 1983; amd. Sec. 2, Ch. 287, L. 1987; amd. Sec. 40, Ch. 609, L. 1987; amd. Sec. 7, Ch. 696, L. 1991; amd. Sec. 165, Ch. 546, L. 1995.

Cross-References

Adoption and publication of rules, Title 2, ch. 4, part 3.

Part 3
Protective Care

Part Cross-References

Establishment of youth center, 7-16-2102, 7-16-2103, 7-16-2105.

Multicounty youth guidance centers, 7-16-2104.

41-3-301. Emergency protective service. (1) Any child protective social worker of the department of public health and human services, a peace officer, or the county attorney who has reason to believe any youth is in immediate or apparent danger of harm may immediately remove the youth and place the youth in a protective facility. The department may make a request for further assistance from the law enforcement agency or take appropriate legal action. The person or agency placing the child shall notify the parents, parent, guardian, or other person having legal custody of the youth at the time the placement is made or as soon after placement as possible.

(2) A child who has been removed from the child's home or any other place for the child's protection or care may not be placed in a jail.

(3) A petition must be filed within 48 hours of emergency placement of a child unless arrangements acceptable to the agency for the care of the child have been made by the parents.

(4) The department of public health and human services shall make the necessary arrangements for the youth's well-being as are required prior to the court hearing.

History: En. 10-1309 by Sec. 5, Ch. 328, L. 1974; amd. Sec. 19, Ch. 100, L. 1977; R.C.M. 1947, 10-1309; amd. Sec. 12, Ch. 543, L. 1979; amd. Sec. 1, Ch. 659, L. 1985; amd. Sec. 41, Ch. 609, L. 1987; amd. Sec. 166, Ch. 546, L. 1995.

Cross-References

Remedy for parental abuse, 40-6-233.

Declaration of policy, 41-3-101.

Action on reporting, 41-3-202.

Abuse and neglect petitions, 41-3-401.

Youth residential services, Title 41, ch. 3, part 11.

Taking into custody, 41-5-321.

41-3-302. Responsibility of providing protective services. (1) The department of public health and human services has the primary responsibility to provide the protective services authorized by this chapter and has the authority pursuant to this chapter to take temporary or permanent custody of a child when ordered to do so by the court, including the right to give consent to adoption.

(2) The department shall respond to emergency reports of known or suspected child abuse or neglect 24 hours a day, 7 days a week.

History: En. 10-1315 by Sec. 11, Ch. 328, L. 1974; R.C.M. 1947, 10-1315; amd. Sec. 13, Ch. 543, L. 1979; amd. Sec. 4, Ch. 511, L. 1981; amd. Sec. 42, Ch. 609, L. 1987; amd. Sec. 167, Ch. 546, L. 1995.

Cross-References

Remedy for parental abuse, 40-6-233.

When parental authority ceases, 40-6-234.

Action on reporting, 41-3-202.

Order for immediate protection of youth, 41-3-403.

Taking into custody, 41-5-321.

Child rehabilitation — duties of Department, 52-2-113.

County departments of public welfare, Title 53, ch. 2, part 3.

41-3-303. Guardian ad litem. (1) In every judicial proceeding, the court shall appoint for any child alleged to be abused or neglected a guardian ad litem. The department or any of its staff may not be appointed as the guardian ad litem in a judicial proceeding under this title. When necessary, the guardian ad litem may serve at public expense.

(2) The guardian ad litem is charged with the representation of the child's best interests and shall perform the following general duties:

(a) to conduct investigations to ascertain the facts constituting the alleged abuse or neglect;

(b) to interview or observe the child who is the subject of the proceeding;

(c) to have access to court, medical, psychological, law enforcement, social services, and school records pertaining to the child and the child's siblings and parents or custodians;

(d) to make written reports to the court concerning the child's welfare;

(e) to appear and participate in all proceedings to the degree necessary to adequately represent the child and make recommendations to the court concerning the child's welfare;

(f) to perform other duties as directed by the court; and

(g) if an attorney, to file motions, including but not limited to filing to expedite proceedings or otherwise assert the child's rights.

(3) Information contained in a report filed by the guardian ad litem or testimony regarding a report filed by the guardian ad litem is not hearsay when it is used to form the basis of the guardian ad litem's opinion as to the best interests of the child.

(4) Any party may petition the court for the removal and replacement of the guardian ad litem if the guardian ad litem fails to perform the duties of the appointment.

History: **En. Sec. 14, Ch. 543, L. 1979; amd. Sec. 1, Ch. 384, L. 1985; amd. Sec. 4, Ch. 434, L. 1993; amd. Sec. 5, Ch. 516, L. 1997; amd. Sec. 7, Ch. 566, L. 1999.**

Compiler's Comments

1999 Amendment: Chapter 566 in (2)(a) after "investigations" deleted "that the guardian ad litem considers necessary"; inserted (2)(g) relating to filing of motions; inserted (3) providing that guardian's information is not hearsay; inserted (4) authorizing petition to remove or replace guardian; and made minor changes in style. Amendment effective October 1, 1999.

Cross-References

Appointment of guardian — document requiring seal, 3-1-206.

Appointment of guardian ad litem when minor is plaintiff or defendant, 25-5-301.

Guardian ad litem, 40-4-205.

When parental authority ceases, 40-6-234.

Enforcement of minor's rights, 41-1-202.

Appointment of guardian ad litem — Montana Youth Court Act, 41-5-1411.

Guardians of minors, Title 72, ch. 5, part 2.

Part 4

Abuse or Neglect Proceedings

41-3-401. Abuse and neglect petitions. (1) The county attorney, attorney general, or an attorney hired by the county is responsible for filing all petitions under this chapter. The petition must be accompanied by an affidavit by the department alleging that the child appears to have been abused, neglected, or abandoned and stating the basis for the allegation.

(2) Upon receipt of a petition, except a petition for temporary investigative authority, the court shall set a date for an adjudicatory hearing on the petition. The petitions must be given preference by the court in setting hearing dates.

(3) A petition alleging abuse or neglect is a civil action brought in the name of the state of Montana. The Montana Rules of Civil Procedure apply except as modified in this part. Proceedings under a petition are not a bar to criminal prosecution.

(4) The parents or parent, guardian, or other person or agency having legal custody of the youth named in the petition, if residing in the state, must be served personally with a copy of the petition and summons at least 5 working days before the date set for hearing. If the person or agency cannot be served personally, the person or agency may be served by publication in the manner provided by the Montana Rules of Civil Procedure for other types of proceedings.

(5) If personal service cannot be made upon the parents or parent, guardian, or other person or agency having legal custody, the court shall appoint an attorney to represent the unavailable party when in the opinion of the court the interests of justice require.

(6) If a parent of the child is a minor, notice must be given to the minor parent's parents or guardian, and if there is no guardian, the court shall appoint one.

(7) Any person interested in any cause under this chapter has the right to appear. Any foster parent, preadoptive parent, or relative caring for the child must be given legal notice by the attorney filing the petition of all judicial hearings for the child and must be given an opportunity to be heard. The right to appear or to be heard does not make that person a party to the action. Any foster parent, preadoptive parent, or relative caring for the child must be given notice of all reviews by the reviewing body.

(8) Except when the proceeding is instituted or commenced at the request of the department, a citation must be issued and served upon a representative of the department before the court hearing.

(9) The petition must:

(a) state the nature of the alleged abuse or neglect;

(b) state the full name, age, and address of the youth and the name and address of the youth's parents or guardian or person having legal custody of the youth;

(c) state the names, addresses, and relationship to the youth of all persons who are necessary parties to the action.

(10) The petition may ask for the following relief:

(a) temporary investigative authority and protective services, as provided in 41-3-402;

(b) temporary legal custody, as provided in 41-3-406;

(c) appointment of a guardian pursuant to 41-3-421;

(d) termination of the parent-child legal relationship and either:

(i) permanent legal custody with the right to consent to adoption, as provided in 41-3-607; or

(ii) appointment of a guardian; or

(e) any combination of the provisions of subsections (10)(a) through (10)(d) or any other relief that may be required for the best interests of the child.

(11) A request for a determination that reunification services need not be provided pursuant to 41-3-403 may be made in conjunction with the filing of a petition requesting relief, as provided for in subsection (10) of this section.

(12) The petition may be modified for different relief at any time within the discretion of the court.

(13) The court may at any time on its own motion or the motion of any party appoint counsel for any indigent party.

History: En. 10-1310 by Sec. 6, Ch. 328, L. 1974; amd. Sec. 20, Ch. 100, L. 1977; R.C.M. 1947, 10-1310; amd. Sec. 4, Ch. 567, L. 1979; amd. Sec. 5, Ch. 511, L. 1981; amd. Sec. 2, Ch. 659, L. 1985; amd. Sec. 2, Ch. 463, L. 1987; amd. Sec. 43, Ch. 609, L. 1987; amd. Sec. 2, Ch. 329, L. 1993; amd. Sec. 11, Ch. 458, L. 1995; amd. Sec. 168, Ch. 546, L. 1995; amd. Sec. 6, Ch. 516, L. 1997; amd. Sec. 1, Ch. 428, L. 1999; amd. Sec. 8, Ch. 566, L. 1999.

Compiler's Comments

1999 Amendments — Composite Section: Chapter 428 inserted (10)(c) relating to appointment of a guardian pursuant to 41-3-421; inserted (10)(d)(ii) relating to appointment of a guardian; and made minor changes in style. Amendment effective October 1, 1999.

Chapter 566 in (1) at end of first sentence after "petitions" substituted "under this chapter" for "alleging abuse or neglect", deleted former second sentence that read: "The county attorney, the attorney general, or an attorney hired by the department with the written consent of the county attorney or the attorney general may require all state, county, and municipal agencies, including law enforcement agencies, to conduct the investigations and furnish reports that may be necessary", and inserted second sentence requiring petition to be accompanied by department's affidavit; in (7) inserted second, third, and fourth sentences requiring that notice of judicial hearings and reviews be given to foster parents, preadoptive parents, or relatives caring for the child and providing that right to appear does not make person a party to action; inserted (11) providing that request for determination that reunification services need not be provided may be filed with petition requesting relief; and made minor changes in style. Amendment effective October 1, 1999.

Cross-References

Rules concerning time, Title 1, ch. 1, part 3; Rule 6, M.R.Civ.P. (see Title 25, ch. 20).

Duties of Attorney General, 2-15-501.

Appointment of guardian ad litem when minor is plaintiff or defendant, 25-5-301.

Montana Rules of Civil Procedure, Title 25, ch. 20.

Service of process, Rule 4D, M.R.Civ.P. (see Title 25, ch. 20).

Guardian ad litem, 40-4-205.

Best interests of child, 40-4-212.

Enforcement of minor's rights, 41-1-202.

Prosecution of offenders — abuse and neglect, 41-3-106.

Action on reporting, 41-3-202.

Parent-child legal relationship termination, Title 41, ch. 3, part 6.

Appointment of guardian ad litem — Montana Youth Court Act, 41-5-1411.

Child rehabilitation — duties of Department, 52-2-113.

State assumption of county public assistance programs, Title 53, ch. 2, part 8.

Guardians of minors, Title 72, ch. 5, part 2.

41-3-402. Petition for temporary investigative authority and protective services. (1) In a case in which it appears that a youth is abused or neglected or is in danger of being abused or neglected, the county attorney, the attorney general, or an attorney hired by the county may file a petition for temporary investigative authority and protective services.

(2) A petition for temporary investigative authority and protective services must state the specific authority requested and the facts establishing probable cause that a youth is abused or neglected or is in danger of being abused or neglected.

(3) The petition for temporary investigative authority and protective services must be supported by an affidavit signed by the county attorney, the attorney general, or an attorney hired by the county or must be supported by a department report stating in detail the facts upon which the request is based. The petition, affidavit, or report of the department must contain information regarding statements, if any, made by the parents detailing the parents' statement of the facts of the case. Except as provided in 41-3-403, the parents must be given an opportunity to address the court before the court rules on the petition.

History: En. 10-1311 by Sec. 7, Ch. 328, L. 1974; amd. Sec. 21, Ch. 100, L. 1977; R.C.M. 1947, 10-1311(1) thru (3); amd. Sec. 3, Ch. 659, L. 1985; amd. Sec. 44, Ch. 609, L. 1987; amd. Sec. 12, Ch. 458, L. 1995; amd. Sec. 169, Ch. 546, L. 1995; amd. Sec. 2, Ch. 501, L. 1997.

Cross-References

Duties of Attorney General, 2-15-501.

Affidavits, Title 26, ch. 1, part 10.

Action on reporting, 41-3-202.

State assumption of county public assistance programs, Title 53, ch. 2, part 8.

41-3-403. Order for immediate protection of youth. (1) (a) Upon the filing of a petition for temporary investigative authority and protective services, the court, after consideration of the parents' statements, if any, included with the petition and any accompanying affidavit or report to the court, may issue an order granting relief that may be required for the immediate protection of the youth.

(b) The order, along with the petition and supporting documents, must be served pursuant to the Montana Rules of Civil Procedure on the person or persons named in the order. When the youth is placed in a medical facility or protective facility, the department shall notify the parents or parent, guardian, or other person having legal custody of the youth, at the time the placement is made or as soon after placement as possible.

(c) The order must require the person served to comply immediately with the terms of the order and to appear before the court issuing the order on the date specified for a show cause hearing. The show cause hearing must be conducted within 20 days of the issuance of the order by the judge or a master appointed by the judge. The person filing the petition has the burden of presenting evidence establishing probable cause for the issuance of the order. At the show cause hearing, the court shall provide an opportunity for a parent or guardian, if present, and any other person having relevant knowledge to provide relevant testimony. The court may consider all relevant evidence in accordance with the rules of civil procedure as modified by this part, but may in its discretion limit testimony and evidence to only that which is relevant to the issues of removal from the home and the child's need for continued protection. The court may amend the order. Except as otherwise provided in this part, the rules of civil procedure apply. Hearsay evidence of statements made by the affected youth is admissible at the hearing or at a contested case proceeding held pursuant to Title 2, chapter 4, part 6, that results from adverse licensing action taken by the department.

(d) If the child is not returned home after the show cause hearing, the person served may request that a local citizen review board, if available pursuant to part 10, review the case within 30 days of the show cause hearing and make a recommendation to the district court, as provided in 41-3-1010.

(e) Upon a failure to comply or show cause, the court may hold the person in contempt or place temporary physical custody of the youth with the department until further order.

(2) At the conclusion of a show cause hearing, in an order granting or denying relief, the court shall make a finding regarding the reasonableness of agency efforts to prevent the child's removal from the home or to make it possible to safely return the child to the child's home. In determining preservation or reunification services to be provided and in making reasonable efforts at providing preservation or reunification services, the child's health and safety are of paramount concern. Reasonable efforts to provide preservation or reunification services are not required if the court finds that the parent has:

(a) subjected a child to aggravated circumstances, including but not limited to abandonment, torture, chronic abuse, or sexual abuse or chronic, severe neglect of a child;

(b) committed, aided, abetted, attempted, conspired, or solicited deliberate or mitigated deliberate homicide of a child;

(c) committed aggravated assault against a child;

(d) committed neglect of a child that resulted in serious bodily injury or death; or

(e) had parental rights to the child's sibling or other child of the parent involuntarily terminated and the circumstances related to the termination of parental rights are relevant to the parent's ability to adequately care for the child at issue.

(3) Preservation or reunification services are not required for a putative father, as defined in 42-2-201, if the court makes a finding that the putative father has failed to do any of the following:

(a) contribute to the support of the child for an aggregate period of 1 year, although able to do so;

(b) establish a substantial relationship with the child. A substantial relationship is demonstrated by:

(i) visiting the child at least monthly when physically and financially able to do so; or

(ii) having regular contact with the child or with the person or agency having the care and custody of the child when physically and financially able to do so; and

(iii) manifesting an ability and willingness to assume legal and physical custody of the child if the child was not in the physical custody of the other parent.

(c) register with the putative father registry pursuant to Title 42, chapter 2, part 2, and the person has not been:

(i) adjudicated in Montana to be the father of the child for the purposes of child support; and

(ii) recorded on the child's birth certificate as the child's father.

(4) If the court finds that preservation or reunification services are not necessary pursuant to subsection (2), a permanency hearing must be held within 30 days of that determination and reasonable efforts must be made to place the child in a timely manner in accordance with the permanency plan and to complete whatever steps are necessary to finalize the permanent placement of the child.

(5) If reasonable efforts have been made to prevent removal of a child from the home or to return a child to the child's home but continuation of the efforts is determined by the court to be inconsistent with the permanency plan for the child, the department shall make reasonable efforts to place the child in a timely manner in accordance with the permanency plan and to complete whatever steps are necessary to finalize the permanent placement of the child. Reasonable efforts to place a child permanently for adoption or to make an alternative out-of-home permanent placement may be made concurrently with reasonable efforts to return a child to the child's home.

(6) The court may grant the following kinds of relief:

(a) right of entry by a peace officer or department worker;

(b) medical and psychological evaluation of the youth or parents, guardians, or person having physical or legal custody;

(c) requirement that the youth, parents, guardians, or person having physical or legal custody receive counseling services;

(d) placement of the youth in a temporary medical facility or a facility for protection of the youth;

(e) requirement that the parents, guardian, or other person having physical or legal custody furnish information that the court may designate;

(f) inquiry into the financial ability of the parents, guardian, or other person having custody of the youth to contribute to the costs for the care, custody, and treatment of the youth and requirement of a contribution for those costs pursuant to the requirements of 41-3-411; or

(g) other temporary disposition that may be required in the best interests of the youth that does not require an expenditure of money by the department unless the department is notified and a court hearing is set in a timely manner on the proposed expenditure. The department is the payor of last resort after all family, insurance, and other resources have been examined.

(7) An order for temporary investigative authority and protective services may not be issued for a period longer than 90 days following the show cause hearing and must be limited to one extension of 90 days. Before the expiration of the time provided for in an order for temporary investigative authority and protective services, the county attorney, the attorney general, or an attorney hired by the county shall file a petition for one of the following:

(a) limited emancipation;

(b) temporary legal custody;

(c) termination of the parent-child legal relationship and permanent legal custody with the right to consent to adoption; or

(d) dismissal.

(8) Notwithstanding the above time limits, the court may continue an order for temporary investigative authority pending a hearing on a petition provided for in subsection (7).

(9) If the time limitations of this section are not met, the court shall review the reasons for the failure and order an appropriate remedy that considers the best interests of the child.

History: En. 10-1311 by Sec. 7, Ch. 328, L. 1974; amd. Sec. 21, Ch. 100, L. 1977; R.C.M. 1947, 10-1311(4), (5); amd. Sec. 4, Ch. 659, L. 1985; amd. Sec. 11, Ch. 609, L. 1987; amd. Sec. 1, Ch. 696, L. 1991; amd. Sec. 1, Ch. 112, L. 1993; amd. Sec. 1, Ch. 362, L. 1993; amd. Sec. 13, Ch. 458, L. 1995; amd. Sec. 3, Ch. 501, L. 1997; amd. Sec. 7, Ch. 516, L. 1997; amd. Sec. 9, Ch. 566, L. 1999.

Compiler's Comments

1999 Amendment: Chapter 566 near beginning of (1)(b) substituted "served pursuant to the Montana Rules of Civil Procedure" for "served by a peace officer or a representative of the department"; in (2) at beginning of first sentence inserted "At the conclusion of a show cause hearing", after "agency efforts to" deleted "rehabilitate the family to", and end inserted "or to make it possible to safely return the child to the child's home" and inserted last two sentences and (2)(a) through (2)(e) providing that child's health and safety are paramount concern in determining preservation and reunification services to be provided and establishing criteria for when reasonable efforts to provide preservation or reunification services are not required; inserted (3) establishing criteria for when preservation or reunification services are not required for putative father; inserted (4) requiring permanency hearing within 30 days of finding that preservation or reunification services are not necessary; inserted (5) requiring department to make reasonable efforts to permanently place child if court determines efforts to return child to home are inconsistent with permanency plan and allowing permanent placement efforts to be conducted concurrently with efforts to return child to home; in (6)(e) substituted "furnish information" for "furnish services"; and made minor changes in style. Amendment effective October 1, 1999.

Cross-References

Rules concerning time, Title 1, ch. 1, part 3; Rule 6, M.R.Civ.P. (see Title 25, ch. 20).

Contempts, Title 3, ch. 1, part 5.

Montana Rules of Civil Procedure, Title 25, ch. 20.

Masters, Rule 53, M.R.Civ.P. (see Title 25, ch. 20).

Best interests of child, 40-4-212.

Remedy for parental abuse, 40-6-233.

Psychiatric or psychological counseling under urgent circumstances, 41-1-406.

Action on reporting, 41-3-202.

Responsibility of providing protective services, 41-3-302.

Taking into custody, 41-5-321.

Child rehabilitation — duties of Department, 52-2-113.

Department to accept custody of children committed by courts, 52-2-115.

41-3-404. Adjudicatory hearing — temporary disposition. (1) In the adjudicatory hearing on a petition under 41-3-401, the court shall determine by a preponderance of the evidence whether the youth is a youth in need of care and ascertain, as far as possible, the cause.

(2) The court shall hear evidence regarding the residence of the youth, the whereabouts of the parents, guardian, or nearest adult relative, and any other matters the court considers relevant in determining the status of the youth.

(3) In all civil and criminal proceedings relating to abuse or neglect, the privileges related to the examination or treatment of the child do not apply, except the attorney-client privilege granted by 26-1-803 and the mediation privilege granted by 26-1-813.

(4) (a) If the court determines that the youth is not an abused or neglected child, the petition must be dismissed and any order made pursuant to 41-3-403 must be vacated.

(b) If the youth is adjudicated a youth in need of care, the court shall set a date for a dispositional hearing to be conducted within 30 days and order any necessary or required investigations. The court may issue a temporary dispositional order pending the dispositional hearing. The temporary dispositional order may provide for any of the forms of relief listed in 41-3-403(6).

History: En. 10-1312 by Sec. 8, Ch. 328, L. 1974; R.C.M. 1947, 10-1312; amd. Sec. 19, Ch. 543, L. 1979; amd. Sec. 5, Ch. 567, L. 1979; amd. Sec. 5, Ch. 659, L. 1985; amd. Sec. 14, Ch. 458, L. 1995; amd. Sec. 8, Ch. 516, L. 1997; amd. Sec. 3, Ch. 481, L. 1999; amd. Sec. 10, Ch. 566, L. 1999.

Compiler's Comments

1999 Amendments — Composite Section: Chapter 481 in (3) near middle after "child" deleted "and granted in Title 26, chapter 1, part 8", after "26-1-803 and the" substituted "mediation" for "mediator", and at end substituted "26-1-813" for "26-1-811, apply"; and made minor changes in style. Amendment effective October 1, 1999.

Chapter 566 at end of (4)(b) substituted "41-3-403(6)" for "41-3-403(3)". Amendment effective October 1, 1999.

Cross-References

Rules concerning time, Title 1, ch. 1, part 3; Rule 6, M.R.Civ.P. (see Title 25, ch. 20).

Remedy for parental abuse, 40-6-233.

Admissibility and preservation of evidence, 41-3-204.

Payment for support of youth in need of care, youth in need of intervention, or delinquent youth — reimbursement by county, 41-3-1122.

Evidence in cases involving sexual offenses, Title 46, ch. 15, part 4.

41-3-405. Combined with 41-5-805, renumbered 41-3-1123. Sec. 31, Ch. 465, L. 1983.

41-3-406. Dispositional hearing — temporary legal custody. (1) If a youth is found to be a youth in need of care under 41-3-404, the court may enter its judgment, making any of the following dispositions to protect the welfare of the youth:

(a) permit the youth to remain with the youth's parent or guardian, subject to those conditions and limitations the court may prescribe;

(b) grant an order of limited emancipation to a youth who is 16 years of age or older, as provided in 41-3-408;

(c) transfer temporary legal custody to any of the following:

(i) the department;

(ii) a licensed child-placing agency that is willing and able to assume responsibility for the education, care, and maintenance of the youth and that is licensed or otherwise authorized by law to receive and provide care of the youth; or

(iii) a relative or other individual who is recommended by the department or a licensed child-placing agency designated by the court and who is found by the court to be qualified to receive and care for the youth;

(d) order a party to the action to do what is necessary to give effect to the final disposition, including undertaking medical and psychological evaluations, treatment, and counseling that does not require an expenditure of money by the department unless the department is notified and a court hearing is set in a timely manner on the proposed expenditure. The department is the payor of last resort after all family, insurance, and other resources have been examined.

(e) order further care and treatment as the court considers in the best interests of the child that does not require an expenditure of money by the department unless the department is notified and a court hearing is set in a timely manner on the proposed expenditure. The department is the payor of last resort after all family, insurance, and other resources have been examined pursuant to 41-3-411.

(2) To grant temporary legal custody, the court shall make a finding that:

(a) dismissing the petition would create a substantial risk of harm to the child or detriment to the child's physical or psychological well-being; and

(b) unless there is a finding that reasonable efforts are not required pursuant to 41-3-403, reasonable services have been provided to the parent or guardian to prevent the removal of the child from the home or to make it possible for the child to safely return home.

(3) If reasonable efforts have been made to prevent removal of a child from the home or to return a child to the child's home but continuation of the efforts is determined by the court to be inconsistent with permanency for the child, the department shall make reasonable efforts to place the child in a timely manner in accordance with a permanent plan and to complete whatever steps are necessary to finalize the permanent placement of the child.

(4) If the court finds that reasonable efforts are not necessary pursuant to subsection (2) or (3), a permanency hearing must be held within 30 days of that determination and reasonable efforts must be made to place the child in a timely manner in accordance with the permanency plan and to complete whatever steps are necessary to finalize the permanent placement of the child.

(5) An order for temporary legal custody may be in effect for no longer than 6 months. Before the expiration of the order for temporary legal custody, the county attorney, the attorney general, or an attorney hired by the county shall petition for one of the following:

(a) an extension of temporary legal custody, not to exceed a total of 6 months, upon a showing that additional time is necessary for the parent or guardian to successfully complete a treatment plan;

(b) termination of the parent-child legal relationship and either:

(i) permanent legal custody with the right of adoption; or

(ii) appointment of a guardian pursuant to 41-3-607;

(c) long-term custody pursuant to 41-3-412;

(d) appointment of a guardian pursuant to 41-3-421; or

(e) dismissal.

(6) The court may continue an order for temporary legal custody pending a hearing on a petition provided for in subsection (5).

(7) If an extension of temporary legal custody is granted to the department, the court shall state the reasons why the child was not returned home and the conditions upon which the child may be returned home.

(8) If the time limitations of this section are not met, the court shall review the reasons for the failure and order an appropriate remedy that considers the best interests of the child.

History: En. 10-1314 by Sec. 10, Ch. 328, L. 1974; R.C.M. 1947, 10-1314; amd. Sec. 7, Ch. 567, L. 1979; amd. Sec. 170, Ch. 575, L. 1981; amd. Sec. 3, Ch. 564, L. 1983; amd. Sec. 6, Ch. 659, L. 1985; amd. Sec. 11, Ch. 609, L. 1987; amd. Sec. 2, Ch. 696, L. 1991; amd. Sec. 2, Ch. 362, L. 1993; amd. Sec. 15, Ch. 458, L. 1995; amd. Sec. 170, Ch. 546, L. 1995; amd. Sec. 9, Ch. 516, L. 1997; amd. Sec. 2, Ch. 428, L. 1999; amd. Sec. 11, Ch. 566, L. 1999.

Compiler's Comments

1999 Amendments — Composite Section: Chapter 428 in (5)(b)(ii) at beginning inserted "appointment of a guardian"; inserted (5)(d) relating to appointment of a guardian pursuant to 41-3-421; and made minor changes in style. Amendment effective October 1, 1999.

Chapter 566 in (2)(a) at beginning substituted "dismissing the petition" for "returning the child to the child's parent or guardian" and substituted "psychological well-being" for "emotional well-being"; in (2)(b) at beginning inserted "unless there is a finding that reasonable efforts are not required pursuant to 41-3-403" and at end inserted "or to make it possible for the child to safely return home"; deleted former (3) that read: "(3) In making a finding regarding the risk of harm to the child or regarding detriment to the child, failure of the child's parent or guardian to participate in, to comply with, in whole or in part, or to meet the goals of a court-ordered treatment plan constitutes prima facie evidence that return of the child to the parent or guardian would be detrimental to the child's physical or emotional well-being"; inserted (3) requiring department to make reasonable efforts to permanently place child if court determines efforts to return child to home are inconsistent with permanency plan; inserted (4) requiring permanency hearing to be conducted within 30 days after determination that reasonable efforts to return child to home are not necessary and requiring finalization of placement; in (5)(a) after "custody" inserted "not to exceed a total of 6 months"; inserted (5)(c) authorizing petition for long-term custody; and made minor changes in style. Amendment effective October 1, 1999.

Cross-References

Remedy for parental abuse, 40-6-233.

When parental authority ceases, 40-6-234.

Jurisdiction and venue, 41-3-103.

Responsibility of providing protective services, 41-3-302.

Priority of Youth Court hearings, 41-5-110.

Endangering welfare of children, 45-5-622.

Department to accept custody of children committed by courts, 52-2-115.

Guardians of minors, Title 72, ch. 5, part 2.

41-3-407. Combined with 41-5-806, renumbered 41-3-1124. Sec. 31, Ch. 465, L. 1983.

41-3-408. Limited emancipation. (1) The court may, upon the request of a youth who is 16 years of age or older, the youth's parent, or the department, enter an order granting limited emancipation to the youth.

(2) Limited emancipation may be granted only if the court has found:

(a) that limited emancipation is in the youth's best interests;

(b) that the youth desires limited emancipation;

(c) that there exists no public interest compelling denial of limited emancipation;

(d) that the youth has, or will reasonably obtain, money sufficient to pay for financial obligations incurred as a result of limited emancipation;

(e) that the youth, as shown by prior conduct and preparation, understands and may be expected to responsibly exercise those rights and responsibilities incurred as a result of limited emancipation;

(f) that the youth has graduated or will continue to diligently pursue graduation from high school, unless circumstances clearly compel deferral of education; and

(g) that, if it is considered necessary by the court, the youth will undergo periodic counseling with an appropriate advisor.

(3) An order of limited emancipation must specifically set forth the rights and responsibilities that are being conferred upon the youth. These may include but are not limited to one or more of the following:

(a) the right to live independently of in-house supervision;

(b) the right to live in housing of the youth's choice;

(c) the right to directly receive and expend money to which the youth is entitled and to conduct the youth's own financial affairs;

(d) the right to enter into contractual agreements and incur debts;

(e) the right to obtain access to medical treatment and records upon the youth's own authorization; and

(f) the right to obtain a license to operate equipment or perform a service.

(4) An order of limited emancipation must include a provision requiring that the youth make periodic reports to the court upon terms prescribed by the court.

(5) The court, on its own motion or on the motion of the county attorney or any parties to the dispositional hearing, may modify or revoke the order upon a showing that:

(a) the youth has committed a material violation of the law;

(b) the youth has violated a condition of the limited emancipation order; or

(c) the best interests of the youth are no longer served by limited emancipation.

History: En. Sec. 5, Ch. 564, L. 1983; amd. Sec. 8, Ch. 696, L. 1991; amd. Sec. 16, Ch. 458, L. 1995.

Cross-References

Schools — compulsory attendance and excuses, 20-5-103.

Obligations of parents, Title 40, ch. 6, part 2.

Minor cannot disaffirm certain obligations, 41-1-306.

Validity of consent to medical treatment, Title 41, ch. 1, part 4.

Definitions — limited emancipation, 41-3-102.

41-3-409. Appeals. Appeals of court orders or decrees made under this part shall be given precedence on the calendar of the supreme court over all other matters, unless otherwise provided by law. An appeal does not stay the order or decree appealed from; however, the supreme court may order a stay upon application and hearing if suitable provision is made for the care and custody of the child.

History: En. Sec. 3, Ch. 463, L. 1987.

Cross-References

Montana Rules of Appellate Procedure, Title 25, ch. 21.

41-3-410. Repealed. Sec. 17, Ch. 516, L. 1997.

History: En. Sec. 1, Ch. 599, L. 1991.

41-3-411. Contributions by parents or guardians for youth's care. (1) If custody of the youth is transferred to the department, the court shall examine the financial ability of the youth's parents or guardians to pay a contribution covering all or part of the costs for the care, custody, and treatment of the youth, including the costs of necessary medical, dental, and other health care.

(2) If the court determines that the youth's parents or guardians are financially able to pay a contribution as provided in subsection (1), the court shall order the youth's parent or guardian to pay an amount based on the uniform child support guidelines adopted by the department of public health and human services pursuant to 40-5-209.

(3) (a) Except as provided in subsection (3)(b), contributions ordered under this section and each modification of an existing order are enforceable by immediate or delinquency income withholding, or both, under Title 40, chapter 5, part 4. An order for a contribution that is inconsistent with this section is nevertheless subject to withholding for the payment of the contribution without need for an amendment of the support order or for any further action by the court.

(b) A court-ordered exception from contributions under this section must be in writing and must be included in the order. An exception from the immediate income withholding requirement may be granted if the court finds that there is:

(i) good cause not to require immediate income withholding; or

(ii) an alternative arrangement between the department and the person who is ordered to pay contributions.

(c) A finding of good cause not to require immediate income withholding must, at a minimum, be based upon:

(i) a written determination and explanation by the court of the reasons why the implementation of immediate income withholding is not in the best interests of the child; and

(ii) proof of timely payment of previously ordered support in cases involving modification of contributions ordered under this section.

(d) An alternative arrangement must:

(i) provide sufficient security to ensure compliance with the arrangement;

(ii) be in writing and be signed by a representative of the department and the person required to make contributions; and

(iii) if approved by the court, be entered into the record of the proceeding.

(4) Upon a showing of a change in the financial ability of the youth's parent or guardian to pay, the court may modify its order for the payment of contributions required under subsection (2).

(5) (a) If the court orders the payment of contributions under this section, the department shall apply to the department of public health and human services for support enforcement services pursuant to Title IV-D of the Social Security Act.

(b) The department of public health and human services may collect and enforce a contribution order under this section by any means available under law, including the remedies provided for in Title 40, chapter 5, parts 2 and 4.

History: En. Sec. 10, Ch. 516, L. 1997.

41-3-412. Permanency plan hearing. (1) A permanency plan hearing must be held by the court no later than 12 months after the initial court finding that the child has been subjected to abuse or neglect or 12 months after the child's first 60 days of removal from the home, whichever comes first, unless the proceeding has been dismissed, the child was not removed from the home, or the child has been returned to the child's parent or guardian. The permanency plan hearing may be combined with a hearing that is required in other sections of this part if held within the time limits of that section. If a permanency plan hearing is combined with another hearing, the requirements of the court related to the disposition of the other hearing must be met in addition to the requirements of this section.

(2) At least 3 days prior to the permanency plan hearing, the department and the guardian ad litem shall each submit a report regarding the child to the court for review. The report must contain the:

(a) efforts and progress demonstrated by the child's parent or guardian to complete a treatment plan;

(b) extent to which the parent or guardian cooperated and used the services provided;

(c) status of the child, including the child's mental, physical, and psychological health; and

(d) plan for permanency for the child, including specific times for achieving the plan.

(3) At least 3 days prior to the permanency plan hearing, an attorney or advocate for a parent or guardian may submit an informational report to the court for review.

(4) If the court finds that the permanency plan is in the best interests of the child, the court shall order the department to take whatever steps are necessary to effectuate the terms of the plan, including returning the child safely to the child's home, and shall order the county attorney, the attorney general, or an attorney hired by the county to file any necessary petition to implement the plan with the court within 30 days after the present hearing unless a petition has already been filed.

(5) In its discretion, the court may enter any other order that it determines to be in the best interests of the child that does not conflict with the provisions in subsection (6) and that does not require an expenditure of money by the department unless the department is notified and a court hearing is set in a timely manner on the proposed expenditure. The department is the payor of last resort after all family, insurance, and other resources have been examined.

(6) If the permanency plan hearing results in a finding that reunification of the child with the child's parent or guardian is not in the best interests of the child, a subsequent petition filed must be one of the following:

(a) termination of parental rights if the applicable requirements to terminate parental rights have been met;

(b) appointment of a guardian pursuant to 41-3-421; or

(c) long-term custody of a child if the evidence demonstrates by a preponderance of the evidence, which is reflected in specific findings by the court, that:

(i) the child has an emotional or mental handicap that is so severe that the child cannot function in a family setting and the best interests of the child are served by placement in a residential or group setting;

(ii) the child is at least 16 years of age and is participating in an independent living program and that termination of parental rights is not in the best interests of the child;

(iii) the child's parent is incarcerated and circumstances, including placement of the child and continued, frequent contact with the parent, indicate that it would not be in the best interests of the child to terminate parental rights of that parent;

(iv) the child is in a group of siblings, at least one of whom meets the requirements of subsections (6)(c)(v)(A) through (6)(c)(v)(D), and the best interests of the child will be met by continued placement in the sibling group in long-term foster care; or

(v) the child is at least 12 years of age and meets the following criteria:

(A) the child has been adjudicated a youth in need of care;

(B) the department has made reasonable efforts to reunite the parent and child, further efforts by the department would likely be unproductive, and reunification of the child with the parent or guardian would be contrary to the best interests of the child;

(C) termination of parental rights to the child is not in the child's best interests; and

(D) the child has been in a placement in which the foster parent has committed to the long-term care and to a relationship with the child, and it is in the best interests of the child to remain in that placement.

(7) The court may terminate long-term custody upon petition of the birth parents or the department if the court finds that the circumstances of the child or family have substantially changed and the best interests of the child are no longer being served.

History: En. Sec. 11, Ch. 516, L. 1997; amd. Sec. 3, Ch. 428, L. 1999; amd. Sec. 12, Ch. 566, L. 1999.

Compiler's Comments

1999 Amendments — Composite Section: Chapter 428 in (4) substituted "to file any necessary petition with the court" for "to petition the court" and after "present hearing" deleted former language that read: "for one of the following:

(i) termination of parental rights;

(ii) temporary legal custody, not to exceed 6 months; or

(iii) dismissal"; in (6) near beginning substituted "results in a finding" for "results in an order for a 6-month extension of temporary legal custody, upon the expiration of the temporary legal custody order and the filing of a petition by the department and if the court finds" and substituted "a subsequent petition may only be for" for "the court shall order"; inserted (6)(b) relating to appointment of a guardian pursuant to 41-3-421; and made minor changes in style. Amendment effective October 1, 1999.

Chapter 566 near beginning of (1) substituted "initial court finding that the child has been subjected to abuse or neglect or 12 months after the child's first 60 days of removal from the home, whichever comes first" for "initial order is issued"; in (2)(c) substituted "psychological health" for "emotional health"; at end of (2)(d) inserted "including specific times for achieving the plan"; in (4) after "terms of the plan" inserted "including returning the child safely to the child's home", after "county" substituted "to file a petition to implement the plan with the court" for "to petition the court", and at end after "hearing" substituted "unless a petition has already been filed" for "for one of the following:

(i) termination of parental rights;

(ii) temporary legal custody, not to exceed 6 months; or

(iii) dismissal"; in (5) after "discretion" inserted "the court may" and after "child" inserted "that does not conflict with the provisions in subsection (6) and"; in (6) substituted "results in a finding" for "results in an order for a 6-month extension of temporary legal custody, upon the expiration of the temporary legal custody order and the filing of a petition by the department and if the court finds" and at end after "child" substituted "any subsequent petition filed must be one of the following" for "the court shall order"; at end of (6)(c) inserted "which is reflected in specific findings by the court"; inserted (6)(c)(i) through (6)(c)(iv) allowing long-term custody of child if child has emotional or mental handicap or is at least 16, child's parent is incarcerated, or child is in group of siblings; in (6)(c)(v) inserted "the child is at least 12 years of age and meets the following criteria"; deleted former (5)(b)(iii) that read: "(iii) the child has reached 12 years of age"; in (7) after "parents" deleted "those to whom legal custody has been transferred"; and made minor changes in style. Amendment effective October 1, 1999.

Style changes were slightly different in the chapters. In each case, the codifier chose appropriate text.

41-3-413. Review hearing. Within 12 months of a finding that reunification is not in the best interests of the child, the court shall make additional findings regarding the department's reasonable efforts to make and finalize a permanent placement for the child.

History: En. Sec. 13, Ch. 566, L. 1999.

Compiler's Comments

Effective Date: This section is effective October 1, 1999.

41-3-414 through 41-3-419 reserved.

41-3-420. Treatment plan — contents — changes. (1) Upon the stipulation of the parties or upon a judicial finding that a child is a youth in need of care, the court may order a treatment plan.

(2) Every treatment plan must contain the following information:

(a) the identification of the problems or conditions that resulted in the abuse or neglect of a child;

(b) the treatment goals and objectives for each condition or requirement established in the plan. If the child has been removed from the home, the treatment plan must include but is not limited to the conditions or requirements that must be established for the safe return of the child to the family.

(c) the projected time necessary to complete each of the treatment objectives;

(d) the specific treatment objectives that clearly identify the separate roles and responsibilities of all parties addressed in the treatment plan; and

(e) the signature of the parent or parents or guardian, unless the plan is ordered by the court.

(3) A treatment plan may include but is not limited to any of the following remedies, requirements, or conditions:

(a) the right of entry into the child's home for the purpose of assessing compliance with the terms and conditions of a treatment plan;

(b) the requirement of either the child or the child's parent or guardian to obtain medical or psychiatric diagnosis and treatment through a physician or psychiatrist licensed in the state of Montana;

(c) the requirement of either the child or the child's parent or guardian to obtain psychological treatment or counseling;

(d) the requirement of either the child or the child's parent or guardian to obtain and follow through with alcohol or substance abuse evaluation and counseling, if necessary;

(e) the requirement that either the child or the child's parent or guardian be restricted from associating with or contacting any individual who may be the subject of a department investigation;

(f) the requirement that the child be placed in a temporary medical facility or a facility for protection of the youth;

(g) the requirement that the parent, guardian, or other person having physical or legal custody furnish services that the court may designate.

(4) A treatment plan may not be altered, amended, continued, or terminated without the approval of the parent or parents or guardian pursuant to a stipulation and order or order of the court.

History: En. Sec. 15, Ch. 566, L. 1999.

Compiler's Comments

Effective Date: This section is effective October 1, 1999.

41-3-421. Abuse and neglect proceedings — appointment of guardian — financial subsidies. (1) The court may, upon the petition of the department or guardian ad litem, enter an order appointing a guardian for a child who has been placed in the temporary or permanent custody of the department pursuant to 41-3-406, 41-3-412, or 41-3-607. The guardianship may be subsidized by the department under subsection (8) if the guardianship meets the department's criteria, or the guardianship may be nonsubsidized.

(2) The court may appoint a guardian for a child pursuant to this section if the following facts are found by the court:

(a) the department has given its written consent to the appointment of the guardian, whether the guardianship is to be subsidized or not;

(b) if the guardianship is to be subsidized, the department has given its written consent after the department has considered initiating or continuing financial subsidies pursuant to subsection (8);

(c) the child has been adjudicated a youth in need of care;

(d) the department has made reasonable efforts to reunite the parent and child, further efforts to reunite the parent and child by the department would likely be unproductive, and reunification of the parent and child would be contrary to the best interests of the child;

(e) the child is at least 12 years old or the child is in a group of siblings, at least one of whom is at least 12 years old, and the guardianship is in the best interests of the siblings;

(f) the child has lived with the potential guardian in a family setting and the potential guardian is committed to providing a long-term relationship with the child;

(g) it is in the best interests of the child to remain or be placed with the potential guardian;

(h) either termination of parental rights to the child is not in the child's best interests or parental rights to the child have been terminated, but adoption is not in the child's best interests; and

(i) if the child concerning whom the petition for guardianship has been filed is an Indian child, as defined in the Indian Child Welfare Act, 25 U.S.C. 1901, et seq., the child's tribe has received notification from the state of the initiation of the proceedings.

(3) The entry of a decree of guardianship pursuant to this section terminates the custody of the department and the involvement of the department with the child and the child's parents except a provision of a financial subsidy, if any, pursuant to subsection (8).

(4) A guardian appointed under this section may exercise the powers and has the duties provided in 72-5-231.

(5) The court may revoke a guardianship ordered pursuant to this section if the court finds, after hearing on a petition for removal of the child's guardian, that continuation of the guardianship is not in the best interests of the child. Notice of hearing on the petition must be provided by the moving party to the child's lawful guardian, the department, any court appointed guardian ad litem, the child's parent if the rights of the parent have not been terminated, and other persons directly interested in the welfare of the child.

(6) A guardian may petition the court for permission to resign the guardianship. A petition may include a request for appointment of a successor guardian.

(7) After notice and hearing on a petition for removal or permission to resign, the court may appoint a successor guardian or may terminate the guardianship and restore temporary legal custody to the department pursuant to 41-3-406.

(8) The department may provide a financial subsidy to a guardian appointed pursuant to this section if the guardianship meets the department's criteria and if the department determines that a subsidy is in the best interests of the child. The amount of the subsidy must be determined by the department.

(9) This section does not apply to guardians appointed pursuant to Title 72, chapter 5.

History: En. Sec. 4, Ch. 428, L. 1999.

Compiler's Comments

Effective Date: This section is effective October 1, 1999.

Part 5

Foster Homes and Other Private Institutions (Renumbered by Sec. 31, Ch. 465, L. 1983)

Part Compiler's Comments

Sections Renumbered:

41-3-501. Renumbered 41-3-1102(3), (4). Sec. 31, Ch. 465, L. 1983.

41-3-502. Renumbered 41-3-1141. Sec. 31, Ch. 465, L. 1983.

41-3-503. Renumbered 41-3-1142. Sec. 31, Ch. 465, L. 1983.

41-3-504. Renumbered 41-3-1143. Sec. 31, Ch. 465, L. 1983.

Renumbered Sections:

41-3-501. Renumbered 41-3-1102(3), (4). Sec. 31, Ch. 465, L. 1983.

41-3-502. Renumbered 41-3-1141. Sec. 31, Ch. 465, L. 1983.

41-3-503. Renumbered 41-3-1142. Sec. 31, Ch. 465, L. 1983.

41-3-504. Renumbered 41-3-1143. Sec. 31, Ch. 465, L. 1983.

Part 6

Parent-Child Legal Relationship Termination

41-3-601. Short title. This part may be cited as the "Parent-Child Legal Relationship Termination Act of 1981".

History: En. Sec. 1, Ch. 420, L. 1981.

41-3-602. Purpose. This part provides procedures and criteria by which the parent-child legal relationship may be terminated by a court if the relationship is not in the best interest of the child. The termination of the parent-child legal relationship provided for in this part is to be used in those situations when there is a determination that a child is abused or neglected, as defined in 41-3-102.

History: En. Sec. 2, Ch. 420, L. 1981; amd. Sec. 17, Ch. 458, L. 1995.

Cross-References

Best interests of child, 40-4-212.

41-3-603. Repealed. Sec. 17, Ch. 516, L. 1997.

History: En. Sec. 3, Ch. 420, L. 1981; amd. Sec. 1, Ch. 1, L. 1983; amd. Sec. 1, Ch. 388, L. 1985; amd. Sec. 18, Ch. 458, L. 1995.

41-3-604. When petition to terminate parental rights required. (1) If a child has been in foster care under the custody of the state for 15 months of the most recent 22 months, the best interests of the child must be presumed to be served by termination of parental rights. If a child has been in foster care for 15 months of the most recent 22 months or if the court has found that reasonable efforts to preserve or reunify a child with the child's parent or guardian are not required pursuant to 41-3-403, a petition to terminate parental rights must be filed unless:

(a) the child is being cared for by a relative;

(b) the department has not provided the services considered necessary for the safe return of the child to the child's home; or

(c) the department has documented a compelling reason, available for court review, for determining that filing a petition to terminate parental rights would not be in the best interests of the child.

(2) Compelling reasons for not filing a petition to terminate parental rights include but are not limited to the following:

(a) There are insufficient grounds for filing a petition.

(b) There is adequate documentation that termination of parental rights is not the appropriate plan and not in the best interests of the child.

(3) If a child has been in foster care for 15 months of the most recent 22 months and a petition to terminate parental rights regarding that child has not been filed with the court, the department shall file a report to the court or review panel at least 3 days prior to the next hearing or review detailing the reasons that the petition was not filed.

(4) If a hearing results in a finding of abandonment or that the parent has subjected the child to any of the circumstances listed in 41-3-403(2)(a) through (2)(e) and that reasonable efforts to provide preservation or reunification are not necessary, unless there is an exception made pursuant to subsections (1)(a)

through (1)(c) of this section, a petition to terminate parental rights must be filed within 60 days of the finding.

History: En. Sec. 14, Ch. 566, L. 1999.

Compiler's Comments

Effective Date: This section is effective October 1, 1999.

41-3-605 and 41-3-606 reserved.

41-3-607. Petition for termination — separate hearing — right to counsel — no jury trial. (1) The termination of a parent-child legal relationship may be considered only after the filing of a petition pursuant to 41-3-401 alleging the factual grounds for termination pursuant to 41-3-609. If termination of a parent-child legal relationship is ordered, the court may:

(a) transfer permanent legal custody of the child, with the right to consent to the child's adoption, to:

(i) the department;

(ii) a licensed child-placing agency; or

(iii) another individual who has been approved by the department and has received consent for the transfer of custody from the department or agency that has custody of the child; or

(b) transfer permanent legal custody of the child to the department with the right to petition for appointment of a guardian pursuant to 41-3-421.

(2) At the time that a petition for termination of a parent-child relationship is filed, parents must be advised of the right to counsel, and counsel must be appointed for an indigent party.

(3) A guardian ad litem must be appointed to represent the child's best interests in any hearing determining the involuntary termination of the parent-child legal relationship. The guardian ad litem shall continue to represent the child until the child is returned home or placed in an appropriate permanent placement. If a respondent parent is a minor, a guardian ad litem must be appointed to serve the minor parent in addition to any counsel requested by the parent.

(4) There is no right to a jury trial at proceedings held to consider the termination of a parent-child legal relationship.

History: En. Sec. 4, Ch. 420, L. 1981; amd. Sec. 2, Ch. 388, L. 1985; amd. Sec. 19, Ch. 458, L. 1995; amd. Sec. 12, Ch. 516, L. 1997; amd. Sec. 5, Ch. 428, L. 1999; amd. Sec. 16, Ch. 566, L. 1999.

Compiler's Comments

1999 Amendments — Composite Section: Chapter 428 inserted (1)(b) relating to custody to the department and guardian under 41-3-421; and made minor changes in style. Amendment effective October 1, 1999.

Chapter 566 in (2) at beginning substituted "At the time that" for "After" and at end substituted "appointed for an indigent party" for "appointed in accordance with 41-3-401". Amendment effective October 1, 1999.

Cross-References

Trial by jury, Art. II, sec. 26, Mont. Const.

Rules concerning time, Title 1, ch. 1, part 3; Rule 6, M.R.Civ.P. (see Title 25, ch. 20).

Duties of Attorney General, 2-15-501.

Appointment of guardian — document requiring seal, 3-1-206.

Guardian ad litem, Title 25, ch. 5, part 3; 41-3-303.

Trial by jury, Rule 39, M.R.Civ.P. (see Title 25, ch. 20).

State assumption of county public assistance programs, Title 53, ch. 2, part 8.

41-3-608. Notice. Before a termination of the parent-child legal relationship based on abandonment may be ordered, the court shall determine whether the rules of civil procedure relating to service of process on the parents have been followed. If the parents were not served personally, the petitioner must file an affidavit stating what efforts have been made to locate the parent or parents of the child. The affidavit must be filed at least 10 days prior to the hearing.

History: En. Sec. 5, Ch. 420, L. 1981.

Cross-References

Service of process and other papers, Title 25, ch. 3.

Service, Rule 4D, M.R.Civ.P. (see Title 25, ch. 20).

41-3-609. Criteria for termination. (1) The court may order a termination of the parent-child legal relationship upon a finding that any of the following circumstances exist:

(a) the parents have relinquished the child pursuant to 42-2-402 and 42-2-412;

(b) the child has been abandoned by the parents;

(c) the parent is convicted of a felony in which sexual intercourse occurred or is a minor adjudicated a delinquent youth because of an act that, if committed by an adult, would be a felony in which sexual intercourse occurred and, as a result of the sexual intercourse, the child is born;

(d) the parent has subjected the child to any of the circumstances listed in 41-3-403(2)(a) through (2)(e);

(e) the putative father meets any of the criteria listed in 41-3-403(3)(a) through (3)(c); or

(f) the child is an adjudicated youth in need of care and both of the following exist:

(i) an appropriate treatment plan that has been approved by the court has not been complied with by the parents or has not been successful; and

(ii) the conduct or condition of the parents rendering them unfit is unlikely to change within a reasonable time.

(2) In determining whether the conduct or condition of the parents is unlikely to change within a reasonable time, the court shall enter a finding that continuation of the parent-child legal relationship will likely result in continued abuse or neglect or that the conduct or the condition of the parents renders the parents unfit, unable, or unwilling to give the child adequate parental care. In making the determinations, the court shall consider but is not limited to the following:

(a) emotional illness, mental illness, or mental deficiency of the parent of a duration or nature as to render the parent unlikely to care for the ongoing physical, mental, and emotional needs of the child within a reasonable time;

(b) a history of violent behavior by the parent;

(c) excessive use of intoxicating liquor or of a narcotic or dangerous drug that affects the parent's ability to care and provide for the child; and

(d) present judicially ordered long-term confinement of the parent.

(3) In considering any of the factors in subsection (2) in terminating the parent-child relationship, the court shall give primary consideration to the physical, mental, and emotional conditions and needs of the child.

(4) A treatment plan is not required under this part upon a finding by the court following hearing if:

(a) the parent meets the criteria of subsections (1)(a) through (1)(e);

(b) two medical doctors or clinical psychologists submit testimony that the parent cannot assume the role of parent;

(c) the parent is or will be incarcerated for more than 1 year and reunification of the child with the parent is not in the best interests of the child because of the child's circumstances, including placement options, age, and developmental, cognitive, and psychological needs; or

(d) the death or serious bodily injury, as defined in 45-2-101, of a child caused by abuse or neglect by the parent has occurred.

History: En. Sec. 6, Ch. 420, L. 1981; amd. Sec. 7, Ch. 15, L. 1985; amd. Sec. 3, Ch. 388, L. 1985; amd. Sec. 2, Ch. 599, L. 1991; amd. Sec. 3, Ch. 439, L. 1993; (5)En. Sec. 2, Ch. 369, L. 1995; amd. Sec. 20, Ch. 458, L. 1995; amd. Sec. 166, Ch. 480, L. 1997; amd. Sec. 8, Ch. 514, L. 1997; amd. Sec. 13, Ch. 516, L. 1997; amd. Sec. 1, Ch. 395, L. 1999; amd. Sec. 17, Ch. 566, L. 1999.

Compiler's Comments

1999 Amendments — Composite Section: Chapter 395 in (4)(d) substituted "45-2-101" for "45-2-101(64)". Amendment effective October 1, 1999.

Chapter 566 at end of (1)(b) after "parents" deleted "as set forth in 41-3-102"; deleted former (1)(c) that read: "(c) the identity of the parent is unknown and has been unknown for a period of 90 days and reasonable efforts to identify and locate the parent have failed"; inserted (1)(d) relating to circumstances listed in 41-3-403(2)(a) through (2)(e); inserted (1)(e) relating to putative father meeting criteria listed in 41-3-403(3)(a) through (3)(c); deleted former (1)(f) that read: "(f) the parent has substantially failed to successfully complete or meet the goals of a treatment plan approved by the court and the child has been in an out-of-home placement for a cumulative total period of 1 year or longer"; deleted former (2)(c) that read: "(c) a single incident of life-threatening or gravely disabling injury to or disfigurement of a child caused by the parent"; deleted former (2)(f) and (2)(g) that read: "(f) the injury or death of a child because of proven abuse or neglect; and

(g) any reasonable efforts by protective service agencies that have been unable to rehabilitate the parent"; in (3) deleted former second sentence that read: "The court shall review and, if necessary, order an evaluation of the child's or the parent's physical, mental, and emotional conditions"; inserted (4)(a) relating to parents who meet criteria of subsections (1)(a) through (1)(e); in (4)(c) after "is" inserted "or will be" and at end substituted "and reunification of the child with the parent is not in the best interests of the child because of the child's circumstances, including placement options, age, and developmental, cognitive, and psychological needs" for "and a treatment plan is not practical considering the incarceration"; and made minor changes in style. Amendment effective October 1, 1999.

Cross-References

Best interests of child, 40-4-212.

Treatment of mentally ill, Title 53, ch. 21.

41-3-610. Review following termination. (1) At the conclusion of a hearing in which the court orders termination of the parent-child legal relationship, the court shall order that a review hearing be held within 180 days following the date of the termination to determine if the child has been permanently placed.

(2) At the review hearing, the agency or individual vested with the custody of the child shall report to the court whether the plan for permanent placement of the child has been accomplished. If the child is not in a permanent placement at the time of the review hearing, the guardian ad litem shall submit to the court a written report with recommendations, based upon an independent investigation, for disposition meeting the best interests of the child.

(3) The court may order the agency or individual vested with custody of the child to report, at appropriate intervals, on the status of the child until the plan for permanent placement of the child has been accomplished.

History: En. Sec. 7, Ch. 420, L. 1981; amd. Sec. 4, Ch. 388, L. 1985.

41-3-611. Effect of decree. (1) An order for the termination of the parent-child legal relationship divests the child and the parents of all legal rights, powers, immunities, duties, and obligations with respect to each other as provided in Title 40, chapter 6, part 2, and Title 41, chapter 3, part 2, except the right of the child to inherit from the parent.

(2) An order or decree entered pursuant to this part may not disentitle a child to any benefit due the child from any third person, including but not limited to any Indian tribe, agency, state, or the United States.

(3) After the termination of a parent-child legal relationship, the former parent is neither entitled to any notice of proceedings for the adoption of the child nor has any right to object to the adoption or to participate in any other placement proceedings held pursuant to 41-3-610.

History: En. Sec. 8, Ch. 420, L. 1981; amd. Sec. 99, Ch. 370, L. 1987; amd. Sec. 21, Ch. 458, L. 1995.

Cross-References

Intestate succession, Title 72, ch. 2, part 1.

41-3-612. Appeals. Appeals of court orders or decrees made under this part shall be given precedence on the calendar of the supreme court over all other matters, unless otherwise provided by law.

History: En. Sec. 9, Ch. 420, L. 1981.

Cross-References

Montana Rules of Appellate Procedure, Title 25, ch. 21.

Priority of Youth Court hearings, 41-5-110.

Part 7

Montana Children's Trust Fund

Part Cross-References

Montana Children's Trust Fund Board, 2-15-2214.

Voluntary tax checkoff for contribution to state child abuse and neglect prevention program, 15-30-155.

41-3-701. Child abuse and neglect prevention program. (1) The Montana children's trust fund board, provided for in 2-15-2214, shall use the money in the children's trust fund account established by 41-3-702 and the interest from the endowment established by 41-3-705 to fund services and activities related to a broad range of child abuse and neglect prevention activities and family resource programs operated by nonprofit or public community-based educational and service organizations.

(2) In administering the child abuse and neglect prevention program, the board shall:

(a) develop a state plan, priorities for funded services and activities, and criteria for the receipt of program funds;

(b) monitor the expenditure of funds by organizations receiving funds under this section;

(c) evaluate the effectiveness of services and activities funded under this section; and

(d) adopt rules necessary to implement 41-3-703, 41-3-704, and this section.

History: En. Sec. 3, Ch. 610, L. 1985; amd. Sec. 1, Ch. 405, L. 1997.

41-3-702. Children's trust fund account — nonsupplantation of funds. (1) There is a children's trust fund account in the state special revenue fund in the state treasury. The money in the account is allocated to the Montana children's trust fund board, provided for in 2-15-2214, for funding services and activities under and payment of administrative costs of the child abuse and neglect prevention program provided for in 41-3-701.

(2) Funds deposited in the children's trust fund account may be used only for the program authorized in 41-3-701 and may not be used to pay the expenses of any other program or service administered in whole or in part by the department of public health and human services.

History: (1)En. Sec. 1, Ch. 610, L. 1985; (2)En. Sec. 6, Ch. 610, L. 1985; amd. Sec. 11, Ch. 609, L. 1987; amd. Sec. 171, Ch. 546, L. 1995.

Cross-References

Fund structure, 17-2-102.

41-3-703. Gifts and grants to program. The Montana children's trust fund board may accept contributions, gifts, and grants, in money or otherwise, to the child abuse and neglect prevention program. Monetary gifts, contributions, and grants earmarked for the endowment for children must be paid into the endowment established by 41-3-705.

History: En. Sec. 4, Ch. 610, L. 1985; amd. Sec. 2, Ch. 405, L. 1997.

41-3-704. Program costs. The costs incurred by the Montana children's trust fund board in administering the child abuse and neglect prevention program must be paid for with money from the children's trust fund account established by 41-3-702. The board shall keep costs to a minimum and use existing office space, personnel, equipment, and supplies of the department of public health and human services to the extent possible.

History: En. Sec. 5, Ch. 610, L. 1985; amd. Sec. 11, Ch. 609, L. 1987; amd. Sec. 172, Ch. 546, L. 1995.

41-3-705. Endowment for children. (1) There is within the nonexpendable trust fund type an endowment for children. The endowment is not subject to appropriation. The purpose of the endowment is to provide a permanent source of funding to support the programs and services referred to in 41-3-701.

(2) The endowment may receive funds from:

(a) appropriations;

(b) gifts, grants, and donations, from public or private sources; and

(c) other money credited or transferred to the endowment from any other fund or source.

(3) The state treasurer must receive and shall deposit money in the endowment. The board of investments shall invest the money in the endowment. Only the interest generated by the endowment is available for expenditure by the board.

History: En. Sec. 3, Ch. 405, L. 1997; amd. Sec. 1, Ch. 356, L. 1999.

Compiler's Comments

1999 Amendment: Chapter 356 in (3) deleted former third sentence that read: "When the endowment reaches $5 million, further deposits may not be made to the endowment." Amendment effective October 1, 1999.

Cross-References

Nonexpendable trust fund type, 17-2-102.

Parts 8 and 9 reserved

Part 10

Local Citizen Review Board Pilot Program Act

41-3-1001. Short title. This part may be cited as the "Local Citizen Review Board Pilot Program Act".

History: En. Sec. 1, Ch. 610, L. 1993.

41-3-1002. Interest in local review board. The office of the supreme court administrator shall solicit written indication of interest from each district court judge interested in having a local citizen review board established pursuant to this part within the jurisdiction of the district court.

History: En. Sec. 2, Ch. 610, L. 1993; amd. Sec. 1, Ch. 386, L. 1995. amd. Sec. 63, Ch. 545, L. 1995.

41-3-1003. Establishment of local citizen review board — membership. (1) Subject to the availability of funds, the district court judge of a district designated pursuant to 41-3-1002 to operate a pilot program shall establish a local citizen review board in the judicial district to review the case of each child assigned to foster care by the district court.

(2) A local citizen review board is composed of at least three and not more than five members appointed by the district court judge of a judicial district designated pursuant to 41-3-1002. Each member appointed must be sworn in by a judge of the judicial district to which the member is appointed to serve.

(3) The district court judge of a judicial district designated pursuant to 41-3-1002 shall appoint the local citizen review board according to the following guidelines:

(a) Members of a local citizen review board must be recruited from groups with special knowledge of or interest in foster care and child welfare, which may include but is not limited to adoptive parents and members of the professions of law, medicine, psychology, social work, and education.

(b) As far as practicable, members of a local citizen review board shall represent the various socioeconomic and ethnic groups of the area served.

(c) A person employed by the department of public health and human services, by a private agency regulated, certified, directed, or licensed by or contracting with the department of public health and human services, or by a district court may not serve on a local citizen review board.

(d) A member of a local citizen review board must be a resident of one of the counties of the judicial district that the member is appointed to serve.

(4) The members of a local citizen review board must be willing to serve without compensation.

History: En. Sec. 3, Ch. 610, L. 1993; amd. Sec. 2, Ch. 386, L. 1995; amd. Sec. 173, Ch. 546, L. 1995.

41-3-1004. Administration — training — oversight — procedures. (1) Subject to the availability of funds, the court administrator shall:

(a) establish policies and procedures for adoption by the Montana supreme court pursuant to subsection (3) for the operation of the local citizen review board;

(b) provide training programs for local citizen review board members;

(c) provide consultation services on request to the local citizen review board; and

(d) employ staff and provide for support services for the local citizen review board.

(2) The office of the supreme court administrator shall, in accordance with the direction of the supreme court, oversee the program established in this part and, at the time prescribed by 5-11-210, prepare a report to the governor, the legislature, and the public regarding:

(a) state laws, policies, and practices affecting permanence and appropriate care for children in the custody of the department of public health and human services and other agencies; and

(b) the effectiveness of the local citizen review board in bringing about permanence and appropriate care for children in the custody of the department of public health and human services and other agencies.

(3) The Montana supreme court shall adopt procedures that have the force of law for the administration of the local citizen review board pilot program regarding:

(a) the removal of members of the local citizen review board;

(b) the time, content, and manner in which case plans for and case progress reports on a child assigned to foster care must be provided to the local citizen review board by the department of public health and human services, other agencies, or individuals directly responsible for the care of the child;

(c) the provision of written notice of the review to the department of public health and human services, any other agency directly responsible for the care or placement of a child, the parents or their attorneys, foster parents, surrogate parents, mature children or their attorneys, a court-appointed attorney or special advocate of any child, any county attorney or attorney general actively involved in the case, and other interested persons. The notice must include a statement that persons receiving a notice may participate in the hearing and be accompanied by a representative.

(d) securing or excusing the presence at the review of caseworkers and other employees of the department of public health and human services or other agencies directly responsible for the care of the child; and

(e) the manner in which the local citizen review board may remove cases from review when review is not required under federal law.

History: En. Sec. 4, Ch. 610, L. 1993; amd. Sec. 1, Ch. 21, Sp. L. November 1993; amd. Sec. 3, Ch. 386, L. 1995; amd. Sec. 174, Ch. 546, L. 1995.

Cross-References

Court Administrator, Title 3, ch. 1, part 7.

41-3-1005. Removal of members — grounds. Grounds for removal of a member of a local citizen review board under 41-3-1004(3) may include but are not limited to the following:

(1) nonparticipation by a local citizen review board member;

(2) a member establishing residence in a judicial district other than the judicial district in which the court the person was appointed to serve is located;

(3) violation of the confidentiality of information established under 41-3-1007; or

(4) other cause or grounds as necessary for the administration of the program.

History: **En. Sec. 5, Ch. 610, L. 1993.**

41-3-1006. Terms — officers — meetings. (1) A local citizen review board member shall serve at the pleasure of the appointing authority. However, if not otherwise released from service on a local citizen review board, the following provisions apply:

(a) A member shall serve a term of 2 years, except that if a vacancy occurs, a successor must be appointed to serve the unexpired term.

(b) A member may be reappointed and continue to serve until a successor is appointed.

(2) A local citizen review board shall:

(a) elect annually from its membership a presiding officer and vice presiding officer to serve in the absence of the presiding officer; and

(b) meet at the nearest department of public health and human services office or another place mutually agreed to by a majority of the local citizen review board as often as it considers necessary to carry out the duties of the board.

History: **En. Sec. 6, Ch. 610, L. 1993; amd. Sec. 175, Ch. 546, L. 1995.**

41-3-1007. Confidentiality of information — penalty. (1) Before beginning to serve on a local citizen review board, each member shall swear or affirm to the court that the member will keep confidential the information reviewed by the board and its actions and recommendations in individual cases.

(2) A member of a local citizen review board who violates the duty imposed by subsection (1) is guilty of a misdemeanor punishable by a fine not to exceed $1,000.

History: **En. Sec. 7, Ch. 610, L. 1993.**

Cross-References

Right to know, Art. II, sec. 9, Mont. Const.

Right of privacy, Art. II, sec. 10, Mont. Const.

41-3-1008. Access to records. (1) Notwithstanding the provisions of 41-3-205, a local citizen review board has access to:

(a) any records of the district court that are pertinent to the case; and

(b) any records of the department of public health and human services or other agencies that would be admissible in a dispositional review hearing conducted pursuant to 41-3-406, including school records and reports of private service providers contained in the records of the department of public health and human services or other agencies.

(2) All requested records not already before the local citizen review board must be submitted by the department of public health and human services within 5 working days after receipt of a request. A local citizen review board and any staff provided for the board shall return all records and copies received from the department of public health and human services to the department within 7 working days after completion of the review.

(3) A local citizen review board may retain a reference copy of case material used by the board to make its recommendation if:

(a) the material is necessary for the ongoing work of the local citizen review board with regard to the particular case or to work of the board; and

(b) the confidentiality of the material is continued and protected in the same manner as other material received from the department of public health and human services. Material retained by the local citizen review boards is not subject to disclosure under the public records law.

(4) If a local citizen review board is denied access to requested records, it may request a hearing. The court may require the organization in possession of the records to show cause why the records should not be made available as provided by this section.

History: En. Sec. 8, Ch. 610, L. 1993; amd. Sec. 4, Ch. 386, L. 1995; amd. Sec. 176, Ch. 546, L. 1995.

Cross-References

Right to know, Art. II, sec. 9, Mont. Const.

41-3-1009. Assignment of cases for review. Within 10 days of entry of the order of disposition or within 30 days of placement, whichever comes first, the district court shall assign the case of each child in foster care to a local citizen review board and forward to the board a copy of the petition and the order of disposition for each child who is within the jurisdiction of the district court and who has been placed in foster care.

History: En. Sec. 9, Ch. 610, L. 1993; amd. Sec. 5, Ch. 386, L. 1995.

41-3-1010. Review — scope — procedures — immunity. (1) Except for cases removed from review under procedures established under 41-3-1004, the local citizen review board shall review the case of each child in foster care that is assigned by the district court.

(2) The review must take place at times set by the local citizen review board. The first review may not be more than 6 months after the child is placed in foster care. Subsequent reviews must take place at least once every 6 months until the child is no longer within the jurisdiction of the district court or no longer in foster care.

(3) The district court, by rule of the court or on an individual case basis, may relieve the local citizen review board of its responsibility to review a case if a complete judicial review has taken place within 60 days prior to the next scheduled board review.

(4) The local citizen review board shall review any case in which a petition to terminate parental rights has been denied as soon as practical but no later than 45 days after the denial.

(5) After reviewing each case, the local citizen review board shall prepare written findings and recommendations with respect to:

(a) whether reasonable efforts were made prior to the placement to prevent or to eliminate the need for removal of the child from the home and to make it possible for the child to be returned home;

(b) the continuing need for and appropriateness of the placement;

(c) compliance with the case plan;

(d) the progress that has been made toward alleviating the need for placement;

(e) a likely date by which the child may be returned home or placed for adoption;

(f) other problems, solutions, or alternatives that the local citizen review board determines should be explored; and

(g) whether the district court should appoint an attorney or other person as special advocate to represent or appear on behalf of the child pursuant to 41-3-303.

(6) Whenever a member of a local citizen review board has a potential conflict of interest in a case being reviewed, the member shall declare to the board the nature of the potential conflict prior to participating in the case review. The following provisions apply:

(a) The declaration of the member must be recorded in the official records of the local citizen review board.

(b) If, in the judgment of the majority of the local citizen review board, the potential conflict of interest may prevent the member from fairly and objectively reviewing the case, the board may remove the member from participation in the review.

(7) The local citizen review board shall keep accurate records and retain the records on file. The local citizen review board shall send copies of its written findings and recommendations to the district court, the department of public health and human services, and other participants in the review.

(8) The local citizen review board may hold joint or separate reviews for groups of siblings.

(9) The local citizen review board may disclose to parents and their attorneys, foster parents, mature children and their attorneys, and other persons authorized by the board to participate in the case review the records disclosed to the board pursuant to 41-3-1008. Before participating in a local citizen review board case review, each participant, other than parents and children, shall swear or affirm to the board that the participant will keep confidential the information disclosed by the board in the case review and will disclose it only as authorized by law.

(10) A person who serves on a local citizen review board in a volunteer capacity, as provided in this part, is considered an agent of the judiciary and is entitled to immunity from suit as provided in 2-9-112.

History: En. Sec. 10, Ch. 610, L. 1993; amd. Sec. 6, Ch. 386, L. 1995; amd. Sec. 177, Ch. 546, L. 1995.

Cross-References

State subject to suit, Art. II, sec. 18, Mont. Const.

41-3-1011. Recommendations by board. In addition to reviewing individual cases of children in foster care, a local citizen review board may make recommendations to the district court and to the department of public health and human services concerning foster care services, policies, procedures, and laws.

History: En. Sec. 11, Ch. 610, L. 1993; amd. Sec. 7, Ch. 386, L. 1995; amd. Sec. 178, Ch. 546, L. 1995.

41-3-1012. Presence of certain employees at meetings of board. (1) Unless excused from doing so by the local citizen review board, the department of public health and human services and any other agency directly responsible for the care and placement of the child shall require the presence of any employees having knowledge of the case at board meetings.

(2) The local citizen review board may require the presence of specific employees of the department of public health and human services or any other

agency or other persons at board meetings. If an employee fails to be present at the meeting, the local citizen review board may request a court order. The court may require the employee to be present and show cause why the employee should not be compelled to appear before the local citizen review board.

(3) As used in this section, "presence" includes telephone participation, except that the caseworker on the case at the time of the meeting must be physically present if required.

History: En. Sec. 12, Ch. 610, L. 1993; amd. Sec. 179, Ch. 546, L. 1995.

Cross-References

Right of participation, Art. II, sec. 8, Mont. Const.

41-3-1013. Court review of findings and recommendations of board. (1) Upon receipt of findings and recommendations from the local citizen review board, the district court shall:

(a) review the findings and recommendations of the local citizen review board within 10 days. If the district court finds it appropriate, the district court may on its own motion schedule a review hearing.

(b) cause the findings and recommendations of the local citizen review board to become part of the district court file; and

(c) give the local citizen review board written notice if the district court modifies, alters, or takes action on a case as a result of the board's recommendations or refuses to take action on the board's recommendations in any case.

(2) Upon receipt of findings and recommendations from the local citizen review board, the department of public health and human services shall:

(a) review the findings and recommendations of the local citizen review board within 10 days. The recommendations must be implemented and the case plan modified as the department of public health and human services considers appropriate and as resources permit.

(b) give the local citizen review board written notice as soon as practicable, but in no case later than 17 days after receipt of the findings and recommendations, of the action the department of public health and human services intends to take to implement the recommendations; and

(c) include the findings and recommendations of the local citizen review board as part of the case file of the department of public health and human services.

(3) Upon its own motion or upon the request of the department of public health and human services, the local citizen review board, or any interested party, the district court may appoint an attorney or other person as special advocate to represent or appear on behalf of the child. Subject to the direction of the district court, the court-appointed special advocate shall:

(a) investigate all relevant information about the case;

(b) advocate for the child, ensuring that all relevant facts are brought before the court;

(c) facilitate and negotiate to ensure that the district court, the department of public health and human services, and the child's attorney fulfill their obligations to the child in a timely fashion; and

(d) monitor all district court orders to ensure compliance and to bring to the district court's attention any change in circumstance that may require modification of the district court's order.

History: En. Sec. 13, Ch. 610, L. 1993; amd. Sec. 8, Ch. 386, L. 1995; amd. Sec. 180, Ch. 546, L. 1995.

41-3-1014. Dispositional review hearing by district court. (1) The district court shall conduct a dispositional review hearing within 18 months after the original placement and conduct a review hearing periodically during the continuation of foster care. Unless good cause otherwise is shown, the district court shall conduct a dispositional review hearing at any time upon the request of the department of public health and human services, an agency directly responsible for care or placement of the child, a parent whose parental rights have not been terminated, an attorney for the child, a court-appointed special advocate, or a local citizen review board. The district court shall schedule the hearing as soon as possible after receiving a request.

(2) The court may order that the child or any other person be present during the hearing.

(3) The court shall notify the parties listed in subsection (1) and any other interested parties of the hearing. The notice must state the time and place of the hearing. Upon request of the district court, the department of public health and human services or other legal custodian of the child shall provide the district court with information concerning the whereabouts and identity of the parties.

(4) The district court shall enter an order within 20 days after the review hearing. If the child is in foster care, the order must include a determination of:

(a) whether the child should be returned to the parent;

(b) whether the child should be placed for adoption;

(c) whether the child should continue in foster care for a specified period; or

(d) whether, because of special needs or circumstances, the child should be placed in the permanent custody or guardianship of a responsible relative or other individual or should continue in foster care on a permanent or long-term basis.

(5) If the court determines that the child must be placed or must continue in foster care or must be placed in the custody or guardianship of a responsible relative or other individual, the district court shall enter written findings specifying why placement with parents or adoption is not appropriate. If the current placement is not expected to be permanent, the district court shall specify a projected timetable for return of the child to the child's home or for permanent placement. If the timetable set forth by the district court is not met, the department of public health and human services shall promptly notify the district court and the parties.

(6) In the course of the dispositional review hearing, the district court may determine the adequacy of and compliance with the case plan and case progress report. In addition to other orders, the district court may:

(a) order the department of public health and human services to develop or to expand a case plan or case progress report that must be submitted within 10 days after the hearing;

(b) set a court hearing at a specific later time;

(c) direct the local citizen review board to review the status of the child prior to its next review, as provided in 41-3-1010;

(d) order the department of public health and human services or other agency directly responsible for the child to modify the care, placement, or supervision of the child; and

(e) determine whether the department of public health and human services or other agency directly responsible for the child has made reasonable efforts to reunify the family.

(7) The dispositional review hearing must be conducted in the manner provided in 41-3-406.

(8) Any decision of the district court made pursuant to the dispositional review hearing is a final order for the purposes of 41-3-406.

History: En. Sec. 14, Ch. 610, L. 1993; amd. Sec. 9, Ch. 386, L. 1995; amd. Sec. 181, Ch. 546, L. 1995.

Part 11
Youth Residential Services

Part Cross-References

Placement of youth in need of care, 41-5-344.

Disposition of youth in need of intervention or youth who violate consent adjustments, 41-5-1512.

Relationship of foster homes, youth group homes, community residential facilities, and day-care homes to zoning, 76-2-412.

41-3-1101. Establishment of substitute care for youth. The legislature, in recognition of the wide and varied needs of youth in need of care, delinquent youth, and youth in need of intervention of this state and of the desirability of meeting these needs on a community level to the fullest extent possible, establishes by this part a system of substitute care to provide facilities and services for youth placed out of their homes and establishes a program to provide those facilities and services through local nonprofit corporations, counties, and the department of public health and human services.

History: En. Sec. 6, Ch. 465, L. 1983; amd. Sec. 11, Ch. 609, L. 1987; amd. Sec. 2, Ch. 434, L. 1989; amd. Sec. 182, Ch. 546, L. 1995; amd. Sec. 6, Ch. 550, L. 1997.

Cross-References

Duty to strengthen child welfare services, 52-2-112.

41-3-1102. Definitions. For the purposes of this part, the following definitions apply:

(1) "Child-care agency" means a youth care facility in which substitute care is provided to 13 or more children or youth.

(2) "Department" means the department of public health and human services provided for in 2-15-2201.

(3) "Foster child" means a person under 18 years of age who has been placed by the department in a youth care facility.

(4) "Person" means any individual, partnership, voluntary association, or corporation.

(5) "Respite care" means the provision of temporary, short-term supervision or care of a foster child, in an emergency or on an intermittent

basis, to provide foster parents relief from the daily care requirements of a foster child whose mental or physical condition requires special or intensive supervision or care. Respite care includes but is not limited to homemaker services, child care, and emergency care either in the home or out of the home.

(6) "Respite care provider" means a person who meets the qualifications and requirements established by the department to provide respite care under 41-3-1151.

(7) "Substitute care" means full-time care of a youth in a residential setting who is placed by the department, another state agency, or a licensed child-placing agency. Individuals who provide care to youth who are recipients of services provided through the department's developmental disabilities, mental health, or medicaid home- and community-based services waiver program are also considered to be providing substitute care. This part does not apply when a person accepts the care and custody of a child on a temporary basis as an accommodation for the parent or parents, guardian, or relative of the child.

(8) "Youth assessment center" has the meaning provided in 41-5-103.

(9) "Youth care facility" means a facility that is licensed by the department or by the appropriate licensing authority in another state and in which facility substitute care is provided to youth. The term includes youth foster homes, youth group homes, child-care agencies, and youth assessment centers.

(10) "Youth foster home" means a youth care facility in which substitute care is provided to one to six children or youth other than the foster parents' own children, stepchildren, or wards.

(11) "Youth group home" means a youth care facility in which substitute care is provided to 7 to 12 children or youth.

History: (1), (2), (5) thru (9)En. Sec. 7, Ch. 465, L. 1983; (3), (4)En. Sec. 1, Ch. 178, L. 1947; Sec. 10-520, R.C.M. 1947; redes. 10-1316 by Sec. 14, Ch. 328, L. 1974; R.C.M. 1947, 10-1316; amd. Sec. 3, Ch. 297, L. 1981; amd. Sec. 16, Ch. 465, L. 1983; MCA 1981, 41-3-501; redes. 41-3-1102 by Sec. 31(4), Ch. 465, L. 1983; amd. Sec. 1, Ch. 531, L. 1985; amd. Sec. 46, Ch. 609, L. 1987; amd. Sec. 1, Ch. 559, L. 1991; amd. Sec. 183, Ch. 546, L. 1995; amd. Sec. 9, Ch. 514, L. 1997; amd. Sec. 7, Ch. 550, L. 1997.

Cross-References

Definition of community residential facility, 76-2-411.

41-3-1103. Powers and duties of department. (1) The department shall:

(a) administer all state and federal funds allocated to the department for youth foster homes, youth group homes, child-care agencies, and youth assessment centers for youth in need of care, as defined in 41-3-102;

(b) exercise licensing authority over all youth foster homes, youth group homes, child-care agencies, and youth assessment centers;

(c) collect and disseminate information relating to youth in need of care;

(d) provide for training of program personnel delivering services;

(e) in cooperation with youth care facility providers, develop and implement standards for youth care facilities;

(f) maintain adequate data on placements it funds in order to keep the legislature properly informed of the following:

(i) the number of youth in need of care in out-of-home care facilities;

(ii) the cost per facility for services rendered;

(iii) the type and level of care of services provided by each facility;

(iv) a profile of out-of-home care placements by level of care; and

(v) a profile of public institutional placements;

(g) administer all funds allocated to the department for residential alcohol and drug abuse treatment for indigent youths in need of care, indigent youths in need of intervention, and indigent delinquent youths who require treatment; and

(h) provide reimbursement for mental health outpatient counseling services for persons who experience the death of a foster child while providing substitute care to the foster child in a youth care facility.

(2) The department may:

(a) enter into contracts with nonprofit corporations or associations or private organizations to provide substitute care for youth in need of care in youth care facilities;

(b) accept gifts, grants, and donations of money and property from public and private sources to initiate and maintain community-based services to youth;

(c) adopt rules to carry out the administration and purposes of this part.

(3) The department shall pay for room, board, clothing, personal needs, transportation, and treatment in youth foster care homes and youth group homes for youths committed to the department who need to be placed in the facilities. Payments for the clothing of a child placed in a youth foster home must be provided to the extent the child needs a basic wardrobe or has a special clothing need. Payments under this subsection may not exceed appropriations for the purposes of this subsection.

(4) The department may provide a subsidy for a guardianship of a child who is in the department's legal custody if the guardianship has been approved by the department pursuant to 41-3-421 and in accordance with eligibility criteria established by department rule.

History: En. Secs. 8, 17, Ch. 465, L. 1983; amd. Sec. 8, Ch. 15, L. 1985; amd. Sec. 1, Ch. 177, L. 1985; amd. Sec. 2, Ch. 531, L. 1985; amd. Sec. 47, Ch. 609, L. 1987; amd. Sec. 3, Ch. 434, L. 1989; amd. Sec. 1, Ch. 629, L. 1991; amd. Sec. 18, Ch. 799, L. 1991; amd. Sec. 1, Ch. 19, Sp. L. November 1993; amd. Sec. 184, Ch. 546, L. 1995; amd. Sec. 8, Ch. 550, L. 1997; amd. Sec. 3, Ch. 127, L. 1999; amd. Sec. 6, Ch. 428, L. 1999.

Compiler's Comments

1999 Amendments — Composite Section: Chapter 127 inserted (1)(h) requiring reimbursement for mental health outpatient counseling services for foster parents who experience death of foster child; and made minor changes in style. Amendment effective July 1, 1999.

Chapter 428 inserted (4) relating to subsidy for guardianship approved pursuant to 41-3-421 and criteria established by department rule; and made minor changes in style. Amendment effective October 1, 1999.

Chapter 566 inserted (4) authorizing department subsidy for guardianship approved pursuant to criteria established by department rule. Amendment effective October 1, 1999.

Cross-References

Administrative duties of Department, 52-2-111.

41-3-1104. Youth facilities. The department of corrections may establish, maintain, and administer youth correctional facilities, evaluation facilities, mental health facilities and services, parole programs, and parole facilities for the care, custody, and treatment of youth who have been committed to the department of corrections.

History: En. Sec. 26, Ch. 465, L. 1983; amd. Sec. 3, Ch. 531, L. 1985; amd. Sec. 48, Ch. 609, L. 1987; amd. Sec. 185, Ch. 546, L. 1995; amd. Sec. 9, Ch. 550, L. 1997.

Cross-References

Establishment of state youth correctional facilities — prohibitions, 52-5-101.

Youth parole agreement, 52-5-126.

41-3-1105. Transfer of custody to private agency — reports. When the legal custody of a youth is vested in a public agency under the provisions of this part, the public agency may transfer physical custody of the youth to an appropriate private agency and may purchase care and treatment from the private agency if the private agency submits periodic reports to the public agency covering the care and treatment the youth is receiving and the youth's responses to that care and treatment. These reports shall be made as frequently as the public agency or the court deems necessary, but not less often than once each 6 months for each youth. The private agency shall also afford an opportunity for a representative of the public agency to examine or consult with the youth as frequently as the public agency deems necessary.

History: En. 10-1227 by Sec. 27, Ch. 329, L. 1974; R.C.M. 1947, 10-1227; MCA 1981, 41-5-804; redes. 41-3-1105 by Sec. 31(4), Ch. 465, L. 1983.

41-3-1106. Repealed. Sec. 112, Ch. 609, L. 1987.

History: En. Sec. 9, Ch. 465, L. 1983.

41-3-1107 through 41-3-1110 reserved.

41-3-1111. Renumbered 41-5-314. Sec. 15, Ch. 547, L. 1991.

41-3-1112. Repealed. Sec. 27, Ch. 458, L. 1995.

History: En. Sec. 23, Ch. 465, L. 1983; amd. Sec. 49, Ch. 609, L. 1987.

41-3-1113. Repealed. Sec. 112, Ch. 609, L. 1987.

History: En. Sec. 24, Ch. 465, L. 1983.

41-3-1114. Continuing jurisdiction of youth court. The youth court committing a delinquent youth or a youth in need of intervention to the department of corrections retains continuing jurisdiction over the youth until the youth becomes 21 years of age or is otherwise discharged by the department of corrections after notice to the youth court of original jurisdiction.

History: En. Sec. 25, Ch. 465, L. 1983; amd. Sec. 50, Ch. 609, L. 1987; amd. Sec. 186, Ch. 546, L. 1995; amd. Sec. 10, Ch. 550, L. 1997.

Cross-References

Retention of jurisdiction — termination, 41-5-205.

41-3-1115. Foster care review committee. (1) Except as provided in Title 41, chapter 3, part 10, in every judicial district the youth court judge, in consultation with the department, shall appoint a foster care review committee. The members of the committee must be willing to act without compensation. The committee shall be composed of not less than five or more than seven members. The members shall include:

(a) a representative of the department;

(b) a representative of the youth court;

(c) someone knowledgeable in the needs of children in foster care placements who is not employed by the department or the youth court;

(d) a representative of a local school district;

(e) if the child whose care under review is an Indian, someone, preferably an Indian person, knowledgeable about Indian cultural and family matters who is appointed effective only for and during that review; and

(f) if there is one, the foster parent of the child whose care is under review. The foster parent's appointment is effective only for and during that review.

(2) When a child is in foster care under the supervision of the department or if payment for care is made pursuant to 41-3-1122, the committee shall conduct a review of the foster care status of the child. The review must be conducted within a time limit established by the department. The time limit must comply with federal law and may not be later than the 12-month anniversary date of the child's placement into foster care.

(3) The department shall provide the committee with guidelines for operation of the committee. Within 30 days of the foster care review, the committee shall provide the youth court and the department a written report of its findings and recommendations for further action by the youth court or the department.

(4) The department shall adopt rules necessary to carry out the purposes of this section.

(5) Because of the individual privacy involved, meetings of the committee, reports of the committee, and information on individuals' cases shared by committee members are confidential and subject to the confidentiality requirements of the department.

(6) The committee is subject to the call of the youth court judge to meet and confer with the judge on all matters pertaining to the foster care of a child before the youth court.

History: En. Sec. 2, Ch. 297, L. 1981; amd. Sec. 1, Ch. 201, L. 1983; MCA 1981, 41-5-807; amd. and redes. 41-3-1115 by Sec. 31, Ch. 465, L. 1983; amd. Sec. 1, Ch. 260, L. 1987; amd. Sec. 51, Ch. 609, L. 1987; amd. Sec. 16, Ch. 610, L. 1993.

Cross-References

Right of privacy, Art. II, sec. 10, Mont. Const.

Adoption and publication of rules, Title 2, ch. 4, part 3.

Disclosure of confidential child abuse and neglect records to Foster Care Review Committee, 41-3-205.

Duty to strengthen child welfare services, 52-2-112.

41-3-1116 through 41-3-1120 reserved.

41-3-1121. Repealed. Sec. 112, Ch. 609, L. 1987.

History: En. 10-1236 by Sec. 36, Ch. 329, L. 1974; amd. Sec. 11, Ch. 100, L. 1977; amd. Sec. 12, Ch. 571, L. 1977; R.C.M. 1947, 10-1236; amd. Sec. 4, Ch. 297, L. 1981; amd. Sec. 10, Ch. 465, L. 1983; MCA 1981, 41-5-801; redes. 41-3-1121 by Sec. 31(4), Ch. 465, L. 1983; amd. Sec. 9, Ch. 15, L. 1985.

41-3-1122. Payment for support of youth in need of care, youth in need of intervention, or delinquent youth — reimbursement by county. (1) Whenever a youth who is a youth in need of care, a youth in need of intervention, or a delinquent youth is placed by the department of public health and human services or the department of corrections in a youth care facility, the department making the placement shall pay, within the limits of the appropriation for that purpose, a foster care payment to the youth care facility at a rate established by the department of public health and human services for the youth's board, clothing, personal needs, treatment, and room.

(2) On or before the 20th of each month, the department of public health and human services or the department of corrections shall present a claim to the county of residence of the youth for no more than one-half of the nonfederal share of the payments made during the month. The county shall make reimbursement to the department within 20 days after the claim is presented.

(3) Except as provided in subsection (4), when a county's level of expenditure for any year reaches the level of reimbursement for foster care in fiscal year 1987, the county has no further obligation for foster care expenditures.

(4) If a county's level of expenditure for foster care in fiscal year 1987 was $10,000 or less, the county's level of expenditure for purposes of determining the county's reimbursement specified in subsection (3) is the level of expenditures for fiscal year 1987 or the average of expenditures for fiscal years 1984 through 1987, whichever is less.

(5) A county that was state-assumed prior to 1987 but that at a later date reassumes responsibility pursuant to 53-2-811 is responsible for reimbursement of foster care expenditures up to the county's calculated level of expenditures for fiscal year 1987 as if the county had not been state-assumed.

(6) The department shall conduct or arrange for the review required under 41-3-1115, or when applicable, 41-3-1010 of a youth placed in a youth care facility if the youth is placed by the department.

History: En. Sec. 1, Ch. 48, L. 1949; amd. Sec. 1, Ch. 194, L. 1965; amd. Sec. 1, Ch. 264, L. 1971; amd. Sec. 48, Ch. 121, L. 1974; Sec. 10-524, R.C.M. 1947; redes. 10-1320 by Sec. 14, Ch. 328, L. 1974; amd. Sec. 22, Ch. 100, L. 1977; R.C.M. 1947, 10-1320; amd. Sec. 3, Ch. 543, L. 1979; amd. Sec. 1, Ch. 297, L. 1981; amd. Sec. 11, Ch. 465, L. 1983; MCA 1981, 41-3-104; redes. 41-3-1122 by Sec. 31(4), Ch. 465, L. 1983; amd. Sec. 4, Ch. 531, L. 1985; amd. Sec. 52, Ch. 609, L. 1987; amd. Sec. 8, Ch. 561, L. 1993; amd. Sec. 17, Ch. 610, L. 1993; amd. Sec. 187, Ch. 546, L. 1995; amd. Sec. 11, Ch. 550, L. 1997.

Cross-References

Remedy for parental abuse, 40-6-233.

Financial responsibility — interstate placement of children, 41-4-102.

Placement of youth in need of care, 41-5-344.

Duty to strengthen child welfare services, 52-2-112.

41-3-1123. Repealed. Sec. 11, Ch. 696, L. 1991.

History: 41-3-405 En. 10-1313 by Sec. 9, Ch. 328, L. 1974; R.C.M. 1947, 10-1313(part); amd. Sec. 6, Ch. 567, L. 1979; 41-5-805 En. Sec. 11, Ch. 567, L. 1979; amd. Secs. 12, 13, Ch. 465, L. 1983; 41-3-405 and 41-5-805 combined by Sec. 31(3)(a), Ch. 465, L. 1983; redes. 41-3-1123 by Sec. 31(3)(c), Ch. 465, L. 1983; amd. Sec. 2, Ch. 564, L. 1983; amd. Sec. 53, Ch. 609, L. 1987.

41-3-1124. Repealed. Sec. 11, Ch. 696, L. 1991.

History: 41-3-407 En. Sec. 8, Ch. 567, L. 1979; 41-3-407 amd. Sec. 14, Ch. 465, L. 1983, and Sec. 4, Ch. 564, L. 1983; 41-5-806 En. Sec. 12, Ch. 567, L. 1979; 41-3-407 and 41-5-806 combined by Sec. 31(3)(b), Ch. 465, L. 1983; redes. 41-3-1124 by Sec. 31(3)(c), Ch. 465, L. 1983.

41-3-1125. Repealed. Sec. 11, Ch. 696, L. 1991.

History: (1)En. Sec. 2, Ch. 48, L. 1949; amd. Sec. 1, Ch. 264, L. 1971; Sec. 10-525, R.C.M. 1947; redes. 10-1321 by Sec. 14, Ch. 328, L. 1974; Sec. 10-1321, R.C.M. 1947; (2)En. 10-1313 by Sec. 9, Ch. 328, L. 1974; Sec. 10-1313, R.C.M. 1947; R.C.M. 1947, 10-1313(part), 10-1321; amd. Sec. 2, Ch. 567, L. 1979; amd. Sec. 15, Ch. 465, L. 1983; MCA 1981, 41-3-105; redes. 41-3-1125 by Sec. 31(4), Ch. 465, L. 1983.

41-3-1126. Debt to state by natural or adoptive parents — limitations. If a child has been placed in substitute care, as defined in 41-5-103 and 41-3-1102, and a written agreement for payment of support has been entered into by the responsible parent or parents and the department, the debt for support is limited to the amount provided for in the agreement. However, if a court order for support is or has been entered, the order prevails over the agreement.

History: **En. Sec. 10, Ch. 609, L. 1987.**

Cross-References

Child support — orders to address health insurance, 40-4-204.

41-3-1127 through 41-3-1130 reserved.

41-3-1131. Power of nonprofit corporations to establish homes and to receive facilities and funds. Nonprofit corporations or associations may be formed or organized for the purpose of establishing youth care facilities or to provide community-based services and to receive from the department and other governmental units such services, facilities, training, and funds as the department or other governmental units may be authorized by law to provide.

History: **En. Sec. 18, Ch. 465, L. 1983.**

41-3-1132. Governmental contracts with nonprofit organizations. (1) The department of public health and human services and the department of corrections may contract with nonprofit corporations or associations to provide facilities and services for youth in need of care, youth in need of intervention, and delinquent youth in youth care facilities and are authorized to expend money that is appropriated or available for those purposes. The contracts must be based on the following considerations:

(a) budgets submitted by the nonprofit corporation or association identifying fixed and variable costs;

(b) reasonable costs of service;

(c) appropriation level; and

(d) availability of funds.

(2) Governmental units, including but not limited to counties, municipalities, school districts, or state institutions of higher learning, are authorized to provide funds, materials, facilities, and services for community-based services at their own expense.

History: **En. Sec. 19, Ch. 465, L. 1983; amd. Sec. 188, Ch. 546, L. 1995; amd. Sec. 12, Ch. 550, L. 1997.**

Cross-References

Public contracts generally, Title 18, ch. 1.

41-3-1133 through 41-3-1140 reserved.

41-3-1141. License required. (1) A person may not maintain or operate a youth care facility for any child or children within the meaning of this part without first securing a license from the department.

(2) A kinship care provider who provides unlicensed care for a child placed pursuant to the legal authority of the department must receive approval in writing from the department.

(3) An extended family member, as defined by the department, who provides unlicensed care for a youth who receives services provided through the department's developmental disabilities program, mental health program,

or medicaid home- and community-based services waiver program must receive approval in writing from the department.

(4) The department may not charge a fee for a license or approval granted under this section.

History: En. Sec. 2, Ch. 178, L. 1947; amd. Sec. 47, Ch. 121, L. 1974; Sec. 10-521, R.C.M. 1947; redes. 10-1317 by Sec. 14, Ch. 328, L. 1974; R.C.M. 1947, 10-1317; amd. Sec. 20, Ch. 465, L. 1983; MCA 1981, 41-3-502; redes. 41-3-1141 by Sec. 31(4), Ch. 465, L. 1983; amd. Sec. 10, Ch. 514, L. 1997.

Cross-References

Requirements for visitation, inspection, and supervision, 41-4-106.

Administrative duties of Department, 52-2-111.

Child rehabilitation — duties of Department, 52-2-113.

Relationship of foster homes, youth group homes, community residential facilities, and day-care homes to zoning, 76-2-412.

41-3-1142. Issuance of license — authority of issuing agency — rules. (1) The department may issue licenses to persons operating youth care facilities or grant approval of kinship or extended family care providers and prescribe the conditions upon which licenses and approvals may be issued. The department may make rules necessary for the licensure or approval, operation, and regulation of those facilities consistent with the welfare of the residents.

(2) The department may inspect all licensed facilities or approved homes and, as appropriate, undertake action, including but not limited to the revocation of licenses and approvals.

(3) The person providing care in the facilities or homes shall give the department any information that may be required and afford the department every reasonable opportunity for observing the operation of the facilities or homes.

History: En. Sec. 2, Ch. 178, L. 1947; amd. Sec. 47, Ch. 121, L. 1974; Sec. 10-521, R.C.M. 1947; redes. 10-1317 by Sec. 14, Ch. 328, L. 1974; R.C.M. 1947, 10-1317; amd. Sec. 21, Ch. 465, L. 1983; MCA 1981, 41-3-503; redes. 41-3-1142 by Sec. 31(4), Ch. 465, L. 1983; amd. Sec. 11, Ch. 514, L. 1997.

Cross-References

Requirements for visitation, inspection, and supervision, 41-4-106.

One-step licensing required, 50-8-102.

Administrative duties of Department, 52-2-111.

Duty to strengthen child welfare services, 52-2-112.

Child rehabilitation — duties of Department, 52-2-113.

Relationship of foster homes, youth group homes, community residential facilities, and day-care homes to zoning, 76-2-412.

41-3-1143. Penalty for failure to obtain license. Any person who maintains or operates a youth care facility or assists in operating or maintaining such facility without having first obtained a license in writing as hereto provided shall be guilty of a misdemeanor.

History: En. Sec. 4, Ch. 178, L. 1947; Sec, 10-523, R.C.M. 1947; redes. 10-1319 by Sec. 14, Ch. 328, L. 1974; R.C.M. 1947, 10-1319; amd. Sec. 22, Ch. 465, L. 1983; MCA 1981, 41-3-504; redes. 41-3-1143 by Sec. 31(4), Ch. 465, L. 1983.

Cross-References

Misdemeanor defined, 45-2-101.

Relationship of foster homes, youth group homes, community residential facilities, and day-care homes to zoning, 76-2-412.

41-3-1144 through 41-3-1150 reserved.

41-3-1151. Respite care. (1) The department shall provide respite care, to the extent funds are available, for foster children who are:

(a) persons with developmental disabilities and either on a respite care waiting list or not eligible for respite care from another program;

(b) medically demanding because they are nonambulatory or have other special needs requiring intensive supervision or care; or

(c) suffering from severe emotional problems that are manifested in serious behavior problems.

(2) Respite care may be provided by the department on an hourly, daily, or weekly basis at a rate of payment to be determined by the department.

(3) Respite care may not be provided in an institutionalized setting except in cases involving foster children who require intensive supervision or care.

History: En. Sec. 2, Ch. 559, L. 1991; amd. Sec. 21, Ch. 255, L. 1995.

41-3-1152. Respite care providers — recruitment, training, and employment — qualifications. (1) The department shall either directly or by contract with public or private, nonprofit agencies recruit, train, and employ respite care providers.

(2) Respite care providers shall meet the qualifications and requirements specified in rules adopted by the department pursuant to 41-3-1103.

History: En. Sec. 3, Ch. 559, L. 1991.

41-3-1153 through 41-3-1159 reserved.

41-3-1160. Purpose. The intent of 41-3-1161 is to provide reimbursement for mental health outpatient counseling services to foster parents who experience the death of a foster child placed with them by the department or a licensed child placing agency. Many of the children have disabilities, terminal illnesses, or other special needs, and often these children spend their childhood in the homes of foster parents. The death of a child is a traumatic experience, and the legislature finds that providing reimbursement for counseling is a necessary support to those persons who are willing to open their homes to foster children who need a stable and safe environment.

History: En. Sec. 1, Ch. 127, L. 1999.

Compiler's Comments

Effective Date: Section 5, Ch. 127, L. 1999, provided: "[This act] is effective July 1, 1999."

41-3-1161. Foster parent counseling services. (1) A person who provides substitute care to a foster child who dies while residing in a youth care facility must be offered reimbursement for mental health outpatient counseling services at the expense of the department.

(2) Upon the death of a foster child in substitute care, the department shall provide information about available reimbursement for mental health outpatient counseling services for the person or persons who were providing care to the foster child.

(3) The reimbursement for mental health outpatient counseling services must be available for up to 1 year in duration by a provider of the person's choice at an amount equivalent to that offered as a benefit to state employees under 2-18-702, subject to the same maximum benefit levels and copayments.

History: En. Sec. 2, Ch. 127, L. 1999.

Compiler's Comments

Effective Date: Section 5, Ch. 127, L. 1999, provided: "[This act] is effective July 1, 1999."

CHAPTER 4

INTERSTATE PLACEMENT OF CHILDREN

Part 1 — Text of Compact

41-4-101. Enactment — provisions.
41-4-102. Financial responsibility.
41-4-103. Appropriate public authorities defined.
41-4-104. Appropriate authority in the receiving state.
41-4-105. Agreements.
41-4-106. Requirements for visitation, inspection, and supervision.
41-4-107. Certain laws not applicable.
41-4-108. Court jurisdiction retained.
41-4-109. Executive head defined.

Chapter Cross-References

Subsidized adoption of hard-to-place children, Title 42, ch. 10, part 1.

Department to supervise importation and exportation of children, 52-2-114.

Part 1

Text of Compact

41-4-101. Enactment — provisions. The Interstate Compact on the Placement of Children is hereby enacted into law and entered into with all other jurisdictions legally joining therein in the form substantially as follows:

Article I. Purpose and Policy

It is the purpose and policy of the party states to cooperate with each other in the interstate placement of children to the end that:

(1) each child requiring placement shall receive the maximum opportunity to be placed in a suitable environment and with persons or institutions having appropriate qualifications and facilities to provide a necessary and desirable degree and type of care;

(2) the appropriate authorities in a state where a child is to be placed may have full opportunity to ascertain the circumstances of the proposed placement, thereby promoting full compliance with applicable requirements for the protection of the child;

(3) the proper authorities of the state from which the placement is made may obtain the most complete information on the basis of which to evaluate a projected placement before it is made;

(4) appropriate jurisdictional arrangements for the care of children will be promoted.

Article II. Definitions

As used in this compact:

(1) "child" means a person who, by reason of minority, is legally subject to parental, guardianship, or similar control;

(2) "sending agency" means a party state, officer or employee thereof; a subdivision of a party state or officer or employee thereof; a court of a party

state; a person, corporation, association, charitable agency, or other entity which sends, brings, or causes to be sent or brought any child to another party state;

(3) "receiving state" means the state to which a child is sent, brought, or caused to be sent or brought, whether by public authorities or private persons or agencies and whether for placement with state or local public authorities or for placement with private agencies or persons;

(4) "placement" means the arrangement for the care of a child in a family free or boarding home or in a child-caring agency or institution but does not include any institution caring for the mentally ill, mentally defective, or epileptic or any institution primarily educational in character and any hospital or other medical facility.

Article III. Conditions for Placement

(1) No sending agency shall send, bring, or cause to be sent or brought into any other party state any child for placement in foster care or as a preliminary to a possible adoption unless the sending agency shall comply with each and every requirement set forth in this article and with the applicable laws of the receiving state governing the placement of children therein.

(2) Prior to sending, bringing, or causing any child to be sent or brought into a receiving state for placement in foster care or as a preliminary to a possible adoption, the sending agency shall furnish the appropriate public authorities in the receiving state written notice of the intention to send, bring, or place the child in the receiving state. The notice shall contain:

(a) the name, date, and place of birth of the child;

(b) the identity and address or addresses of the parents or legal guardian;

(c) the name and address of the person, agency, or institution to or with which the sending agency proposes to send, bring, or place the child;

(d) a full statement of the reasons for such proposed action and evidence of the authority pursuant to which the placement is proposed to be made.

(3) Any public officer or agency in a receiving state which is in receipt of a notice pursuant to (2) of this article may request of the sending agency or any other appropriate officer or agency of or in the sending agency's state and shall be entitled to receive therefrom such supporting or additional information as it may deem necessary under the circumstances to carry out the purpose and policy of this compact.

(4) The child shall not be sent, brought, or caused to be sent or brought into the receiving state until the appropriate public authorities in the receiving state shall notify the sending agency, in writing, to the effect that the proposed placement does not appear to be contrary to the interests of the child.

Article IV. Penalty for Illegal Placement

The sending, bringing, or causing to be sent or brought into any receiving state of a child in violation of the terms of this compact shall constitute a violation of the laws respecting the placement of children of both the state in which the sending agency is located or from which it sends or brings the child and of the receiving state. Such violation may be punished or subjected to penalty in either jurisdiction in accordance with its laws. In addition to liability for any such punishment or penalty, any such violation shall constitute full and sufficient grounds for the suspension or revocation of any license, permit, or other legal authorization held by the sending agency which empowers or allows it to place or care for children.

Article V. Retention of Jurisdiction

(1) The sending agency shall retain jurisdiction over the child sufficient to determine all matters in relation to the custody, supervision, care, treatment, and disposition of the child which it would have had if the child had remained in the sending agency's state, until the child is adopted, reaches majority, becomes self-supporting, or is discharged with the concurrence of the appropriate authority in the receiving state. Such jurisdiction shall also include the power to effect or cause the return of the child or his transfer to another location and custody pursuant to law. The sending agency shall continue to have financial responsibility for support and maintenance of the child during the period of the placement. Nothing contained herein shall defeat a claim of jurisdiction by receiving state sufficient to deal with an act of delinquency or crime committed therein.

(2) When the sending agency is a public agency, it may enter into an agreement with an authorized public or private agency in the receiving state providing for the performance of one or more services in respect of such case by the latter as agent for the sending agency.

(3) Nothing in this compact shall be construed to prevent a private charitable agency authorized to place children in the receiving state from performing services or acting as agent in that state for a private charitable agency of the sending state, nor to prevent the agency in the receiving state from discharging financial responsibility for the support and maintenance of a child who has been placed on behalf of the sending agency without relieving the responsibility set forth in (1) hereof.

Article VI. Institutional Care of Delinquent Children

A child adjudicated delinquent may be placed in an institution in another party jurisdiction pursuant to this compact, but no such placement shall be made unless the child is given a court hearing on notice to the parent or guardian with opportunity to be heard prior to his being sent to such other party jurisdiction for institutional care and the court finds that:

(1) equivalent facilities for the child are not available in the sending agency's jurisdiction; and

(2) institutional care in the other jurisdiction is in the best interest of the child and will not produce undue hardship.

Article VII. Compact Administrator

The executive head of each jurisdiction party to this compact shall designate an officer who shall be general coordinator of activities under this compact in his jurisdiction and who, acting jointly with like officers of other party jurisdictions, shall have power to promulgate rules to carry out more effectively the terms and provisions of this compact.

Article VIII. Limitations

This compact shall not apply to:

(1) the sending or bringing of a child into a receiving state by his parent, stepparent, grandparent, adult brother or sister, adult uncle or aunt, or his guardian and leaving the child with any such relative or nonagency guardian in the receiving state;

(2) any placement, sending, or bringing of a child into a receiving state pursuant to any other interstate compact to which both the state from which the child is sent or brought and the receiving state are party or to any other agreement between said states which has the force of law.

Article IX. Enactment and Withdrawal

This compact shall be open to joinder by any state, territory, or possession of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and with the consent of congress, the government of Canada or any province thereof. It shall become effective with respect to any such jurisdiction when such jurisdiction has enacted the same into law. Withdrawal from this compact shall be by the enactment of a statute repealing the same, but shall not take effect until 2 years after the effective date of such statute and until written notice of the withdrawal has been given by the withdrawing state to the governor of each other party jurisdiction. Withdrawal of a party state shall not affect the rights, duties, and obligations under this compact of any sending agency therein with respect to a placement made prior to the effective date of withdrawal.

Article X. Construction and Severability

The provisions of this compact shall be liberally construed to effectuate the purposes thereof. The provisions of this compact shall be severable, and if any phrase, clause, sentence, or provision of this compact is declared to be contrary to the constitution of any party state or of the United States or the applicability thereof to any government, agency, person, or circumstance is held invalid, the validity of the remainder of this compact and the applicability thereof to any government, agency, person, or circumstance shall not be affected thereby. If this compact shall be held contrary to the constitution of any state party thereto, the compact shall remain in full force and effect as to the remaining states and in full force and effect as to the state affected as to all severable matters.

History: En. 10-1401 by Sec. 1, Ch. 376, L. 1975; R.C.M. 1947, 10-1401.

Cross-References

Effect of judicial record of another state, 26-3-203.

Interagency cooperation, 41-3-107.

Youth residential services, Title 41, ch. 3, part 11.

Disposition of youth in need of intervention or youth who violate consent adjustments, 41-5-1512.

Custodial care, Title 41, ch. 5, part 18.

Subsidized adoption, Title 42, ch. 10, part 1.

Administrative duties of Department, 52-2-111.

Department to assist other agencies, 52-2-116.

41-4-102. Financial responsibility. Financial responsibility for any child placed pursuant to the provisions of the Interstate Compact on the Placement of Children must be determined in accordance with the provisions of Article V of that compact in the first instance. However, in the event of partial or complete default of performance under the compact, the provisions of Title 40, chapter 5, part 1 (Uniform Interstate Family Support Act), 41-3-411, and 41-3-1122 also may be invoked.

History: En. 10-1402 by Sec. 1, Ch. 376, L. 1975; R.C.M. 1947, 10-1402; amd. Sec. 18, Ch. 543, L. 1979; amd. Sec. 31, Ch. 465, L. 1983; amd. Sec. 9, Ch. 696, L. 1991; amd. Sec. 190, Ch. 42, L. 1997; amd. Sec. 14, Ch. 516, L. 1997.

41-4-103. Appropriate public authorities defined. The "appropriate public authorities" as used in Article III of the Interstate Compact on the Placement of Children, with reference to this state, means the department of public health and human services, and the department shall receive and act with reference to notices required by Article III.

History: En. 10-1403 by Sec. 1, Ch. 376, L. 1975; R.C.M. 1947, 10-1403; amd. Sec. 11, Ch. 609, L. 1987; amd. Sec. 189, Ch. 546, L. 1995.

Cross-References

Administrative duties of Department, 52-2-111.

Child rehabilitation — duties of Department, 52-2-113.

Department to supervise importation and exportation of children, 52-2-114.

Department to assist other agencies, 52-2-116.

41-4-104. Appropriate authority in the receiving state. As used in Article V(1) of the Interstate Compact on the Placement of Children, the phrase "appropriate authority in the receiving state", with reference to this state, means the department of public health and human services.

History: En. 10-1404 by Sec. 1, Ch. 376, L. 1975; R.C.M. 1947, 10-1404; amd. Sec. 11, Ch. 609, L. 1987; amd. Sec. 190, Ch. 546, L. 1995.

Cross-References

Administrative duties of Department, 52-2-111.

Child rehabilitation — duties of Department, 52-2-113.

Department to supervise importation and exportation of children, 52-2-114.

Department to assist other agencies, 52-2-116.

41-4-105. Agreements. The officers and agencies of this state and its subdivisions having authority to place children are hereby empowered to enter into agreements with appropriate officers or agencies of or in other party states pursuant to Article V(2) of the Interstate Compact on the Placement of Children. Any such agreement which contains a financial commitment or imposes a financial obligation on this state or subdivision or agency thereof shall not be binding unless it has the approval in writing of the state treasurer in the case of the state and of the chief local fiscal officer in the case of a subdivision of the state.

History: En. 10-1405 by Sec. 1, Ch. 376, L. 1975; R.C.M. 1947, 10-1405.

Cross-References

Payment for support of youth in need of care, youth in need of intervention, or delinquent youth — reimbursement by county, 41-3-1122.

41-4-106. Requirements for visitation, inspection, and supervision. Any requirements for visitation, inspection, or supervision of children, homes, institutions, or other agencies in another party state which may apply under 41-3-1141, 41-3-1142, and 52-2-113 are considered to be met if performed pursuant to an agreement entered into by appropriate officers or agencies of this state or a subdivision thereof as contemplated by Article V(2) of the Interstate Compact on the Placement of Children.

History: En. 10-1406 by Sec. 1, Ch. 376, L. 1975; R.C.M. 1947, 10-1406; amd. Sec. 31, Ch. 465, L. 1983.

Cross-References

Inspection by employees of other department, 50-8-105.

41-4-107. Certain laws not applicable. The provisions of 52-2-114 shall not apply to placements made pursuant to the Interstate Compact on the Placement of Children.

History: En. 10-1407 by Sec. 1, Ch. 376, L. 1975; R.C.M. 1947, 10-1407.

41-4-108. Court jurisdiction retained. Any court having jurisdiction to place delinquent children may place such a child in an institution of or in another state pursuant to Article VI of the Interstate Compact on the Placement of Children and shall retain jurisdiction as provided in Article V thereof.

History: En. 10-1408 by Sec. 1, Ch. 376, L. 1975; R.C.M. 1947, 10-1408.

Cross-References

Jurisdiction and venue in abuse and neglect cases, 41-3-103.

Youth Court — jurisdiction — records, Title 41, ch. 5, part 2.

41-4-109. Executive head defined. As used in Article VII of the Interstate Compact on the Placement of Children, the term "executive head" means the governor. The governor is hereby authorized to appoint a compact administrator in accordance with the terms of said Article VII.

History: En. 10-1409 by Sec. 1, Ch. 376, L. 1975; R.C.M. 1947, 10-1409.

Cross-References

Policymaking authority and administrative powers of Governor, 2-15-103.

Powers and duties of Governor, 2-15-201.

CHAPTER 5

YOUTH COURT ACT

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41-5-804. Renumbered 41-3-1105.
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41-5-806. Combined with 41-3-407, renumbered 41-3-1124.
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41-5-1415. Admissibility of confession or illegally seized evidence.
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41-5-1503. Medical or psychological evaluation of youth — urinalysis.
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41-5-2504 through 41-5-2509 reserved.
41-5-2510. Sentence review hearing.

Chapter Cross-References

Civil liability of parent for shoplifting by minor, 27-1-718.

Crimes, Title 45.

Unlawful possession of intoxicating substance by children, 45-5-624.

Use of firearms by children under 14 prohibited, 45-8-344.

Department of Corrections — youthful offenders, Title 52, ch. 5, part 1.

Part 1
General

Part Cross-References

Destruction of property by minor — liability of parents, 40-6-237.

Youthful offenders, Title 52, ch. 5, part 1.

41-5-101. Short title. This chapter may be cited as the "Montana Youth Court Act".

History: En. 10-1201 by Sec. 1, Ch. 329, L. 1974; R.C.M. 1947, 10-1201.

41-5-102. Declaration of purpose. The Montana Youth Court Act must be interpreted and construed to effectuate the following express legislative purposes:

(1) to preserve the unity and welfare of the family whenever possible and to provide for the care, protection, and wholesome mental and physical development of a youth coming within the provisions of the Montana Youth Court Act;

(2) to prevent and reduce youth delinquency through a system that does not seek retribution but that provides:

(a) immediate, consistent, enforceable, and avoidable consequences of youths' actions;

(b) a program of supervision, care, rehabilitation, detention, competency development, and community protection for youth before they become adult offenders; and

(c) in appropriate cases, restitution as ordered by the youth court;

(3) to achieve the purposes of subsections (1) and (2) in a family environment whenever possible, separating the youth from the parents only when necessary for the welfare of the youth or for the safety and protection of the community;

(4) to provide judicial procedures in which the parties are ensured a fair, accurate hearing and recognition and enforcement of their constitutional and statutory rights.

History: En. 10-1202 by Sec. 2, Ch. 329, L. 1974; R.C.M. 1947, 10-1202; amd. Sec. 1, Ch. 246, L. 1979; amd. Sec. 3, Ch. 528, L. 1995; amd. Sec. 1, Ch. 537, L. 1999.

Compiler's Comments

1999 Amendment: Chapter 537 in (2) inserted "a system that does not seek retribution but that provides"; in (2)(b) inserted "for youth before they become adult offenders"; and made minor changes in style. Amendment effective April 30, 1999.

Cross-References

Application of Montana Rules of Civil Procedure to this chapter, Rule 81(a), M.R.Civ.P. (see Title 25, ch. 20).

Action on reporting, 41-3-202.

Abuse or neglect proceedings, Title 41, ch. 3, part 4.

Recognition of parental control of children — placement with extended family, 52-2-102.

41-5-103. Definitions. As used in the Montana Youth Court Act, unless the context requires otherwise, the following definitions apply:

(1) "Adult" means an individual who is 18 years of age or older.

(2) "Agency" means any entity of state or local government authorized by law to be responsible for the care or rehabilitation of youth.

(3) "Assessment officer" means a person who is authorized by the court to provide initial intake and evaluation for a youth who appears to be in need of intervention or an alleged delinquent youth.

(4) "Commit" means to transfer to legal custody.

(5) "Correctional facility" means a public or private residential facility used for the placement of delinquent youth or individuals convicted of criminal offenses.

(6) "Court", when used without further qualification, means the youth court of the district court.

(7) "Criminally convicted youth" means a youth who has been convicted in a district court pursuant to 41-5-206.

(8) "Custodian" means a person, other than a parent or guardian, to whom legal custody of the youth has been given but does not include a person who has only physical custody.

(9) "Delinquent youth" means a youth who is adjudicated under formal proceedings under the Montana Youth Court Act as a youth:

(a) who has committed an offense that, if committed by an adult, would constitute a criminal offense; or

(b) who has been placed on probation as a delinquent youth or a youth in need of intervention and who has violated any condition of probation.

(10) "Department" means the department of corrections provided for in 2-15-2301.

(11) "Department records" means information or data, either in written or electronic form, maintained by the department pertaining to youth who are committed to the department under 41-5-1512(3) or 41-5-1513(1)(b) or (1)(c) or who are under parole supervision. Department records do not include information provided by the department to the department of public health and human services' management information system.

(12) "Detention" means the holding or temporary placement of a youth in the youth's home under home arrest or in a facility other than the youth's own home for:

(a) the purpose of ensuring the continued custody of the youth at any time after the youth is taken into custody and before final disposition of the youth's case;

(b) contempt of court or violation of a valid court order; or

(c) violation of a youth parole agreement.

(13) "Detention facility" means a physically restricting facility designed to prevent a youth from departing at will. The term includes a youth detention facility, short-term detention center, and regional detention facility.

(14) "Family" means the parents, guardians, legal custodians, and siblings or other youth with whom a youth ordinarily lives.

(15) "Final disposition" means the implementation of a court order for the disposition or placement of a youth as provided in 41-5-1422, 41-5-1503, 41-5-1504, 41-5-1512, 41-5-1513, and 41-5-1522 through 41-5-1525.

(16) "Foster home" means a private residence licensed by the department of public health and human services for placement of a youth.

(17) "Guardian" means an adult:

(a) who is responsible for a youth and has the reciprocal rights, duties, and responsibilities with the youth; and

(b) whose status is created and defined by law.

(18) "Habitual truancy" means recorded absences of 10 days or more of unexcused absences in a semester or absences without prior written approval of a parent or a guardian.

(19) "Holdover" means a room, office, building, or other place approved by the board of crime control for the temporary detention and supervision of youth in a physically unrestricting setting for a period not to exceed 24 hours while the youth is awaiting a probable cause hearing, release, or transfer to an appropriate detention or shelter care facility. The term does not include a jail.

(20) "Jail" means a facility used for the confinement of adults accused or convicted of criminal offenses. The term includes a lockup or other facility used primarily for the temporary confinement of adults after arrest but does not include a collocated juvenile detention facility that complies with 28 CFR, part 31.

(21) "Judge", when used without further qualification, means the judge of the youth court.

(22) "Juvenile home arrest officer" means a court-appointed officer administering or supervising juveniles in a program for home arrest, as provided for in Title 46, chapter 18, part 10.

(23) "Law enforcement records" means information or data, either in written or electronic form, maintained by a law enforcement agency, as defined in 7-32-201, pertaining to a youth covered by this chapter.

(24) (a) "Legal custody" means the legal status created by order of a court of competent jurisdiction that gives a person the right and duty to:

(i) have physical custody of the youth;

(ii) determine with whom the youth shall live and for what period;

(iii) protect, train, and discipline the youth; and

(iv) provide the youth with food, shelter, education, and ordinary medical care.

(b) An individual granted legal custody of a youth shall personally exercise the individual's rights and duties as guardian unless otherwise authorized by the court entering the order.

(25) "Necessary parties" includes the youth and the youth's parents, guardian, custodian, or spouse.

(26) "Parent" means the natural or adoptive parent but does not include a person whose parental rights have been judicially terminated, nor does it

include the putative father of an illegitimate youth unless the putative father's paternity is established by an adjudication or by other clear and convincing proof.

(27) "Probable cause hearing" means the hearing provided for in 41-5-332.

(28) "Regional detention facility" means a youth detention facility established and maintained by two or more counties, as authorized in 41-5-1804.

(29) "Restitution" means payments in cash to the victim or with services to the victim or the general community when these payments are made pursuant to a consent adjustment, consent decree, or other youth court order.

(30) "Running away from home" means that a youth has been reported to have run away from home without the consent of a parent or guardian or a custodian having legal custody of the youth.

(31) "Secure detention facility" means a public or private facility that:

(a) is used for the temporary placement of youth or individuals accused or convicted of criminal offenses or as a sanction for contempt of court, violation of a parole agreement, or violation of a valid court order; and

(b) is designed to physically restrict the movements and activities of youth or other individuals held in lawful custody of the facility.

(32) "Serious juvenile offender" means a youth who has committed an offense that would be considered a felony offense if committed by an adult and that is an offense against a person, an offense against property, or an offense involving dangerous drugs.

(33) "Shelter care" means the temporary substitute care of youth in physically unrestricting facilities.

(34) "Shelter care facility" means a facility used for the shelter care of youth. The term is limited to the facilities enumerated in 41-5-344.

(35) "Short-term detention center" means a detention facility licensed by the department for the temporary placement or care of youth, for a period not to exceed 10 days excluding weekends and legal holidays, pending a probable cause hearing, release, or transfer of the youth to an appropriate detention facility, youth assessment center, or shelter care facility.

(36) "State youth correctional facility" means a residential facility used for the placement and rehabilitation of delinquent youth, such as the Pine Hills youth correctional facility in Miles City.

(37) "Substitute care" means full-time care of youth in a residential setting for the purpose of providing food, shelter, security and safety, guidance, direction, and, if necessary, treatment to youth who are removed from or are without the care and supervision of their parents or guardians.

(38) "Victim" means:

(a) a person who suffers property, physical, or emotional injury as a result of an offense committed by a youth that would be a criminal offense if committed by an adult;

(b) an adult relative of the victim, as defined in subsection (38)(a), if the victim is a minor; and

(c) an adult relative of a homicide victim.

(39) "Youth" means an individual who is less than 18 years of age without regard to sex or emancipation.

(40) "Youth assessment" means a multidisciplinary assessment of a youth as provided in 41-5-1201.

(41) "Youth assessment center" means a staff-secured location that is licensed by the department of public health and human services to hold a youth for up to 10 days for the purpose of providing an immediate and comprehensive community-based youth assessment to assist the youth and the youth's family in addressing the youth's behavior.

(42) "Youth care facility" has the meaning provided in 41-3-1102.

(43) "Youth court" means the court established pursuant to this chapter to hear all proceedings in which a youth is alleged to be a delinquent youth, a youth in need of intervention, or a youth in need of care and includes the youth court judge, probation officers, and assessment officers.

(44) "Youth court records" means information or data, either in written or electronic form, maintained by the youth court pertaining to a youth under jurisdiction of the youth court and includes reports of preliminary inquiries, petitions, motions, other filed pleadings, court findings, verdicts, orders and decrees, youth assessment materials, predispositional studies, and supervision records of probationers. Youth court records do not include information provided by the youth court to the department of public health and human services' management information system.

(45) "Youth detention facility" means a secure detention facility licensed by the department for the temporary substitute care of youth that is:

(a) (i) operated, administered, and staffed separately and independently of a jail; or

(ii) a collocated secure detention facility that complies with 28 CFR, part 31; and

(b) used exclusively for the lawful detention of alleged or adjudicated delinquent youth or as a sanction for contempt of court, violation of a parole agreement, or violation of a valid court order.

(46) "Youth in need of care" has the meaning provided for in 41-3-102.

(47) "Youth in need of intervention" means a youth who is adjudicated as a youth and who commits an offense prohibited by law that if committed by an adult would not constitute a criminal offense, including but not limited to a youth who:

(a) violates any Montana municipal or state law regarding alcoholic beverages;

(b) continues to exhibit behavior, including running away from home or habitual truancy, beyond the control of the youth's parents, foster parents, physical custodian, or guardian despite the attempt of the youth's parents, foster parents, physical custodian, or guardian to exert all reasonable efforts to mediate, resolve, or control the youth's behavior; or

(c) has committed any of the acts of a delinquent youth but whom the youth court, in its discretion, chooses to regard as a youth in need of intervention.

History: Ap.p. Sec. 3, Ch. 329, L. 1974; amd. Sec. 1, Ch. 571, L. 1977; Sec. 10-1203, R.C.M. 1947; Ap.p. Sec. 2, Ch. 427, L. 1971; Sec. 10-1102, R.C.M. 1947; amd. and redes. 10-1243 by Sec. 43, Ch. 329, L. 1974; amd. Sec. 15, Ch. 571, L. 1977; Sec. 10-1243, R.C.M. 1947; R.C.M. 1947, 10-1203, 10-1243; amd. Sec. 2, Ch. 246, L. 1979; amd. Sec. 1, Ch. 233, L. 1983; amd. Sec. 2, Ch. 465, L. 1983; amd. Sec. 6, Ch. 475, L. 1987; amd. Sec. 1, Ch. 515, L. 1987; amd. Sec. 54, Ch. 609, L. 1987; amd. Sec. 1, Ch. 231, L. 1991; amd. Sec. 2, Ch. 547,

L. 1991; amd. Sec. 2, Ch. 548, L. 1991; amd. Secs. 1, 29, Ch. 799, L. 1991; amd. Sec. 191, Ch. 546, L. 1995; amd. Sec. 191, Ch. 42, L. 1997; amd. Sec. 2, Ch. 189, L. 1997; amd. Sec. 3, Ch. 286, L. 1997; amd. Sec. 13, Ch. 550, L. 1997; amd. Sec. 1, Ch. 106, L. 1999; amd. Sec. 1, Ch. 326, L. 1999; amd. Sec. 1, Ch. 532, L. 1999.

Compiler's Comments

1999 Amendments — Composite Section: Chapter 106 inserted definitions of department records, law enforcement records, and youth court records; and made minor changes in style. Amendment effective October 1, 1999.

Chapter 326 inserted definition of juvenile home arrest officer; and made minor changes in style. Amendment effective July 1, 1999.

Chapter 532 inserted definition of criminally convicted youth; in definition of detention inserted (c) concerning violation of parole agreement; in definition of victim in (a) substituted "criminal offense" for "felony offense"; in definition of youth detention facility inserted (a)(ii) concerning collocated secure detention facility; and made minor changes in style. Amendment effective October 1, 1999.

Cross-References

Compulsory attendance and excuses, 20-5-103.

Minors and adults defined, 41-1-101.

Youth residential services, Title 41, ch. 3, part 11.

State grants for youth detention services, Title 41, ch. 5, part 19.

Guardians of minors, Title 72, ch. 5, part 2.

41-5-104. County commissioners authorized to provide funds. (1) The county commissioners of all counties are hereby authorized, empowered, and required to provide the necessary funds and to make all needful appropriations to carry out the provisions of this chapter.

(2) Each county shall pay its portion of the costs of the youth court based:

(a) on actual costs incurred in or on behalf of the county; or

(b) if actual costs cannot be identified, on each county's proportion of the total youth court workload in the judicial district during the calendar year preceding the setting of the budget.

(3) The youth court judge shall, in January of each year, establish the proportion of the workload of the court to be attributed to each county in the ensuing budget year for purposes of any necessary application of subsection (2)(b).

History: En. Sec. 30, Ch. 227, L. 1943; Sec. 10-631, R.C.M. 1947; redes. 10-1239 by Sec. 39, Ch. 329, L. 1974; R.C.M. 1947, 10-1239; amd. Sec. 1, Ch. 580, L. 1985.

Cross-References

District Court budget, 7-6-2351.

County levy for District Court expenses, 7-6-2511.

41-5-105. Youth court committee. In every county of the state the judge having jurisdiction may appoint a committee, willing to act without compensation, composed of not less than three or more than seven reputable citizens, including youth representatives. The committee must be designated as a youth court committee. This committee shall meet subject to the call of the judge to confer with him on all matters pertaining to the youth department of the court, including the appointment of probation officers, and shall act as a supervisory committee of youth detention facilities.

History: En. Sec. 27, Ch. 227, L. 1943; amd. Sec. 1, Ch. 128, L. 1957; amd. Sec. 13, Ch. 262, L. 1969; Sec. 10-628, R.C.M. 1947; amd. and redes. 10-1240 by Sec. 40, Ch. 329, L. 1974; R.C.M. 1947, 10-1240; amd. Sec. 19, Ch. 799, L. 1991.

Cross-References

Placement of youth in need of care, 41-5-344.

Appointment of probation officers, 41-5-1701.

41-5-106. Order of adjudication — noncriminal. No placement of any youth in any state youth correctional facility under this chapter shall be deemed commitment to a penal institution. No adjudication upon the status of any youth in the jurisdiction of the court shall operate to impose any of the civil disability imposed on a person by reason of conviction of a criminal offense, nor shall such adjudication be deemed a criminal conviction, nor shall any youth be charged with or convicted of any crime in any court except as provided in this chapter. Neither the disposition of a youth under this chapter nor evidence given in youth court proceedings under this chapter shall be admissible in evidence except as otherwise provided in this chapter.

History: En. 10-1235 by Sec. 35, Ch. 329, L. 1974; amd. Sec. 11, Ch. 571, L. 1977; R.C.M. 1947, 10-1235; amd. Sec. 55, Ch. 609, L. 1987.

Cross-References

Youth Court and Department records, 41-5-215.

Investigation, fingerprints, and photographs, 41-5-1206.

Communications privileged, 41-5-1303.

Right to counsel, 41-5-1413.

Admissibility of confession or illegally seized evidence, 41-5-1415.

Disposition of youth in need of intervention or youth who violate consent adjustments, 41-5-1512.

41-5-107. Administration. The provisions of Title 41, chapter 3, part 11, govern the administration of this chapter.

History: En. Sec. 30, Ch. 465, L. 1983.

41-5-108 and 41-5-109 reserved.

41-5-110. Youth court hearings — priority. All hearings and other court appearances required under Title 41, chapter 5, must be given priority by the court and must be scheduled to be heard as expeditiously as possible.

History: En. Sec. 15, Ch. 515, L. 1987.

41-5-111. Court costs and expenses. The following expenses shall be a charge upon the funds of the court or other appropriate agency when applicable, upon their certification by the court:

(1) the costs of medical and other examinations and treatment of a youth ordered by the court;

(2) reasonable compensation for services and related expenses for counsel appointed by the court for a party;

(3) the expenses of service of summons, notices, subpoenas, traveling expenses of witnesses, and other like expenses incurred in any proceeding under the Montana Youth Court Act as provided for by law;

(4) reasonable compensation of a guardian ad litem appointed by the court; and

(5) cost of transcripts and printing briefs on appeal.

History: En. 10-1226 by Sec. 26, Ch. 329, L. 1974; R.C.M. 1947, 10-1226; amd. Sec. 6, Ch. 363, L. 1983; amd. Sec. 1, Ch. 737, L. 1985; amd. Sec. 2, Ch. 11, Sp. L. June 1986; amd. Sec. 6, Ch. 14, Sp. L. June 1986; Sec. 41-5-207, MCA 1995; redes. 41-5-111 by Sec. 47, Ch. 286, L. 1997.

41-5-112. Parental contributions account — allocation of proceeds. (1) There is a parental contributions account in the state special revenue fund.

(2) Contributions paid by the parents and guardians of youth under 41-3-411, 41-5-1501, or 41-5-1525 must be deposited in the account.

(3) All money in the account, except any amount required to be returned to federal or county sources, is allocated to the department of public health and human services to carry out its duties under 52-1-103.

History: En. Sec. 6, Ch. 696, L. 1991; amd. Sec. 196, Ch. 546, L. 1995; amd. Secs. 40, 49(3)(f), Ch. 286, L. 1997; amd. Sec. 15, Ch. 516, L. 1997; Sec. 41-5-530, MCA 1995; redes. 41-5-112 by Sec. 47, Ch. 286, L. 1997.

41-5-113 through 41-5-120 reserved.

41-5-121. Youth placement committees — composition. (1) In each judicial district, the department shall establish a youth placement committee for the purposes of:

(a) recommending an appropriate placement of a youth referred to the department under 41-5-1512 and 41-5-1513; or

(b) recommending available community services or alternative placements whenever a change is required in the placement of a youth who is currently in the custody of the department under 41-5-1512 or 41-5-1513. However, the committee may not substitute its judgment for that of the superintendent of a state youth correctional facility regarding the discharge of a youth from the facility.

(2) The committee consists of not less than five members and must include persons who are knowledgeable about the youth, treatment and placement options, and other resources appropriate to address the needs of the youth. Members may include:

(a) two representatives of the department;

(b) a representative of the department of public health and human services;

(c) either the chief probation officer or the youth's probation officer;

(d) a mental health professional;

(e) a representative of a school district located within the boundaries of the judicial district who must have personal knowledge of and experience with the youth;

(f) if an Indian child or children are involved, someone, preferably an Indian person, knowledgeable about Indian culture and family matters;

(g) a parent or guardian; and

(h) a youth services provider.

(3) Committee members serve without compensation.

(4) Notwithstanding the provisions of 41-5-123, the committee may be convened by the department or the probation officer of the youth court.

(5) If a representative of the school district within the boundaries of which the youth is recommended to be placed and will be attending school is not included on the committee, the person who convened the committee shall inform the school district of the final placement decision for the youth.

History: En. Sec. 15, Ch. 609, L. 1987; amd. Sec. 2, Ch. 67, L. 1989; amd. Sec. 1, Ch. 403, L. 1995; amd. Sec. 38, Ch. 286, L. 1997; amd. Sec. 43, Ch. 550, L. 1997; Sec. 41-5-525, MCA 1995; redes. 41-5-121 by Sec. 47, Ch. 286, L. 1997; amd. Sec. 2, Ch. 532, L. 1999.

Compiler's Comments

1999 Amendment: Chapter 532 in (1)(a) at end substituted "41-5-1512 and 41-5-1513" for "41-5-1304". Amendment effective October 1, 1999.

41-5-122. Duties of the youth placement committee. A youth placement committee shall:

(1) review all information relevant to the placement of a youth referred or committed to the department;

(2) consider available resources appropriate to meet the needs of the youth;

(3) consider the treatment recommendations of any professional person who has evaluated the youth;

(4) consider options for the financial support of the youth;

(5) recommend in writing to the department an appropriate placement for the youth, considering the age and treatment needs of the youth and the relative costs of care in facilities considered appropriate for placement. A committee shall consider placement in a licensed facility, at a state youth correctional facility, or with a parent, other family member, or guardian.

(6) review temporary and emergency placements as required under 41-5-124; and

(7) conduct placement reviews at least semiannually and at other times as requested by the department.

History: En. Sec. 16, Ch. 609, L. 1987; amd. Sec. 1, Ch. 399, L. 1989; amd. Sec. 2, Ch. 403, L. 1995; Sec. 41-5-526, MCA 1995; redes. 41-5-122 by Sec. 47, Ch. 286, L. 1997.

41-5-123. Youth placement committee to submit recommendation to department — acceptance or rejection of recommendation by department. (1) Prior to commitment of a youth to the department pursuant to 41-5-1512 or 41-5-1513, a youth placement committee must be convened. The committee shall submit in writing to the department and to the youth court judge its primary and alternative recommendations for placement of the youth.

(2) If the department accepts either of the committee's recommendations, it shall promptly notify the committee in writing.

(3) If the department rejects both of the committee's recommendations, it shall promptly notify the committee in writing of the reasons for rejecting the recommendations and shall make an appropriate placement for the youth.

(4) Within 72 hours after making a decision on a placement or change of placement, the department shall notify the youth court of the decision and of the placement or change of placement.

History: En. Sec. 17, Ch. 609, L. 1987; amd. Sec. 2, Ch. 399, L. 1989; amd. Sec. 3, Ch. 403, L. 1995; amd. Sec. 39, Ch. 286, L. 1997; Sec. 41-5-527, MCA 1995; redes. 41-5-123 by Sec. 47, Ch. 286, L. 1997.

41-5-124. Temporary and emergency placements — limit. (1) A temporary placement of a youth in a shelter care facility or an emergency placement of a youth in a youth care facility is exempt from the requirements of 41-5-123.

(2) If a temporary or emergency placement of a youth continues for 45 or more days, the department shall refer the placement of the youth to the appropriate youth placement committee for review. The committee shall make a recommendation for placement to the department in accordance with 41-5-123.

History: En. Sec. 18, Ch. 609, L. 1987; Sec. 41-5-528, MCA 1995; redes. 41-5-124 by Sec. 47, Ch. 286, L. 1997.

41-5-125. Confidentiality of youth placement committee meetings and records. (1) Meetings of a youth placement committee are closed to the public to protect a youth's right to individual privacy.

(2) Information presented to the committee about a youth and committee records are confidential and subject to confidentiality requirements established by rule by the department.

History: En. Sec. 19, Ch. 609, L. 1987; Sec. 41-5-529, MCA 1995; redes. 41-5-125 by Sec. 47, Ch. 286, L. 1997.

Part 2
Youth Court — Jurisdiction — Records

41-5-201. Youth court judge — judges pro tempore — special masters. (1) Each judicial district in the state must have at least one judge of the youth court whose duties are to:

(a) appoint and supervise qualified personnel to staff the youth division probation departments within the judicial district;

(b) conduct hearings on youth court proceedings under this chapter;

(c) perform any other functions consistent with the legislative purpose of this chapter.

(2) In each multijudge judicial district the judges shall, by court rule, designate one or more of their number to act as youth court judge in each county in the judicial district for a fixed period of time. Service as youth court judge may be rotated among the different judges of the judicial district and among the individual counties within the judicial district for given periods of time. Continuity of service of a given judge as youth court judge and continuity in the operation and policies of the youth court in the county having the largest population in the judicial district must be the principal consideration of the rule.

(3) (a) A youth court judge may appoint a judge pro tempore or a special master to conduct preliminary, nondispositive matters, including but not limited to hearings for probable cause or detention and taking of responses for petitions.

(b) A judge pro tempore or special master must be a member of the state bar of Montana.

History: En. 10-1233 by Sec. 33, Ch. 329, L. 1974; R.C.M. 1947, 10-1233(part); amd. Sec. 1, Ch. 60, L. 1985; amd. Sec. 14, Ch. 550, L. 1997.

Cross-References

District Court Judges, Title 3, ch. 5, part 2.

Proceeding on petition, Title 41, ch. 5, part 14.

Appointment of probation officers, 41-5-1701.

41-5-202. Renumbered 41-5-1405. Sec. 47, Ch. 286, L. 1997.

41-5-203. Jurisdiction of court. (1) Except as provided in subsection (2) and for cases filed in the district court under 41-5-206, the court has exclusive original jurisdiction of all proceedings under the Montana Youth Court Act in which a youth is alleged to be a delinquent youth, a youth in need of intervention, or a youth in need of care or concerning any person under 21 years of age charged with having violated any law of the state or any ordinance of a city or town other than a traffic or fish and game law prior to having become 18 years of age.

(2) Justice, municipal, and city courts have concurrent jurisdiction with the youth court over all alcoholic beverage, tobacco products, and gambling violations alleged to have been committed by a youth.

(3) The court has jurisdiction to:

(a) transfer a youth court case to the district court after notice and hearing; and

(b) with respect to extended jurisdiction juvenile cases:

(i) designate a proceeding as an extended jurisdiction juvenile prosecution;

(ii) conduct a hearing, receive admissions, and impose upon a youth who is adjudicated as an extended jurisdiction juvenile a sentence that may extend beyond the youth's age of majority;

(iii) stay that portion of an extended jurisdiction sentence that is extended beyond a youth's majority, subject to the performance of the juvenile portion of the sentence;

(iv) continue, modify, or revoke the stay after notice and hearing;

(v) after revocation, transfer execution of the stayed sentence to the department;

(vi) transfer supervision of any juvenile sentence if, after notice and hearing, the court determines by a preponderance of the evidence that the juvenile has violated or failed to perform the juvenile portion of an extended jurisdiction sentence; and

(vii) transfer a juvenile case to district court after notice and hearing.

History: En. 10-1206 by Sec. 6, Ch. 329, L. 1974; amd. Sec. 3, Ch. 100, L. 1977; amd. Sec. 1, Ch. 446, L. 1977; R.C.M. 1947, 10-1206; amd. Sec. 1, Ch. 427, L. 1979; amd. Sec. 22, Ch. 626, L. 1993; amd. Sec. 2, Ch. 376, L. 1995; amd. Sec. 1, Ch. 498, L. 1997; amd. Secs. 15, 76, Ch. 550, L. 1997.

Cross-References

Municipal Courts — jurisdiction, 3-6-103.

Justices' Courts — criminal jurisdiction, 3-10-303.

City Courts — concurrent jurisdiction, 3-11-102.

Jurisdiction of courts — misdemeanor alcohol violations, 16-6-201.

Evidence in administrative proceedings, 23-5-138.

Concurrent jurisdiction and venue, 41-3-103.

Continuing jurisdiction of Youth Court, 41-3-1114.

Priority of Youth Court hearings, 41-5-110.

Unlawful attempt to purchase or possession of intoxicating substance, 45-5-624.

Tobacco possession or consumption by persons under 18 years of age prohibited — penalties, 45-5-637.

Criminal possession of toxic substances, 45-9-121.

41-5-204. Venue and transfer. (1) The county where a youth is a resident or is alleged to have violated the law has initial jurisdiction over any youth alleged to be a delinquent youth. Except as provided in 41-5-206, the youth court shall assume the initial handling of the case.

(2) The county where a youth is a resident has initial jurisdiction over any youth alleged to be a youth in need of intervention or a youth in need of care. The youth court of that county shall assume the initial handling of the case. Transfers of venue may be made to any of the following counties in the state:

(a) the county in which the youth is apprehended or found;

(b) the county in which the youth is alleged to have violated the law; or

(c) the county of residence of the youth's parents or guardian.

(3) In the case of a youth alleged to be a youth in need of intervention or a youth in need of care, a change of venue may be ordered at any time by the

concurrence of the youth court judges of both counties in order to ensure a fair, impartial, and speedy hearing and final disposition of the case.

(4) In the case of a youth 16 years of age or older who is accused of one of the serious offenses listed in 41-5-206 and who is to be tried in district court, the charge must be filed and trial held in the district court of the county where the offense occurred.

History: En. 10-1207 by Sec. 7, Ch. 329, L. 1974; R.C.M. 1947, 10-1207; amd. Sec. 2, Ch. 60, L. 1985; amd. Sec. 16, Ch. 550, L. 1997.

Cross-References

Residence — rules for determining, 1-1-215.

District Court original jurisdiction, 3-5-302.

Concurrent jurisdiction and venue, 41-3-103.

Place of trial — proper venue, 46-3-111.

41-5-205. Retention of jurisdiction — termination. (1) The court may dismiss a petition or otherwise terminate jurisdiction on its own motion or on the motion or petition of any interested party at any time. Unless terminated by the court and except as provided in subsections (2) and (3), the jurisdiction of the court continues until the individual becomes 21 years of age.

(2) Court jurisdiction terminates when:

(a) the proceedings are transferred to district court under 41-5-208 or an information is filed concerning the offense in district court pursuant to 41-5-206;

(b) the youth is discharged by the department; or

(c) execution of a sentence is ordered under 41-5-1605(2)(b)(iii) and the supervisory responsibilities are transferred to the district court under 41-5-1605.

(3) The jurisdiction of the court over an extended jurisdiction juvenile, with respect to the offense for which the youth was convicted as an extended jurisdiction juvenile, extends until the offender becomes 25 years of age unless the court terminates jurisdiction before that date.

History: En. 10-1208 by Sec. 8, Ch. 329, L. 1974; R.C.M. 1947, 10-1208; amd. Sec. 56, Ch. 609, L. 1987; amd. Sec. 2, Ch. 498, L. 1997.

Cross-References

Minors and adults defined, 41-1-101.

Concurrent jurisdiction and venue, 41-3-103.

Continuing jurisdiction of Youth Court, 41-3-1114.

Disposition permitted under consent adjustment — contributions for youth's care, 41-5-1304.

Disposition of youth in need of intervention or youth who violate consent adjustments, 41-5-1512.

State youth correctional facilities — jurisdiction of Department to age 18, 52-5-101.

41-5-206. Filing in district court prior to formal proceedings in youth court. (1) The county attorney may, in the county attorney's discretion and in accordance with the procedure provided in 46-11-201, file with the district court a motion for leave to file an information in the district court if:

(a) the youth charged was 12 years of age or older at the time of the conduct alleged to be unlawful and the unlawful act would if it had been committed by an adult constitute:

(i) sexual intercourse without consent as defined in 45-5-503;

(ii) deliberate homicide as defined in 45-5-102;

(iii) mitigated deliberate homicide as defined in 45-5-103;

(iv) assault on a peace officer or judicial officer as defined in 45-5-210; or

(v) the attempt, as defined in 45-4-103, of or accountability, as provided in 45-2-301, for either deliberate or mitigated deliberate homicide; or

(b) the youth charged was 16 years of age or older at the time of the conduct alleged to be unlawful and the unlawful act is one or more of the following:

(i) negligent homicide as defined in 45-5-104;

(ii) arson as defined in 45-6-103;

(iii) aggravated assault as defined in 45-5-202;

(iv) assault with a weapon as defined in 45-5-213;

(v) robbery as defined in 45-5-401;

(vi) burglary or aggravated burglary as defined in 45-6-204;

(vii) aggravated kidnapping as defined in 45-5-303;

(viii) possession of explosives as defined in 45-8-335;

(ix) criminal distribution of dangerous drugs as defined in 45-9-101;

(x) criminal production or manufacture of dangerous drugs as defined in 45-9-110;

(xi) attempt, as defined in 45-4-103, of or accountability, as provided in 45-2-301, for any of the acts enumerated in subsections (1)(b)(i) through (1)(b)(iii) and (1)(b)(v) through (1)(b)(xii);

(xii) use of threat to coerce criminal street gang membership or use of violence to coerce criminal street gang membership, as defined in 45-8-403;

(xiii) escape as defined in 45-7-306.

(2) The county attorney shall file with the district court a petition for leave to file an information in district court if the youth was 17 years of age at the time the youth committed an offense listed under subsection (1).

(3) The district court shall grant leave to file the information if it appears from the affidavit or other evidence supplied by the county attorney that there is probable cause to believe that the youth has committed the alleged offense. Within 30 days after leave to file the information is granted, the district court shall conduct a hearing to determine whether the matter must be transferred back to the youth court, unless the hearing is waived by the youth or by the youth's counsel in writing or on the record. The hearing may be continued on request of either party for good cause. The district court may not transfer the case back to the youth court if the district court finds, by a preponderance of the evidence, that a youth court proceeding and disposition will not serve the interests of community protection and the best interests of the youth, and that, considering the seriousness of the offense, the case should remain in the district court.

(4) The filing of an information in district court terminates the jurisdiction of the youth court over the youth with respect to the acts alleged in the information. A youth may not be prosecuted in the district court for a criminal offense originally subject to the jurisdiction of the youth court unless the case has been filed in the district court as provided in this section. A case may be transferred to district court after prosecution as provided in 41-5-208 or 41-5-1605.

(5) An offense not enumerated in subsection (1) that arises during the commission of a crime enumerated in subsection (1) may be:

(a) tried in youth court;

(b) transferred to district court with an offense enumerated in subsection (1) upon motion of the county attorney and order of the district court. The district court shall hold a hearing before deciding the motion.

(6) If a youth is found guilty in district court of an offense enumerated in subsection (1), the court shall sentence the youth pursuant to 41-5-2503 and Titles 45 and 46. A youth who is sentenced to the department or a state prison must be evaluated and placed by the department in an appropriate juvenile or adult correctional facility. The department shall confine the youth in an institution that it considers proper, including a state youth correctional facility under the procedures of 52-5-111. However, a youth under 16 years of age may not be confined in a state prison facility. During the period of confinement, school-aged youth with disabilities must be provided an education consistent with the requirements of the federal Individuals With Disabilities Education Act, 20 U.S.C. 1400, et seq.

(7) A youth whose case is filed in the district court may not be detained or otherwise placed in a jail or other adult detention facility before final disposition of the youth's case unless:

(a) alternative facilities do not provide adequate security; and

(b) the youth is kept in an area that provides physical separation as well as sight and sound separation from adults accused or convicted of criminal offenses.

History: En. 10-1229 by Sec. 29, Ch. 329, L. 1974; amd. Sec. 9, Ch. 100, L. 1977; R.C.M. 1947, 10-1229; amd. Sec. 1, Ch. 484, L. 1981; amd. Sec. 3, Ch. 60, L. 1985; amd. Sec. 100, Ch. 370, L. 1987; amd. Sec. 3, Ch. 515, L. 1987; amd. Sec. 57, Ch. 609, L. 1987; amd. Sec. 4, Ch. 434, L. 1989; amd. Sec. 1, Ch. 262, L. 1991; amd. Sec. 6, Ch. 547, L. 1991; amd. Sec. 2, Ch. 448, L. 1993; amd. Sec. 7, Ch. 438, L. 1995; amd. Sec. 192, Ch. 546, L. 1995; amd. Sec. 9, Ch. 285, L. 1997; amd. Sec. 18, Ch. 550, L. 1997; amd. Sec. 2, Ch. 432, L. 1999; amd. Sec. 1, Ch. 523, L. 1999; amd. Sec. 3, Ch. 532, L. 1999; amd. Sec. 2, Ch. 537, L. 1999.

Compiler's Comments

1999 Amendments — Composite Section: Chapter 432 in (1)(b)(iii) before "assault" deleted "or felony"; inserted (1)(b)(iv) concerning assault with a weapon; in (1)(b)(ix) substituted "criminal distribution" for "criminal sale"; and made minor changes in style. Amendment effective October 1, 1999.

Chapter 523 in (1) in introductory clause near middle after "discretion" inserted "and in accordance with the procedure provided in 46-11-201"; in (3) substituted present language pertaining to hearings on and transfer of cases back to youth court for former language that read: "(3) The district court shall grant leave to file the information if the court finds that there is probable cause to believe that the youth has committed the alleged offense and that, considering the seriousness of the offense and in the interests of community protection, the case should be filed in the district court"; in (5)(b) inserted second sentence requiring a hearing before court decides the motion; and made minor changes in style. Amendment effective October 1, 1999.

Chapter 532 inserted (1)(a)(iv) concerning assault on a peace officer or judicial officer; inserted (1)(b)(xiii) concerning escape; in (6) at end of first sentence substituted "the court shall sentence the youth pursuant to 41-5-2503 and Titles 45 and 46. A youth who is sentenced to the department or a state prison must be evaluated and placed by the department in an appropriate juvenile or adult correctional facility" for "and is sentenced to the state prison, the commitment must be to the department of corrections"; and made minor changes in style. Amendment effective October 1, 1999.

Chapter 537 at end of first sentence in (6) inserted "not to exceed the period of time allowed in 46-18-201"; and made minor changes in style. Amendment effective April 30, 1999. The code commissioner has not codified the change made to (6) by Ch. 537 because the change appears to have been rendered void by the changes to (6) made by Ch. 532.

Cross-References

Youth Court and Department records — notification of school, 41-5-215.

Petition — form and content, 41-5-1402.

Right to counsel, 41-5-1413.

Sentences that may be imposed — commitment to Department of Corrections — 5-year limit, 46-18-201.

Commutation of sentence to state prison and transfer to youth correctional facility, 52-5-111.

Adult offenders — Montana State Prison, Title 53, ch. 30, part 1.

41-5-207. Renumbered 41-5-111. Sec. 47, Ch. 286, L. 1997.

41-5-208. Transfer of supervisory responsibility to district court after juvenile disposition — nonextended jurisdiction and nontransferred cases. (1) After adjudication by the court of a case that was not transferred to district court under 41-5-206 and that was not prosecuted as an extended jurisdiction juvenile prosecution under part 16 of this chapter, the court may, on the youth's motion or the motion of the county attorney, transfer jurisdiction to the district court and order the transfer of supervisory responsibility from juvenile probation services to adult probation services. A transfer under this section may be made to ensure continued compliance with the court's disposition under 41-5-1512 or 41-5-1513 and may be made at any time after a youth reaches 18 years of age but before the youth reaches 21 years of age.

(2) Before transfer, the court shall hold a hearing on whether the transfer should be made. The hearing must be held in conformity with the rules on a hearing on a petition alleging delinquency, except that the hearing must be conducted by the court without a jury. The court shall give the youth, the youth's counsel, and the youth's parents, guardian, or custodian notice in writing of the time, place, and purpose of the hearing at least 10 days before the hearing. At the hearing, the youth is entitled to receive:

(a) written notice of the motion to transfer;

(b) an opportunity to be heard in person and to present witnesses and evidence;

(c) a written statement by the court of the evidence relied on and reasons for the transfer;

(d) the right to cross-examine witnesses, unless the court finds good cause for not allowing confrontation; and

(e) the right to counsel.

(3) After the hearing, if the court finds by a preponderance of the evidence that transfer of continuing supervisory responsibility to the district court is appropriate, the court shall order the transfer.

(4) If a youth whose case has been transferred to district court under this section violates a disposition previously imposed under 41-5-1512 or 41-5-1513, the district court may, after hearing, impose conditions as provided under 46-18-201 through 46-18-203.

(5) If, at the time of transfer, the youth is incarcerated in a state youth correctional facility, the district court may order that the youth, after reaching 18 years of age:

(a) be incarcerated in a state adult correctional facility, boot camp, or prerelease center; or

(b) be supervised by the department.

(6) The district court's jurisdiction over a case transferred under this section terminates when the youth reaches 25 years of age.

History: En. Sec. 6, Ch. 438, L. 1995; amd. Sec. 4, Ch. 286, L. 1997; amd. Sec. 4, Ch. 498, L. 1997; amd. Sec. 19, Ch. 550, L. 1997; amd. Sec. 3, Ch. 537, L. 1999.

Compiler's Comments

1999 Amendment: Chapter 537 in middle of first sentence in (1) substituted "part 16" for "part 11". Amendment effective April 30, 1999.

Cross-References

State youth correctional facilities — jurisdiction of Department to age 18, 52-5-101.

41-5-209 through 41-5-214 reserved.

41-5-215. Youth court and department records — notification of school. (1) Reports of preliminary inquiries, petitions, motions, other filed pleadings, court findings, verdicts, and orders and decrees on file with the clerk of court are public records and are open to public inspection until the records are sealed under 41-5-216.

(2) Social, medical, and psychological records, youth assessment materials, predispositional studies, and supervision records of probationers are open only to the following:

(a) the youth court and its professional staff;

(b) representatives of any agency providing supervision and having legal custody of a youth;

(c) any other person, by order of the court, having a legitimate interest in the case or in the work of the court;

(d) any court and its probation and other professional staff or the attorney for a convicted party who had been a party to proceedings in the youth court when considering the sentence to be imposed upon the party;

(e) the county attorney;

(f) the youth who is the subject of the report or record, after emancipation or reaching the age of majority;

(g) a member of a county interdisciplinary child information team formed under 52-2-211 who is not listed in this subsection (2);

(h) members of a local interagency staffing group provided for in 52-2-203;

(i) persons allowed access to the records referred to under 45-5-624(7); and

(j) persons allowed access under 42-3-203.

(3) (a) Notwithstanding the requirements of 20-5-321(1)(d) or (1)(e) and subject to the provisions of subsection (3)(b), the youth court shall notify the school district that the youth presently attends or the school district that the youth has applied to attend of a youth's suspected drug use or criminal activity if after an investigation has been completed:

(i) the youth has admitted the allegation or a petition has been filed with the youth court; and

(ii) a juvenile probation officer has reason to believe that a youth is currently involved with drug use or other criminal activity that has a bearing on the safety of children.

(b) Notification under subsection (3)(a) may not be given for status offenses.

(c) A school district may not refuse to accept the student if refusal violates the federal Individuals With Disabilities Education Act or the federal Americans With Disabilities Act of 1990.

(4) In all cases, a victim is entitled to all information concerning the identity and disposition of the youth, as provided in 41-5-1416.

(5) The identity of a youth who for the second or subsequent time admits violating or is adjudicated as having violated a statute must be disclosed by youth court officials to the administrative officials of the school in which the youth is a student. The administrative officials may enforce school disciplinary procedures that existed at the time of the admission or adjudication. The information may not be further disclosed and may not be made part of the student's permanent records.

(6) The school district may disclose, without consent, personally identifiable information from an education record of a pupil to the youth court and law enforcement authorities pertaining to violations of the Montana Youth Court Act or criminal laws by the pupil. The youth court or law enforcement authorities receiving the information shall certify in writing to the school district that the information will not be disclosed to any other party except as provided under state law without the prior consent of the parent or guardian of the pupil.

(7) Any part of records information secured from records listed in subsection (2), when presented to and used by the court in a proceeding under this chapter, must also be made available to the counsel for the parties to the proceedings.

History: En. 10-1231 by Sec. 31, Ch. 329, L. 1974; R.C.M. 1947, 10-1231; amd. Sec. 1, Ch. 507, L. 1979; amd. Sec. 13, Ch. 515, L. 1987; amd. Sec. 64, Ch. 609, L. 1987; amd. Sec. 4, Ch. 510, L. 1991; amd. Sec. 7, Ch. 655, L. 1991; amd. Sec. 4, Ch. 466, L. 1995; amd. Sec. 4, Ch. 481, L. 1995; amd. Sec. 1, Ch. 450, L. 1997; amd. Sec. 167, Ch. 480, L. 1997; amd. Sec. 46, Ch. 550, L. 1997; Sec. 41-5-603, MCA 1995; redes. 41-5-215 by Sec. 47, Ch. 286, L. 1997; amd. Sec. 2, Ch. 106, L. 1999; amd. Sec. 1, Ch. 564, L. 1999.

Compiler's Comments

1999 Amendments — Composite Section: Chapter 106 in (1) at beginning deleted "Except as provided in subsection (2), all youth court records on file with the clerk of court, including" and after "decrees" inserted "on file with the clerk of court are public records and"; deleted former (6) that read: "(6) After youth court and department records, reports of preliminary inquiries, predispositional studies, and supervision records of probationers are sealed, they are not open to inspection except, upon order of the youth court, for good cause to:

(a) those persons and agencies listed in subsection (2); and

(b) adult probation professional staff preparing a presentence report on a youth who has reached the age of majority"; and made minor changes in style. Amendment effective October 1, 1999.

Chapter 564 at beginning of (1) substituted "Reports" for "Except as provided in subsection (2), all youth court records on file with the clerk of court, including reports"; inserted (3) requiring youth court to notify school of youth's suspected drug use or criminal activity; inserted (6) allowing school district to disclose personally identifiable information to youth and law enforcement; in (8)(a) inserted reference to subsection (3) (amendment by Ch. 106 rendered the amendment void); and made minor changes in style. Amendment effective October 1, 1999.

41-5-216. Disposition of youth court, law enforcement, and department records. (1) Youth court records, law enforcement records, and department records that are not exempt from sealing under subsections (4) and (6) and that pertain to a youth covered by this chapter must be physically sealed 3 years after supervision for an offense ends. In those cases in which jurisdiction of the court or any agency is extended beyond the youth's 18th birthday, the records must be physically sealed upon termination of the extended jurisdiction.

(2) Except as provided in subsection (6), when the records pertaining to a youth pursuant to this section are sealed, an agency, other than the

department, that has in its possession copies of the sealed records shall destroy the copies of the records. Anyone violating the provisions of this subsection is subject to contempt of court.

(3) Except as provided in subsection (6), this section does not prohibit the destruction of records with the consent of the youth court judge or county attorney after 10 years from the date of sealing.

(4) The requirements for sealed records in this section do not apply to fingerprints, DNA records, photographs, youth traffic records, records in any case in which the youth did not fulfill all requirements of the court's judgment or disposition, or records referred to in 42-3-203 or 45-5-624(7).

(5) After youth court records, law enforcement records, and department records are sealed, they are not open to inspection except, upon order of the youth court, for good cause, including when a youth commits a new offense, to:

(a) those persons and agencies listed in 41-5-215(2); and

(b) adult probation professional staff preparing a presentence report on a youth who has reached the age of majority.

(6) (a) When youth court records, law enforcement records, and department records are sealed under subsection (1), the electronic records of the management information system maintained by the department of public health and human services relating to the youth whose records are being sealed must be preserved for the express purpose of research and program evaluation as provided in subsection (6)(b).

(b) The department of public health and human services shall disassociate the offense and disposition information from the name of the youth in the management information system. The offense and disposition information must be maintained separately and may be used only:

(i) for research and program evaluation authorized by the department of public health and human services and subject to any applicable laws; and

(ii) as provided in Title 5, chapter 13.

History: En. 10-1232 by Sec. 32, Ch. 329, L. 1974; amd. Sec. 1, Ch. 59, L. 1975; R.C.M. 1947, 10-1232; amd. Sec. 2, Ch. 507, L. 1979; amd. Sec. 4, Ch. 469, L. 1981; amd. Sec. 14, Ch. 515, L. 1987; amd. Sec. 8, Ch. 251, L. 1995; amd. Sec. 10, Ch. 466, L. 1995; amd. Sec. 5, Ch. 481, L. 1995; amd. Sec. 9, Ch. 528, L. 1995; amd. Sec. 168, Ch. 480, L. 1997; Sec. 41-5-604, MCA 1995; redes. 41-5-216 by Sec. 47, Ch. 286, L. 1997; amd. Sec. 3, Ch. 106, L. 1999.

Compiler's Comments

1999 Amendment: Chapter 106 in (1) at beginning deleted "Except as provided in subsections (2) and (5)", after "enforcement records" inserted "and department records that are not exempt from sealing under subsections (4) and (6) and that pertain", deleted former second sentence that read: "The records may be unsealed if a new offense is committed", and in second sentence after "records" deleted "and files not exempt from sealing under subsection (5)"; in (2) at beginning substituted exception clause for "Upon the physical sealing of" and near middle after "agency" substituted "other than the department" for "or department"; at beginning of (3) inserted exception clause; inserted (5) regarding sealing of youth court and other records and providing exception for inspection to certain persons or agencies upon showing of good cause or upon commission of new offense; inserted (6) regarding maintenance and use of electronic records of the management information system; and made minor changes in style. Amendment effective October 1, 1999.

41-5-217. Repealed. Sec. 4, Ch. 106, L. 1999.

History: En. Sec. 1, Ch. 466, L. 1995; amd. Sec. 47, Ch. 550, L. 1997; Sec. 41-5-605, MCA 1995; redes. 41-5-217 by Sec. 47, Ch. 286, L. 1997.

Part 3
Custody and Detention

41-5-301. Renumbered 41-5-1201. Sec. 47, Ch. 286, L. 1997.

41-5-302. Renumbered 41-3-1111. Sec. 31, Ch. 465, L. 1983.

41-5-303 through 41-5-307. Renumbered. Sec. 47, Ch. 286, L. 1997.

Compiler's Comments

Sections Renumbered:

41-5-303.	Renumbered 41-5-331.
41-5-304.	Renumbered 41-5-1206.
41-5-305.	Renumbered 41-5-341.
41-5-306.	Renumbered 41-5-344.
41-5-307.	Renumbered 41-5-322.

41-5-308. Repealed. Secs. 14, 16, Ch. 547, L. 1991.

History: En. Sec. 2, Ch. 475, L. 1987; amd. Sec. 6, Ch. 434, L. 1989; amd. Sec. 22, Ch. 799, L. 1991.

41-5-309. Renumbered 41-5-323. Sec. 47, Ch. 286, L. 1997.

41-5-310. Repealed. Sec. 46, Ch. 286, L. 1997; Sec. 74, Ch. 550, L. 1997.

History: En. Sec. 1, Ch. 548, L. 1991.

41-5-311. Renumbered 41-5-349. Sec. 47, Ch. 286, L. 1997.

41-5-312. Repealed. Sec. 46, Ch. 286, L. 1997.

History: En. Sec. 4, Ch. 547, L. 1991.

41-5-313. Renumbered 41-5-350. Sec. 47, Ch. 286, L. 1997.

41-5-314. Renumbered 41-5-321. Sec. 47, Ch. 286, L. 1997.

41-5-315. Repealed. Sec. 27, Ch. 799, L. 1991.

History: En. Sec. 12, Ch. 434, L. 1989.

41-5-316. Repealed. Sec. 27, Ch. 799, L. 1991.

History: En. Sec. 13, Ch. 434, L. 1989.

41-5-317 through 41-5-320 reserved.

41-5-321. Taking into custody. (1) A youth may be taken into custody under the following circumstances:

(a) by a law enforcement officer pursuant to a lawful order or process of any court;

(b) by a law enforcement officer pursuant to a lawful arrest for violation of the law;

(c) by a law enforcement officer, agent of the department, county attorney, or a person or physician treating a youth when there is reason to believe the youth is a youth in need of care and that the residence of the youth or the custody by the person legally responsible for the youth presents an imminent danger to the life or health of the youth;

(d) by a juvenile home arrest officer or an officer listed in subsections (1)(a) through (1)(c) if a youth placed under a home arrest program has violated a condition of the placement and the home arrest officer or law enforcement officer has direct knowledge of the violation or a juvenile probation officer has provided the juvenile home arrest officer notice of a violation.

(2) The taking of a youth into custody is not an arrest except for the purpose of determining the validity of the taking under the constitution of Montana or the United States.

History: En. 10-1211 by Sec. 11, Ch. 329, L. 1974; R.C.M. 1947, 10-1211; MCA 1981, 41-5-302; redes. 41-3-1111 by Sec. 31(4), Ch. 465, L. 1983; Sec. 41-3-1111, MCA 1989; redes. 41-5-314 by Sec. 15, Ch. 547, L. 1991; Sec. 41-5-314, MCA 1995; redes. 41-5-321 by Sec. 47, Ch. 286, L. 1997; amd. Sec. 2, Ch. 326, L. 1999.

Compiler's Comments

1999 Amendment: Chapter 326 inserted (1)(d) providing for taking a youth into custody for violation of condition of home arrest placement; and made minor changes in style. Amendment effective July 1, 1999.

41-5-322. Release from custody — detention — shelter care. (1) Whenever a peace officer believes, on reasonable grounds, that a youth can be released to a responsible person, the peace officer may release the youth to that person upon receiving a written promise from the person to bring the youth before the probation officer at a time and place specified in the written promise, or a peace officer may release the youth under any other reasonable circumstances.

(2) Whenever the peace officer believes, on reasonable grounds, that the youth must be detained, the peace officer shall notify the probation officer immediately and shall, as soon as practicable, provide the probation officer with a written report of the peace officer's reasons for holding the youth in detention. If it is necessary to hold the youth pending appearance before the youth court, then the youth must be held in a place of detention, as provided in 41-5-348, that is approved by the youth court.

(3) If the peace officer believes that the youth must be sheltered, the peace officer shall notify the probation officer immediately and shall provide a written report of the peace officer's reasons for placing the youth in shelter care. If the youth is then held, the youth must be placed in a shelter care facility approved by the youth court.

History: En. 10-1213 by Sec. 13, Ch. 329, L. 1974; amd. Sec. 1, Ch. 348, L. 1975; amd. Sec. 5, Ch. 571, L. 1977; R.C.M. 1947, 10-1213; amd. Sec. 7, Ch. 547, L. 1991; amd. Sec. 22, Ch. 286, L. 1997; Sec. 41-5-307, MCA 1995; redes. 41-5-322 by Sec. 47, Ch. 286, L. 1997.

41-5-323. Bail. A youth placed in detention or shelter care may be released on bail. The court shall use the provisions of Title 46, chapter 9, as guidance. In determining the amount of bail, the court shall consider the financial ability of the youth and the parents or legal custodian of the youth.

History: En. Sec. 3, Ch. 475, L. 1987; amd. Sec. 8, Ch. 547, L. 1991; Sec. 41-5-309, MCA 1995; redes. 41-5-323 by Sec. 47, Ch. 286, L. 1997.

41-5-324 through 41-5-330 reserved.

41-5-331. Rights of youth taken into custody — questioning — waiver of rights. (1) When a youth is taken into custody for questioning upon a matter that could result in a petition alleging that the youth is either a delinquent youth or a youth in need of intervention, the following requirements must be met:

(a) The youth must be advised of the youth's right against self-incrimination and the youth's right to counsel.

(b) The investigating officer, probation officer, or person assigned to give notice shall immediately notify the parents, guardian, or legal custodian of the youth that the youth has been taken into custody, the reasons for taking the youth into custody, and where the youth is being held. If the parents, guardian, or legal custodian cannot be found through diligent efforts, a close relative or friend chosen by the youth must be notified.

(2) A youth may waive the rights listed in subsection (1) under the following situations:

(a) when the youth is 16 years of age or older, the youth may make an effective waiver;

(b) when the youth is under 16 years of age and the youth and the youth's parent or guardian agree, they may make an effective waiver; or

(c) when the youth is under 16 years of age and the youth and the youth's parent or guardian do not agree, the youth may make an effective waiver only with advice of counsel.

History: En. 10-1218 by Sec. 18, Ch. 329, L. 1974; amd. Sec. 6, Ch. 100, L. 1977; amd. Sec. 9, Ch. 571, L. 1977; R.C.M. 1947, 10-1218(1)(a), (1)(b); amd. Sec. 1, Ch. 385, L. 1979; amd. Sec. 7, Ch. 475, L. 1987; amd. Sec. 5, Ch. 515, L. 1987; (2) thru (6) En. Sec. 1, Ch. 475, L. 1987; amd. Sec. 2, Ch. 271, L. 1989; amd. Sec. 3, Ch. 547, L. 1991; amd. Sec. 11, Ch. 286, L. 1997; amd. Sec. 76, Ch. 550, L. 1997; Sec. 41-5-303, MCA 1995; redes. 41-5-331 by Sec. 47, Ch. 286, L. 1997.

41-5-332. Custody — hearing for probable cause. (1) When a youth is taken into custody for questioning, a hearing to determine whether there is probable cause to believe the youth is a delinquent youth or a youth in need of intervention must be held within 24 hours, excluding weekends and legal holidays. A hearing is not required if the youth is released prior to the time of the required hearing.

(2) When a youth is taken into custody for a violation of placement under a home arrest program, a hearing to determine whether a violation occurred must be held within 24 hours, excluding weekends and holidays.

(3) The probable cause hearing required under subsection (1) may be held by the youth court, a justice of the peace, a municipal or city judge, or a magistrate having jurisdiction in the case as provided in 41-5-203. If the probable cause hearing is held by a justice of the peace, a municipal or city judge, or a magistrate, a record of the hearing must be made by a court reporter or by a tape recording of the hearing.

(4) A probable cause hearing may be conducted by telephone if other means of conducting the hearing are impractical. All written orders and findings of the court in a hearing conducted by telephone must bear the name of the judge or magistrate presiding in the case and the hour and date the order or findings were issued.

(5) A hearing is not required for a youth placed in detention for an alleged parole violation.

History: En. Sec. 12, Ch. 286, L. 1997; amd. Sec. 76, Ch. 550, L. 1997; amd. Sec. 3, Ch. 326, L. 1999; amd. Sec. 4, Ch. 532, L. 1999.

Compiler's Comments

1999 Amendments — Composite Section: Chapter 326 inserted (2) providing for a hearing for youth taken into custody for violation of placement under home arrest program; and made minor changes in style. Amendment effective July 1, 1999.

Chapter 532 inserted (5) providing that hearing is not required for detention for alleged parole violation. Amendment effective October 1, 1999.

41-5-333. Custody — hearing for probable cause — procedure. (1) At a probable cause hearing held pursuant to 41-5-332, the youth must be informed of the youth's constitutional rights and the youth's rights under this chapter.

(2) A parent, guardian, or custodian of the youth may be held in contempt of court for failing to be present at or to participate in the probable cause hearing unless the parent, guardian, or custodian:

(a) cannot be located through diligent efforts of the investigating peace officer or peace officers; or

(b) is excused by the court for good cause.

(3) At the probable cause hearing, a guardian ad litem may be appointed as provided in 41-5-1411.

History: **En. Sec. 13, Ch. 286, L. 1997.**

41-5-334. Custody — hearing for probable cause — determinations — detention — release. (1) If, at a probable cause hearing held pursuant to 41-5-332, it is determined that there is probable cause to believe that the youth is a delinquent youth or a youth in need of intervention, the court having jurisdiction in the case shall determine whether the youth should be retained in custody. If the court determines that continued custody of the youth is necessary and if the youth meets the criteria in 41-5-341 through 41-5-343, the youth may be placed in a detention facility, a youth assessment center, or a shelter care facility as provided in 41-5-345 through 41-5-348 but may not be placed in a jail or other facility used for the confinement of adults accused or convicted of criminal offenses.

(2) If probable cause is not found or if a probable cause hearing is not held within the time specified in 41-5-332, the youth must be immediately released from custody.

History: **En. Secs. 14, 49(3)(f), Ch. 286, L. 1997.**

41-5-335 through 41-5-340 reserved.

41-5-341. Criteria for placement of youth in secure detention facilities. A youth may be placed in a secure detention facility only if the youth:

(1) has allegedly committed an act that if committed by an adult would constitute a criminal offense and the alleged offense is one specified in 41-5-206;

(2) is alleged to be a delinquent youth and:

(a) has escaped from a correctional facility or secure detention facility;

(b) has violated a valid court order or a parole agreement;

(c) the youth's detention is required to protect persons or property;

(d) the youth has pending court or administrative action or is awaiting a transfer to another jurisdiction and may abscond or be removed from the jurisdiction of the court;

(e) there are not adequate assurances that the youth will appear for court when required; or

(f) the youth meets additional criteria for secure detention established by the youth court in the judicial district that has current jurisdiction over the youth; or

(3) has been adjudicated delinquent and is awaiting final disposition of the youth's case.

History: **En. 10-1212 by Sec. 12, Ch. 329, L. 1974; amd. Sec. 4, Ch. 571, L. 1977; R.C.M. 1947, 10-1212; amd. Sec. 1, Ch. 689, L. 1985; amd. Sec. 8, Ch. 475, L. 1987; amd. Sec. 7, Ch. 515, L. 1987; amd. Sec. 1, Ch. 610, L. 1987; amd. Sec. 3, Ch. 548, L. 1991; amd. Secs.**

15, 49(3)(i), Ch. 286, L. 1997; Sec. 41-5-305, MCA 1995; redes. 41-5-341 by Sec. 47, Ch. 286, L. 1997.

41-5-342. Criteria for placement of youth in shelter care facilities. A youth may be placed in a shelter care facility only if:

(1) the youth and the youth's family need shelter care to address their problematic situation and it is not possible for the youth to remain at home;

(2) the youth needs to be protected from physical or emotional harm;

(3) the youth needs to be deterred or prevented from immediate repetition of troubling behavior;

(4) shelter care is necessary to assess the youth and the youth's environment;

(5) shelter care is necessary to provide adequate time for case planning and disposition; or

(6) shelter care is necessary to intervene in a crisis situation and provide intensive services or attention that might alleviate the problem and reunite the family.

History: En. Sec. 16, Ch. 286, L. 1997.

41-5-343. Criteria for placement of youth in youth assessment centers. A youth may be placed in a youth assessment center only if:

(1) the youth meets the requirements for placement in shelter care;

(2) the youth has not committed an act that would be a felony offense if committed by an adult;

(3) the youth needs an alternative, staff-secured site for evaluation and assessment of the youth's need for services;

(4) the youth needs to be held accountable for the youth's actions with structured programming; and

(5) the youth meets qualifications as outlined by the placement guidelines that are determined by the department and coordinated with the guidelines used by the youth placement committees.

History: En. Sec. 49(3)(h), Ch. 286, L. 1997.

41-5-344. Limitation on placement of youth in need of care. A youth alleged to be a youth in need of care may be placed only by the department of public health and human services as provided in Title 41, chapter 3, and may not be placed in a youth assessment center, youth detention facility, jail, or other facility intended or used for the confinement of adults accused or convicted of criminal offenses.

History: En. 10-1214 by Sec. 14, Ch. 329, L. 1974; amd. Sec. 6, Ch. 571, L. 1977; R.C.M. 1947, 10-1214; amd. Sec. 3, Ch. 465, L. 1983; amd. Sec. 2, Ch. 737, L. 1985; amd. Sec. 1, Ch. 11, Sp. L. June 1986; amd. Sec. 9, Ch. 475, L. 1987; amd. Sec. 5, Ch. 434, L. 1989; amd. Sec. 7, Ch. 105, L. 1991; amd. Sec. 5, Ch. 547, L. 1991; amd. Secs. 4, 5, Ch. 548, L. 1991; amd. Secs. 20, 21, Ch. 799, L. 1991; amd. Sec. 62, Ch. 10, L. 1993; amd. Sec. 5, Ch. 528, L. 1995; amd. Secs. 17, 49(3)(f), Ch. 286, L. 1997; Sec. 41-5-306, MCA 1995; redes. 41-5-344 by Sec. 47, Ch. 286, L. 1997.

41-5-345. Limitation on placement of youth in need of intervention. (1) After a probable cause hearing provided for in 41-5-332, a youth alleged to be a youth in need of intervention may be placed only in shelter care, as provided in 41-5-347.

(2) A youth alleged or found to be a youth in need of intervention may not be placed in a jail, secure detention facility, or correctional facility.

History: **En. Sec. 18, Ch. 286, L. 1997; amd. Sec. 76, Ch. 550, L. 1997.**

41-5-346. Limitation on placement of delinquent youth. After a probable cause hearing provided for in 41-5-332, a youth alleged to be a delinquent youth may be placed only:

(1) in shelter care, in the facilities described in 41-5-347;

(2) under home arrest as provided in 41-5-347;

(3) in detention, as provided in 41-5-348; or

(4) in a community youth court program.

History: **En. Sec. 19, Ch. 286, L. 1997.**

41-5-347. Place of shelter care. Placement in shelter care means placement in one of the following:

(1) in a licensed youth care facility as defined in 41-3-1102; or

(2) under home arrest, with or without a monitoring device, as provided in Title 46, chapter 18, part 10, either in the youth's own home or in a facility described in subsection (1).

History: **En. Secs. 20, 49(3)(f), Ch. 286, L. 1997; amd. Sec. 76, Ch. 51, L. 1999.**

Compiler's Comments

1999 Amendment: Chapter 51 deleted former (2) that read: "(2) All money in the account, except any amount required to be returned to federal or county sources, is allocated to the department of public health and human services to carry out its duties under 52-1-103"; and made minor changes in style. Amendment effective March 15, 1999.

41-5-348. Place of detention. Placement in detention means placement in one of the following facilities:

(1) a short-term detention center;

(2) a youth detention facility, including a regional detention facility; or

(3) a secure detention facility outside the state or operated by an Indian tribe that is under contract to the state or a subdivision of the state and that is in substantial compliance with the licensing requirements contained in rules adopted by the department.

History: **En. Sec. 21, Ch. 286, L. 1997; amd. Sec. 5, Ch. 532, L. 1999.**

Compiler's Comments

1999 Amendment: Chapter 532 inserted (3) concerning facilities outside Montana or operated by an Indian tribe; and made minor changes in style. Amendment effective October 1, 1999.

41-5-349. Youth not to be detained in jail — exceptions — time limitations. (1) A youth may not be detained or otherwise placed in a jail or other adult detention facility except as provided in 41-5-206 and this section.

(2) A youth who has allegedly committed an offense that if committed by an adult would constitute a criminal offense may be temporarily detained in a jail or other adult detention facility for a period not to exceed:

(a) 6 hours, but in no case overnight, for the purpose of identification, processing, or transfer of the youth to an appropriate detention facility or shelter care facility; or

(b) 24 hours, excluding weekends and legal holidays, if the youth is awaiting a probable cause hearing pursuant to 41-5-332.

(3) The exception provided for in subsection (2)(b) applies only if:

(a) the court having jurisdiction over the youth is outside a metropolitan statistical area;

(b) alternative facilities are not available or alternative facilities do not provide adequate security; and

(c) the youth is kept in an area that provides physical as well as sight and sound separation from adults accused or convicted of criminal offenses.

(4) Whenever, despite all good faith efforts to comply with the time limitations specified in subsection (2), the limitations are exceeded, this circumstance does not serve as grounds for dismissal of the case nor does this circumstance constitute a defense in a subsequent delinquency or criminal proceeding.

History: En. Sec. 1, Ch. 547, L. 1991; amd. Sec. 49, Ch. 18, L. 1995; amd. Sec. 23, Ch. 286, L. 1997; Sec. 41-5-311, MCA 1995; redes. 41-5-349 by Sec. 47, Ch. 286, L. 1997.

41-5-350. Permitted acts — detention of youth in law enforcement facilities — criteria. (1) Nothing in this chapter precludes the detention of youth in a police station or other law enforcement facility that is attached to or part of a jail if:

(a) the area where the youth is held is an unlocked, multipurpose area, such as a lobby, office, interrogation room, or other area that is not designated or used as a secure detention area or that is not part of a secure detention area, or, if part of such an area, that is used only for the purpose of processing, such as a booking room;

(b) the youth is not secured to a cuffing rail or other stationary object during the period of detention;

(c) use of the area is limited to ensuring custody of the youth for the purpose of identification, processing, or transfer of the youth to an appropriate detention or shelter care facility;

(d) the area is not designed or intended to be used for residential purposes; and

(e) the youth is under continuous visual supervision by a law enforcement officer or by facility staff during the period of time that the youth is held in detention.

(2) For purposes of this section, “secure detention” means the detention of youth or confinement of adults accused or convicted of criminal offenses in a physically restricting setting, including but not limited to a locked room or set of rooms or a cell designed to prevent a youth or adult from departing at will.

History: En. Sec. 7, Ch. 548, L. 1991; Sec. 41-5-313, MCA 1995; redes. 41-5-350 by Sec. 47, Ch. 286, L. 1997.

41-5-351 through 41-5-354 reserved.

41-5-355. Excessive juvenile population — confinement of juveniles in alternate placements. (1) The department shall determine the capacity for state youth correctional facilities. The department shall notify all district courts, sheriffs, and youth courts of the capacity for each state youth correctional facility by sending a report to each annually.

(2) If the population of a state youth correctional facility exceeds the capacity established by the department, the director of the department may declare that the capacity has been exceeded and temporarily stop admissions to the facility. The director shall notify each district court, sheriff, and youth court that delinquent or criminally convicted youth will not be accepted by the

department for admission into the facility until the population is reduced to less than the capacity determined by the department in subsection (1).

(3) If the director of the department declares that the capacity has been exceeded, the department shall place delinquent youth committed to a state youth correctional facility or criminally convicted youth in alternate placements based on the needs of the delinquent youth or criminally convicted youth. If a youth is denied placement in a state youth correctional facility under this section, the department shall inform and seek approval of the district court of the intended alternative placement prior to placing the youth.

(4) The department may enter into contracts with the federal government, other states, local governments, public or private corporations, and other entities that have suitable facilities for confining delinquent youth or criminally convicted youth committed to the department, either because a state youth correctional facility has exceeded its capacity or because the department has no youth correctional facility that is adequate for certain delinquent youth or criminally convicted youth.

History: En. Sec. 16, Ch. 532, L. 1999.

Compiler's Comments

Effective Date: This section is effective October 1, 1999.

Part 4

Informal Proceeding (Renumbered. Sec. 47, Ch. 286, L. 1997)

Part Compiler's Comments

Sections Renumbered:

41-5-401. Renumbered 41-5-1302.

41-5-402. Renumbered 41-5-1303.

41-5-403. Renumbered 41-5-1304.

Part 5

Proceeding on Petition (Renumbered and Repealed)

Part Compiler's Comments

Sections Renumbered and Repealed:

41-5-501. Renumbered 41-5-1402 by Sec. 47, Ch. 286, L. 1997.

41-5-502. Renumbered 41-5-1403 by Sec. 47, Ch. 286, L. 1997.

41-5-503. Renumbered 41-5-1404 by Sec. 47, Ch. 286, L. 1997.

41-5-504 through 41-5-510 reserved.

41-5-511. Renumbered 41-5-1413 by Sec. 47, Ch. 286, L. 1997.

41-5-512. Renumbered 41-5-1411 by Sec. 47, Ch. 286, L. 1997.

41-5-513. Renumbered 41-5-1414 by Sec. 47, Ch. 286, L. 1997.

41-5-514. Renumbered 41-5-1415 by Sec. 47, Ch. 286, L. 1997.

41-5-515. Renumbered 41-5-1412 by Sec. 47, Ch. 286, L. 1997.

41-5-516. Repealed. Sec. 16, Ch. 515, L. 1987.

41-5-517 through 41-5-520 reserved.

41-5-521. Renumbered 41-5-1502 by Sec. 47, Ch. 286, L. 1997.

41-5-522. Renumbered 41-5-1511 by Sec. 47, Ch. 286, L. 1997.

41-5-523. Renumbered 41-5-1512 by Sec. 47, Ch. 286, L. 1997.

41-5-524. Renumbered 41-5-1501 by Sec. 47, Ch. 286, L. 1997.

41-5-525. Renumbered 41-5-121 by Sec. 47, Ch. 286, L. 1997.

41-5-526. Renumbered 41-5-122 by Sec. 47, Ch. 286, L. 1997.

41-5-527. Renumbered 41-5-123 by Sec. 47, Ch. 286, L. 1997.

41-5-528. Renumbered 41-5-124 by Sec. 47, Ch. 286, L. 1997.

41-5-529. Renumbered 41-5-125 by Sec. 47, Ch. 286, L. 1997.

41-5-530. Renumbered 41-5-112 by Sec. 47, Ch. 286, L. 1997.

41-5-531. Renumbered 41-5-1421 by Sec. 47, Ch. 286, L. 1997.

41-5-532. Renumbered 41-5-1423 by Sec. 47, Ch. 286, L. 1997.

41-5-533. Renumbered 41-5-1431 by Sec. 47, Ch. 286, L. 1997.

History of Repealed Section:

41-5-516. En. 10-1219 by Sec. 19, Ch. 329, L. 1974; R.C.M. 1947, 10-1219; amd. Sec. 1, Ch. 215, L. 1979; amd. Sec. 1, Ch. 158, L. 1983.

Part 6

Confidentiality of Proceedings — Records (Renumbered and Repealed)

Part Compiler's Comments

Sections Renumbered and Repealed:

41-5-601. Repealed. Sec. 8, Ch. 466, L. 1995.

41-5-602. Repealed. Sec. 8, Ch. 466, L. 1995.

41-5-603. Renumbered 41-5-215 by Sec. 47, Ch. 286, L. 1997.

41-5-604. Renumbered 41-5-216 by Sec. 47, Ch. 286, L. 1997.

41-5-605. Renumbered 41-5-217 by Sec. 47, Ch. 286, L. 1997.

Histories of Repealed Sections:

41-5-601. En. 10-1241 by Sec. 41, Ch. 329, L. 1974; R.C.M. 1947, 10-1241; amd. Sec. 2, Ch. 469, L. 1981; amd. Sec. 10, Ch. 15, L. 1985; amd. Sec. 1, Ch. 462, L. 1987; amd. Sec. 12, Ch. 515, L. 1987.

41-5-602. En. 10-1230 by Sec. 30, Ch. 329, L. 1974; amd. Sec. 10, Ch. 100, L. 1977; R.C.M. 1947, 10-1230; amd. Sec. 3, Ch. 469, L. 1981; amd. Sec. 63, Ch. 609, L. 1987; amd. Sec. 3, Ch. 510, L. 1991; amd. Sec. 6, Ch. 655, L. 1991.

Part 7

Probation Officers (Renumbered. Sec. 47, Ch. 286, L. 1997)

Part Compiler's Comments

Sections Renumbered:

41-5-701.	Renumbered 41-5-1701.
41-5-702.	Renumbered 41-5-1702.
41-5-703.	Renumbered 41-5-1703.
41-5-704.	Renumbered 41-5-1704.
41-5-705.	Renumbered 41-5-1705.
41-5-706.	Renumbered 41-5-1706.

Part 8

Custodial Care (Renumbered and Repealed)

41-5-801. Renumbered 41-3-1121. Sec. 31, Ch. 465, L. 1983.

41-5-802. Renumbered 41-5-1801. Sec. 47, Ch. 286, L. 1997.

41-5-803. Repealed. Sec. 32, Ch. 465, L. 1983.

History: En. Sec. 14, Ch. 227, L. 1943; amd. Sec. 7, Ch. 276, L. 1947; Sec. 10-615, R.C.M. 1947; amd. and redes. 10-1238 by Sec. 38, Ch. 329, L. 1974; amd. Sec. 8, Ch. 450, L. 1977; R.C.M. 1947, 10-1238; amd. Sec. 10, Ch. 567, L. 1979.

41-5-804. Renumbered 41-3-1105. Sec. 31, Ch. 465, L. 1983.

41-5-805. Combined with 41-3-405, renumbered 41-3-1123. Sec. 31, Ch. 465, L. 1983.

41-5-806. Combined with 41-3-407, renumbered 41-3-1124. Sec. 31, Ch. 465, L. 1983.

41-5-807. Renumbered 41-3-1115. Sec. 31, Ch. 465, L. 1983.

41-5-808. Repealed. Sec. 27, Ch. 799, L. 1991.

History: En. Sec. 4, Ch. 475, L. 1987; amd. Sec. 58, Ch. 83, L. 1989; amd. Sec. 9, Ch. 434, L. 1989.

41-5-809 through 41-5-814. Renumbered. Sec. 47, Ch. 286, L. 1997.

Compiler's Comments

Sections Renumbered:

41-5-809.	Renumbered 41-5-1802.
41-5-810.	Renumbered 41-5-1803.
41-5-811.	Renumbered 41-5-1804.
41-5-812.	Renumbered 41-5-1805.
41-5-813.	Renumbered 41-5-1806.
41-5-814.	Renumbered 41-5-1807.

Part 9

District Youth Guidance Homes (Repealed. Sec. 32, Ch. 465, L. 1983)

Part Compiler's Comments

Histories of Repealed Sections:

41-5-901. En. Sec. 1, Ch. 427, L. 1971; Sec. 10-1101, R.C.M. 1947; amd. and redes. 10-1242 by Sec. 42, Ch. 329, L. 1974; amd. Sec. 12, Ch. 100, L. 1977; amd. Sec 14, Ch. 571, L. 1977; R.C.M. 1947, 10-1242.

41-5-902. En. Sec. 10, Ch. 427, L. 1971; Sec. 10-1110, R.C.M. 1947; redes. 10-1251 by Sec. 51, Ch. 329, L. 1974; amd. Sec. 16, Ch. 100, L. 1977; R.C.M. 1947, 10-1251.

41-5-903. En. Sec. 3, Ch. 427, L. 1971; Sec. 10-1103, R.C.M. 1947; redes. 10-1244 by Sec. 44, Ch. 329, L. 1974; R.C.M. 1947, 10-1244.

41-5-904 through 41-5-910 reserved.

41-5-911. En. Sec. 8, Ch. 427, L. 1971; Sec. 10-1108, R.C.M. 1947; amd. and redes. 10-1249 by Sec. 49, Ch. 329, L. 1974; amd. Sec. 15, Ch. 100, L. 1977; amd. Sec. 9, Ch. 450, L. 1977; R.C.M. 1947, 10-1249.

41-5-912. En. Sec. 4, Ch. 427, L. 1971; Sec. 10-1104, R.C.M. 1947; amd. and redes. 10-1245 by Sec. 45, Ch. 329, L. 1974; R.C.M. 1947, 10-1245.

41-5-913. En. Sec. 11, Ch. 427, L. 1971; Sec. 10-1111, R.C.M. 1947; redes. 10-1252 by Sec. 52, Ch. 329, L. 1974; amd. Sec. 17, Ch. 100, L. 1977; R.C.M. 1947, 10-1252.

41-5-914 through 41-5-920 reserved.

41-5-921. En. Sec. 6, Ch. 427, L. 1971; Sec. 10-1106, R.C.M. 1947; amd. and redes. 10-1247 by Sec. 47, Ch. 329, L. 1974; R.C.M. 1947, 10-1247; amd. Sec. 1, Ch. 141, L. 1981.

41-5-922. En. Sec. 9, Ch. 427, L. 1971; Sec. 10-1109, R.C.M. 1947; amd. and redes. 10-1250 by Sec. 50, Ch. 329, L. 1974; R.C.M. 1947, 10-1250.

41-5-923. En. Sec. 5, Ch. 427, L. 1971; Sec. 10-1105, R.C.M. 1947; amd. and redes. 10-1246 by Sec. 46, Ch. 329, L. 1974; amd. Sec. 13, Ch. 100, L. 1977; R.C.M. 1947, 10-1246.

41-5-924. En. Sec. 7, Ch. 427, L. 1971; Sec. 10-1107, R.C.M. 1947; amd. and redes. 10-1248 by Sec. 48, Ch. 329, L. 1974; amd. Sec. 14, Ch. 100, L. 1977; R.C.M. 1947, 10-1248.

Part 10

State Grants for Youth Detention Services (Renumbered. Sec. 47, Ch. 286, L. 1997)

Part Compiler's Comments

Sections Renumbered:

41-5-1001.	Renumbered 41-5-1901.
41-5-1002.	Renumbered 41-5-1902.
41-5-1003.	Renumbered 41-5-1903.
41-5-1004.	Renumbered 41-5-1904.
41-5-1005.	Renumbered 41-5-1905.
41-5-1006.	Renumbered 41-5-1906.
41-5-1007.	Renumbered 41-5-1907.
41-5-1008.	Renumbered 41-5-1908.

Part 11

Extended Jurisdiction Prosecution Act (Renumbered. Sec. 47, Ch. 286, L. 1997)

Part Compiler's Comments

Sections Renumbered:

41-5-1101.	Renumbered 41-5-1601.
41-5-1102.	Renumbered 41-5-1602.
41-5-1103.	Renumbered 41-5-1603.
41-5-1104.	Renumbered 41-5-1604.
41-5-1105.	Renumbered 41-5-1605.

Part 12

Preliminary Investigation

41-5-1201. Preliminary inquiry — referral of youth in need of care. (1) Whenever the court receives information from an agency or person, including a parent or guardian of a youth, based upon reasonable grounds, that a youth is or appears to be a delinquent youth or a youth in need of intervention or that the youth is subject to a court order or consent order and has violated the terms of an order, a probation officer or an assessment officer shall make a preliminary inquiry into the matter.

(2) If the probation officer or assessment officer determines that the facts indicate that the youth is a youth in need of care, the matter must be immediately referred to the department of public health and human services.

History: En. 10-1209 by Sec. 9, Ch. 329, L. 1974; amd. Sec. 2, Ch. 571, L. 1977; R.C.M. 1947, 10-1209; amd. Sec. 4, Ch. 515, L. 1987; amd. Sec. 58, Ch. 609, L. 1987; amd. Sec. 1, Ch. 271, L. 1989; amd. Sec. 193, Ch. 546, L. 1995; amd. Sec. 1, Ch. 185, L. 1997; amd. Secs. 5, 49(3)(f), Ch. 286, L. 1997; Sec. 41-5-301, MCA 1995; redes. 41-5-1201 by Sec. 47, Ch. 286, L. 1997.

41-5-1202. Preliminary inquiry — procedure — youth assessment. (1) In conducting a preliminary inquiry under 41-5-1201, the probation officer or assessment officer shall:

(a) advise the youth of the youth's rights under this chapter and the constitutions of the state of Montana and the United States;

(b) determine whether the matter is within the jurisdiction of the court;

(c) determine, if the youth is in detention, a youth assessment center, or shelter care, whether detention, placement in a youth assessment center, or shelter care should be continued or modified based upon criteria set forth in 41-5-341 through 41-5-343.

(2) In conducting a preliminary inquiry, the probation officer or assessment officer may:

(a) require the presence of any person relevant to the inquiry;

(b) request subpoenas from the judge to accomplish this purpose;

(c) require investigation of the matter by any law enforcement agency or any other appropriate state or local agency;

(d) perform a youth assessment pursuant to 41-5-1203.

History: En. Secs. 6, 49(3)(f), Ch. 286, L. 1997; amd. Sec. 78(5)(a), Ch. 550, L. 1997.

41-5-1203. Preliminary inquiry — youth assessment. (1) The probation officer or assessment officer may perform a youth assessment if:

(a) a youth has been referred to the youth court as an alleged youth in need of intervention with a minimum of two misdemeanor offenses or three offenses in the past year that would not be offenses if the youth were an adult;

(b) the youth is alleged to be a youth in need of intervention or a delinquent youth and the youth or the youth's parents or guardian requests the youth assessment and both the youth and the parents or guardian are willing to cooperate with the assessment process; or

(c) the circumstances surrounding a youth who has committed an act that would be a felony if committed by an adult indicate the need for a youth assessment and the safety of the community has been considered in determining where the youth assessment is conducted.

(2) A youth assessment:

(a) must be a multidisciplinary effort that may include, but is not limited to a chemical dependency evaluation of the youth, an educational assessment of the youth, an evaluation to determine if the youth has mental health needs, or an assessment of the need for any family-based services or other services provided by the department of public health and human services or other state and local agencies. The education component of the youth assessment is intended to address attendance, behavior, and performance issues of the youth. The education component is not intended to interfere with the right to attend a nonpublic or home school that complies with 20-5-109.

(b) must include a summary of the family's strengths and needs as they relate to addressing the youth's behavior;

(c) may occur in a youth's home, with or without electronic monitoring, or pursuant to 41-5-343 in a youth assessment center licensed by the department of public health and human services or in any other entity licensed by the department of public health and human services. The county shall provide adequate security in other licensed entities through provision of additional staff or electronic monitoring. The staff provided by the county must meet licensing requirements applicable to the licensed entity in which the youth is being held.

(3) The assessment officer arranging the youth assessment shall work with the parent or guardian of the youth to coordinate the performance of the various parts of the assessment with any providers that may already be working with the family or providers that are chosen by the family to the extent possible to meet the goals of the Youth Court Act.

History: En. Sec. 49(3)(g), Ch. 286, L. 1997; amd. Sec. 78(5)(c), Ch. 550, L. 1997.

41-5-1204. Preliminary inquiry — determinations — release. Once relevant information is secured after a preliminary inquiry under 41-5-1201, the probation officer or assessment officer shall:

(1) determine whether the interest of the public or the youth requires that further action be taken;

(2) terminate the inquiry upon the determination that no further action be taken; and

(3) release the youth immediately upon the determination that the filing of a petition is not authorized.

History: En. Secs. 7, 49(3)(f), Ch. 286, L. 1997.

41-5-1205. Preliminary inquiry — dispositions available to probation officer. Upon determining that further action is required after a preliminary inquiry under 41-5-1201, the probation officer or assessment officer may:

(1) arrange informal disposition as provided in 41-5-1301; or

(2) refer the matter to the county attorney for filing a petition in youth court charging the youth to be a delinquent youth or a youth in need of intervention or for filing an information in the district court as provided in 41-5-206.

History: En. Secs. 8, 49(3)(f), Ch. 286, L. 1997.

41-5-1206. Investigation, fingerprints, and photographs. (1) All law enforcement investigations relating to a delinquent youth or youth in need of intervention must be conducted in accordance with this chapter and Title 46.

(2) A youth may be fingerprinted or photographed for criminal identification purposes:

(a) if arrested for conduct alleged to be unlawful that would be a felony if committed by an adult;

(b) pursuant to a search warrant, supported by probable cause, issued by a judge, justice of the peace, or magistrate; or

(c) upon the order of the youth court judge, after a petition alleging delinquency has been filed.

(3) Fingerprint records and photographs may be used by the department of justice or any law enforcement agency in the judicial district for comparison and identification purposes in any other investigation.

History: En. 10-1218 by Sec. 18, Ch. 329, L. 1974; amd. Sec. 6, Ch. 100, L. 1977; amd. Sec. 9, Ch. 571, L. 1977; R.C.M. 1947, 10-1218(2); amd. Sec. 2, Ch. 484, L. 1981; amd. Sec. 6, Ch. 515, L. 1987; amd. Sec. 1, Ch. 346, L. 1991; amd. Sec. 1, Ch. 603, L. 1993; amd. Sec. 4, Ch. 528, L. 1995; amd. Sec. 22, Ch. 550, L. 1997; Sec. 41-5-304, MCA 1995; redes. 41-5-1206 by Sec. 47, Ch. 286, L. 1997.

41-5-1207 through 41-5-1209 reserved.

41-5-1210. Information to be collected by juvenile probation officer or assessment officer. The juvenile probation officer or assessment officer shall collect the following information regarding a youth:

(1) biographical data;
(2) a description of prior and current offenses, including criminal history;
(3) a listing of known or suspected associates;
(4) any gang or drug involvement;
(5) field investigation data;
(6) motor vehicle ownership and offense data, if any;
(7) whether the youth is a suspect in other criminal investigations;
(8) history of any victimization of others by the youth;
(9) the youth's status offense history;
(10) existence of active warrants;
(11) school, employment, and family histories;
(12) social and medical services histories; and
(13) prior conduct in a youth detention or correctional facility, if any.

History: En. Sec. 6, Ch. 532, L. 1999.

Compiler's Comments

Effective Date: This section is effective October 1, 1999.

Part 13
Informal Proceeding

41-5-1301. Informal disposition. After a preliminary inquiry under 41-5-1201, the probation officer or assessment officer upon determining that further action is required and that referral to the county attorney is not required may:

(1) provide counseling, refer the youth and the youth's family to another agency providing appropriate services, or take any other action or make any informal adjustment that does not involve probation or detention; or

(2) provide for treatment or adjustment involving probation or other disposition authorized under 41-5-1302 through 41-5-1304 if the treatment or adjustment is voluntarily accepted by the youth's parents or guardian and the youth, if the matter is referred immediately to the county attorney for review, and if the probation officer or assessment officer proceeds no further unless authorized by the county attorney.

History: En. Sec. 9, Ch. 286, L. 1997, and Sec. 78(5)(b), Ch. 550, L. 1997; amd. Sec. 7, Ch. 532, L. 1999.

Compiler's Comments

1999 Amendment: Chapter 532 deleted former (2) that read: "(2) The juvenile probation officer or assessment officer shall collect the following information regarding a youth if the youth is alleged to be a delinquent youth and if the probation officer or assessment officer determines that the matter should be referred to the county attorney for filing a petition in youth court:

(a) biographical data;

(b) a description of prior and current offenses, including criminal history;

(c) a listing of known or suspected associates;

(d) any gang or drug involvement;

(e) field investigation data;

(f) motor vehicle ownership and offense data, if any;

(g) whether the youth is a suspect in other criminal investigations;

(h) history of any victimization of others by the youth;

(i) the youth's status offense history;

(j) existence of active warrants;

(k) school, employment, and family histories;

(l) social and medical services histories;

(m) prior conduct in a youth detention or correctional facility, if any"; and made minor changes in style. Amendment effective October 1, 1999.

41-5-1302. Consent adjustment without petition. (1) Before referring the matter to the county attorney and subject to the limitations in subsection (3), the probation officer or assessment officer may enter into a consent adjustment and give counsel and advice to the youth, the youth's family, and other interested parties if it appears that:

(a) the admitted facts bring the case within the jurisdiction of the court;

(b) counsel and advice without filing a petition would be in the best interests of the child, the family, and the public; and

(c) the youth may be a youth in need of intervention and the probation officer or assessment officer believes that the parents, foster parents, physical custodian, or guardian exerted all reasonable efforts to mediate, resolve, or control the youth's behavior and the youth continues to exhibit behavior beyond the control of the parents, foster parents, physical custodian, or guardian.

(2) Any probation or other disposition imposed under this section against a youth must conform to the following procedures:

(a) Every consent adjustment must be reduced to writing and signed by the youth and the youth's parents or the person having legal custody of the youth.

(b) If the probation officer or assessment officer believes that the youth is a youth in need of intervention, the probation officer or assessment officer shall determine that the parents, foster parents, physical custodian, or guardian exerted all reasonable efforts to mediate, resolve, or control the youth's behavior and that the youth continues to exhibit behavior beyond the control of the parents, foster parents, physical custodian, or guardian.

(c) Approval by the youth court judge is required if the complaint alleges commission of a felony or if the youth has been or will be in any way detained.

(3) A consent adjustment without petition under this section may not be used to dispose of a youth's alleged second or subsequent offense if:

(a) the youth has admitted commission of or has been adjudicated or sentenced for a prior offense that would be a felony if committed by an adult;

(b) the second or subsequent offense would be a felony if committed by an adult and was committed within 3 years of a prior offense; or

(c) the second or subsequent offense would be a misdemeanor if committed by an adult and was committed within 3 years of a prior offense, other than a felony, unless the probation officer notifies the youth court and obtains written approval from the county attorney and the youth court judge.

(4) For purposes of subsection (3), related offenses committed by a youth during the same 24-hour period must be considered a single offense.

History: En. 10-1210 by Sec. 10, Ch. 329, L. 1974; amd. Sec. 4, Ch. 100, L. 1977; amd. Sec. 3, Ch. 571, L. 1977; R.C.M. 1947, 10-1210(1), (2); amd. Sec. 2, Ch. 231, L. 1991; amd. Sec. 25, Ch. 550, L. 1997; Sec. 41-5-401, MCA 1995; redes. 41-5-1302 by Sec. 47, Ch. 286, L. 1997; amd. Sec. 8, Ch. 532, L. 1999.

Compiler's Comments

1999 Amendment: Chapter 532 at beginning of (3)(a) inserted "the youth has admitted commission of or has been adjudicated or sentenced for a prior" and at end deleted "or third or subsequent offense if"; inserted (3)(b) concerning second or subsequent offense that would be a felony; at beginning of (3)(c) inserted "the second or subsequent" and at end inserted "and was committed within 3 years of a prior offense, other than a felony, unless the probation officer notifies the youth court and obtains written approval from the county attorney and the youth court judge"; inserted (4) concerning related offenses as single offense; and made minor changes in style. Amendment effective October 1, 1999.

41-5-1303. Communications privileged. An incriminating statement relating to any act or omission constituting delinquency or need of intervention made by the participant to the person giving counsel or advice in the discussions or conferences incident thereto may not be used against the declarant in any proceeding under this chapter, nor may the incriminating statement be admissible in any criminal proceeding against the declarant. This section does not apply to the use of voluntary and reliable statements that are offered for impeachment purposes.

History: En. 10-1210 by Sec. 10, Ch. 329, L. 1974; amd. Sec. 4, Ch. 100, L. 1977; amd. Sec. 3, Ch. 571, L. 1977; R.C.M. 1947, 10-1210(3); amd. Sec. 8, Ch. 515, L. 1987; amd. Sec. 76, Ch. 550, L. 1997; Sec. 41-5-402, MCA 1995; redes. 41-5-1303 by Sec. 47, Ch. 286, L. 1997.

41-5-1304. Disposition permitted under consent adjustment. (1) The following dispositions may be imposed by consent adjustment:

(a) probation;

(b) placement of the youth in substitute care in a youth care facility, as defined in 41-3-1102 and pursuant to a recommendation made under 41-5-121;

(c) placement of the youth with a private agency responsible for the care and rehabilitation of the youth pursuant to a recommendation made under 41-5-121;

(d) restitution, as provided in 41-5-1521, upon approval of the youth court judge;

(e) placement of the youth under home arrest as provided in Title 46, chapter 18, part 10;

(f) confiscation of the youth's driver's license, if the youth has one, by the probation officer for a specified period of time, not to exceed 90 days. The probation officer shall notify the department of justice of the confiscation and its duration. The department of justice may not enter the confiscation on the youth's driving record. The probation officer shall notify the department of justice when the confiscated driver's license has been returned to the youth. A youth's driver's license may be confiscated under this subsection more than once. The probation officer may, in the probation officer's discretion and with the concurrence of a parent or guardian, return a youth's confiscated driver's license before the termination of the time period for which it had been confiscated. The confiscation may not be used by an insurer as a factor in determining the premium or part of a premium to be paid for motor vehicle insurance covering the youth or a vehicle or vehicles driven by the youth, nor may it be used as grounds for denying coverage for an accident or other occurrence under an existing policy;

(g) a requirement that the youth receive counseling services;

(h) placement in a youth assessment center for up to 10 days;

(i) placement of the youth in detention for up to 3 days on a space-available basis at the county's expense, which is not reimbursable under part 19 of this chapter;

(j) a requirement that the youth perform community service;

(k) a requirement that the youth participate in victim-offender mediation;

(l) an agreement that the youth pay a contribution covering all or a part of the costs for the adjudication, disposition, attorney fees for the costs of prosecuting or defending the youth, costs of detention, supervision, care, custody, and treatment of the youth, including the costs of counseling;

(m) an agreement that the youth pay a contribution covering all or a part of the costs of a victim's counseling or restitution for damages that result from the offense for which the youth is disposed;

(n) any other condition ordered by the court to accomplish the goals of the consent adjustment, including but not limited to mediation or youth assessment. Before ordering youth assessment, the court shall provide the family an estimate of the cost of youth assessment, and the court shall take into consideration the financial resources of the family before ordering parental or guardian contribution for the costs of youth assessment.

(2) If the youth violates a parole agreement as provided for in 52-5-126, the youth must be returned to the court for further disposition. A youth may not be placed in a state youth correctional facility under consent adjustment.

(3) If the youth is placed in substitute care, an assessment placement, or detention requiring payment by any state department or local government

agency, the court shall examine the financial ability of the youth's parents or guardians to pay a contribution covering all or part of the costs for the adjudication, disposition, supervision, care, placement, and treatment of the youth, including the costs of necessary medical, dental, and other health care.

History: En. 10-1210 by Sec. 10, Ch. 329, L. 1974; amd. Sec. 4, Ch. 100, L. 1977; amd. Sec. 3, Ch. 571, L. 1977; R.C.M. 1947, 10-1210(4); amd. Sec. 3, Ch. 246, L. 1979; amd. Sec. 3, Ch. 484, L. 1981; amd. Sec. 1, Ch. 129, L. 1983; amd. Sec. 7, Ch. 363, L. 1983; amd. Sec. 4, Ch. 465, L. 1983; amd. Sec. 5, Ch. 531, L. 1985; amd. Sec. 7, Ch. 14, Sp. L. June 1986; amd. Sec. 59, Ch. 609, L. 1987; amd. Sec. 8, Ch. 105, L. 1991; amd. Sec. 3, Ch. 696, L. 1991; amd. Sec. 6, Ch. 528, L. 1995; amd. Sec. 194, Ch. 546, L. 1995; amd. Sec. 2, Ch. 185, L. 1997; amd. Sec. 26, Ch. 550, L. 1997; Sec. 41-5-403, MCA 1995; redes. 41-5-1304 by Sec. 47, Ch. 286, L. 1997.

Cross-References

Suspending driving privileges of persons under age 18, 61-5-217.

Part 14

Formal Proceeding — Procedure

41-5-1401. Petition — county attorney — procedure — release from custody. (1) The county attorney may apply to the youth court for permission to file a petition charging a youth to be a delinquent youth or a youth in need of intervention. The application must be supported by evidence that the youth court may require. If it appears that there is probable cause to believe that the allegations of the petition are true, the youth court shall grant leave to file the petition.

(2) A petition charging a youth who is held in detention or a youth assessment center must be filed within 7 working days from the date the youth was first taken into custody or the petition must be dismissed and the youth released unless good cause is shown to further detain the youth.

(3) If a petition is not filed under this section, the complainant and victim, if any, must be informed by the probation officer or assessment officer of the action and the reasons for not filing and must be advised of the right to submit the matter to the county attorney for review. The county attorney, upon receiving a request for review, shall consider the facts, consult with the probation officer or assessment officer, and make the final decision as to whether a petition is filed.

History: En. Secs. 10, 49(3)(f), Ch. 286, L. 1997.

41-5-1402. Petition — form and content. (1) A petition initiating proceedings under this chapter must be signed by the county attorney, must be entitled "In the Matter of...., a youth", and must set forth with specificity:

(a) the facts necessary to invoke the jurisdiction of the court, together with a statement alleging the youth to be a delinquent youth or a youth in need of intervention;

(b) the charge of an offense, that must:

(i) state the name of the offense;

(ii) cite in customary form the statute, rule, or other provisions of law that the youth is alleged to have violated;

(iii) state the facts constituting the offense in ordinary and concise language and in a manner that enables a person of common understanding to know what is intended; and

(iv) state the time and place of the offense as definitely as possible;

(c) the name, birth date, and residence address of the youth;

(d) the names and residence addresses of the parents, guardian, or spouse of the youth and, if the parents, guardian, or spouse do not reside or cannot be found within the state or if there is none, the adult relative residing nearest to the court;

(e) whether the youth is in detention, a youth assessment center, or shelter care and, if so, the place of detention, assessment, or shelter care and the time that the youth was detained or sheltered;

(f) if any of the matters required to be set forth by this section are not known, a statement of those matters and the fact that they are not known; and

(g) a list of witnesses to be used in proving the commission of the offense or offenses charged in the petition, together with their residence addresses. The names and addresses of any witnesses discovered after the filing of the petition must be furnished to the youth upon request.

(2) When a county attorney files a delinquency petition alleging that a youth committed an offense that would be a felony if committed by an adult and that is transferable under 41-5-206 or in which a youth 12 years of age or older allegedly used a firearm, the county attorney shall indicate in the petition whether the county attorney designates the proceeding an extended jurisdiction juvenile prosecution. When the county attorney files a delinquency petition alleging that a youth committed any other offense that would be a felony if committed by an adult, the county attorney may request that the court designate the proceeding an extended jurisdiction juvenile prosecution.

History: En. 10-1215 by Sec. 15, Ch. 329, L. 1974; amd. Sec. 7, Ch. 571, L. 1977; R.C.M. 1947, 10-1215; amd. Sec. 5, Ch. 498, L. 1997; amd. Secs. 27, 76, Ch. 550, L. 1997; Sec. 41-5-501, MCA 1995; redes. 41-5-1402 by Sec. 47, Ch. 286, L. 1997.

41-5-1403. Summons. (1) After a petition has been filed, summons must be served directly to:

(a) the youth;

(b) the youth's parent or parents having actual custody of the youth or the youth's guardian or custodian, as the case may be; and

(c) other persons as the court may direct.

(2) The summons must:

(a) require the parties to whom it is directed to appear personally before the court at the time fixed by the summons to answer the allegations of the petition;

(b) advise the parties of their right to counsel under the Montana Youth Court Act; and

(c) have attached to it a copy of the petition.

(3) The court may endorse upon the summons an order directing the person or persons having the physical custody or control of the youth to bring the youth to the hearing.

(4) If it appears to the court that the youth needs to be placed in detention or shelter care, the judge may endorse on the summons an order directing the officer serving the summons to at once take the youth into custody and to take

the youth to the place of detention or shelter care designated by the court, subject to the rights of the youth and parent or person having legal custody of the youth as set forth in the provisions of the Montana Youth Court Act relating to detention and shelter care criteria and postdetention proceedings.

(5) If a youth is placed in detention or shelter care under any provision of this chapter pending an adjudication, the court shall, as soon as practicable, conduct a probable cause hearing as provided in 41-5-332.

(6) The youth court judge may also admit the youth to bail in accordance with Title 46, chapter 9.

History: En. 10-1216 by Sec. 16, Ch. 329, L. 1974; amd. Sec. 8, Ch. 571, L. 1977; R.C.M. 1947, 10-1216; amd. Sec. 10, Ch. 475, L. 1987; amd. Sec. 9, Ch. 515, L. 1987; amd. Sec. 9, Ch. 547, L. 1991; amd. Sec. 25, Ch. 286, L. 1997; Sec. 41-5-502, MCA 1995; redes. 41-5-1403 by Sec. 47, Ch. 286, L. 1997.

41-5-1404. Service of summons. (1) Any youth who is the subject of a proceeding under this chapter must be personally served with summons at least 5 days before the time stated for appearance.

(2) Service of summons on all other persons designated in 41-5-1403(1) shall be made in accordance with Rule 4D of the Montana Rules of Civil Procedure, except that in all cases service shall be completed at least 5 days before the time stated for appearance.

(3) If a party referred to in subsection (2) herein is not personally served before a hearing and has not secluded himself with an attempt to delay or disrupt any proceeding, such party may appear within a reasonable time subsequent to the hearing and, on motion to the court, request a rehearing. The motion may be granted at the discretion of the judge if a rehearing would be in the best interest of the youth.

(4) The court may authorize payment from county funds of costs of service and necessary travel expenses incurred by persons summoned or otherwise required to appear at the hearing.

(5) An actual abandonment of a youth by his parent or parents shall constitute a waiver of summons and notice requirements by the parent or parents. A return endorsed upon the summons showing inability to serve summons constitutes prima facie evidence of actual abandonment.

(6) The youth court may, in the interests of justice, shorten the notice requirements contained herein, and such notice of shortened time shall be endorsed on the summons.

(7) A party, other than the youth, may waive service of summons on himself by written stipulation or by voluntary appearance at the hearing. If the youth is present at the hearing, his counsel may waive service of summons in his behalf.

History: En. 10-1217 by Sec. 17, Ch. 329, L. 1974; amd. Sec. 5, Ch. 100, L. 1977; R.C.M. 1947, 10-1217; Sec. 41-5-503, MCA 1995; redes. 41-5-1404 by Sec. 47, Ch. 286, L. 1997.

41-5-1405. Disqualification of judges. The statutes of the state of Montana relating to disqualification of judges in criminal proceedings shall apply to all proceedings under this chapter.

History: En. 10-1223 by Sec. 23, Ch. 329, L. 1974; R.C.M. 1947, 10-1223; amd. Sec. 2, Ch. 515, L. 1987; Sec. 41-5-202, MCA 1995; redes. 41-5-1405 by Sec. 47, Ch. 286, L. 1997.

41-5-1406 through 41-5-1410 reserved.

41-5-1411. Appointment of guardian ad litem. The court at any stage of a proceeding on a petition under this chapter may appoint a guardian ad litem for a youth if the youth has no parent or guardian appearing in his behalf or if their interests conflict with those of the youth. A party to the proceeding or an employee or representative of a party may not be appointed as guardian ad litem.

History: En. 10-1218 by Sec. 18, Ch. 329, L. 1974; amd. Sec. 6, Ch. 100, L. 1977; amd. Sec. 9, Ch. 571, L. 1977; R.C.M. 1947, 10-1218(4); Sec. 41-5-512, MCA 1995; redes. 41-5-1411 by Sec. 47, Ch. 286, L. 1997.

Cross-References

Appointment of guardian — document requiring seal, 3-1-206.

41-5-1412. Rights and obligations — persons to be advised — contempt. (1) A person afforded rights under this chapter must be advised of those rights and any other rights existing under law at the time of the person's first appearance in a proceeding on a petition under the Montana Youth Court Act and at any other time specified in that act or other law.

(2) A person must be advised of obligations, including possible assessments and related costs, that may arise under this chapter, including the possibility that the person may be required to reimburse the state or local governments for costs attributable to the adjudication, disposition, attorney fees for the costs of prosecuting or defending the youth, costs of detention, supervision, care, custody, and treatment of the youth and may be required to participate in counseling, treatment, or other support services.

(3) A youth's parents or guardians are obligated to assist and support the youth court in implementing the court's orders concerning a youth under youth court jurisdiction, and the parents or guardians are subject to the court's contempt powers if they fail to do so. The youth court personnel shall assist the parents to the extent possible in implementing and enforcing interventions and consequences designed to modify the youth's behavior.

(4) A parent has a right to review the results of a youth assessment and to place a rebuttal, statement, or additional information in the youth's file in youth court.

History: En. 10-1218 by Sec. 18, Ch. 329, L. 1974; amd. Sec. 6, Ch. 100, L. 1977; amd. Sec. 9, Ch. 571, L. 1977; R.C.M. 1947, 10-1218(6); amd. Sec. 29, Ch. 550, L. 1997; Sec. 41-5-515, MCA 1995; redes. 41-5-1412 by Sec. 47, Ch. 286, L. 1997.

41-5-1413. Right to counsel. In all proceedings following the filing of a petition alleging that a youth is a delinquent youth or youth in need of intervention, the youth and the parents or guardian of the youth must be advised by the court or, in the absence of the court, by its representative that the youth may be represented by counsel at all stages of the proceedings. If counsel is not retained or if it appears that counsel will not be retained, counsel must be appointed for the youth if the parents or guardian and the youth are unable to provide counsel unless the right to appointed counsel is waived by the youth and the parents or guardian. Neither the youth nor the youth's parents or guardian may waive counsel after a petition has been filed if commitment to the department for a period of more than 6 months may result from adjudication.

History: En. 10-1218 by Sec. 18, Ch. 329, L. 1974; amd. Sec. 6, Ch. 100, L. 1977; amd. Sec. 9, Ch. 571, L. 1977; R.C.M. 1947, 10-1218(3); amd. Sec. 1, Ch. 386, L. 1979; amd. Sec.

4, Ch. 484, L. 1981; amd. Sec. 60, Ch. 609, L. 1987; amd. Sec. 28, Ch. 550, L. 1997; Sec. 41-5-511, MCA 1995; redes. 41-5-1413 by Sec. 47, Ch. 286, L. 1997.

41-5-1414. Right to confront witnesses. In a proceeding on a petition, a party is entitled to:

(1) the opportunity to introduce evidence and otherwise be heard on the party's own behalf;

(2) confront and cross-examine witnesses testifying against the party; and

(3) admit or deny the allegations against the party in the petition.

History: En. 10-1218 by Sec. 18, Ch. 329, L. 1974; amd. Sec. 6, Ch. 100, L. 1977; amd. Sec. 9, Ch. 571, L. 1977; R.C.M. 1947, 10-1218(5); Sec. 41-5-513, MCA 1995; redes. 41-5-1414 by Sec. 47, Ch. 286, L. 1997.

41-5-1415. Admissibility of confession or illegally seized evidence. In a proceeding alleging a youth to be a delinquent youth:

(1) an extrajudicial statement that would be constitutionally inadmissible in a criminal matter may not be received in evidence;

(2) evidence illegally seized or obtained may not be received in evidence to establish the allegations of a petition against a youth; and

(3) an extrajudicial admission or confession made by the youth out of court is insufficient to support a finding that the youth committed the acts alleged in the petition unless it is corroborated by other evidence.

History: En. 10-1218 by Sec. 18, Ch. 329, L. 1974; amd. Sec. 6, Ch. 100, L. 1977; amd. Sec. 9, Ch. 571, L. 1977; R.C.M. 1947, 10-1218(1)(c); amd. Sec. 7, Ch. 528, L. 1995; Sec. 41-5-514, MCA 1995; redes. 41-5-1415 by Sec. 47, Ch. 286, L. 1997; amd. Sec. 9, Ch. 532, L. 1999.

Compiler's Comments

1999 Amendment: Chapter 532 deleted former (4) that read: "(4) upon a finding of an offense related to use of alcohol or illegal drugs, the court may order the youth to undergo urinalysis for the purpose of determining whether the youth is using alcoholic beverages or illegal drugs"; and made minor changes in style. Amendment effective October 1, 1999.

41-5-1416. Victims and witnesses of juvenile felony offenses — consultation — notification of proceedings. (1) The attorney general shall ensure that the services and assistance that must be provided under Title 46, chapter 24, to a victim or witness of a crime are also provided to the victim or witness of a juvenile felony offense.

(2) In a proceeding filed under this part, the county attorney or a designee shall consult with the victim of a juvenile felony offense regarding the disposition of the case, including:

(a) a dismissal of the petition filed under 41-5-1402;

(b) a reduction of the charge to misdemeanor;

(c) the release of the youth from detention or shelter care pending the adjudicatory hearing; and

(d) the disposition of the youth.

(3) (a) Whenever possible, a person described in subsection (3)(b) who provides the appropriate agency with a current address and telephone number must receive prompt advance notification of youth court case proceedings, including:

(i) the filing of a petition under 41-5-1402;

(ii) the release of the youth from detention or shelter care; and

(iii) proceedings in the adjudication of the petition, including, when applicable, entry of a consent decree under 41-5-1501, the setting of a date for the adjudicatory hearing under 41-5-1502, the setting of a date for the dispositional hearing under 41-5-1511, the disposition made, and the release of the youth from a youth correctional facility.

(b) A person entitled to notification under this subsection (3) must be a victim, as defined in 41-5-103, of a juvenile felony offense.

(c) The county attorney or a designee that provides the consultation regarding the disposition of a case required in subsection (2) shall give the victim the opportunity to provide the victim's current telephone number and address and shall provide the victim with the name and address of the agency or agencies responsible for operation of youth detention, correctional, or shelter care facilities that are responsible for the custody of the youth.

(d) The appropriate official or agency shall provide the notification required by this subsection (3) in the same manner as required for offenses committed by adults.

(4) For purposes of this section, "juvenile felony offense" means an offense committed by a juvenile that, if committed by an adult, would constitute a felony offense. The term includes any offense for which a juvenile may be declared a serious juvenile offender, as defined in 41-5-103.

History: En. Sec. 1, Ch. 170, L. 1991; amd. Sec. 6, Ch. 466, L. 1995; amd. Sec. 43, Ch. 286, L. 1997; amd. Sec. 57, Ch. 550, L. 1997; Sec. 46-24-207, MCA 1995; redes. 41-5-1416 by Sec. 77, Ch. 550, L. 1997.

41-5-1417 through 41-5-1420 reserved.

41-5-1421. Posttrial motions. All posttrial motions and other remedies available to an adult in a criminal proceeding under the Montana Code of Criminal Procedure are available to a youth proceeded against under this chapter.

History: En. 10-1218 by Sec. 18, Ch. 329, L. 1974; amd. Sec. 6, Ch. 100, L. 1977; amd. Sec. 9, Ch. 571, L. 1977; R.C.M. 1947, 10-1218(7); Sec. 41-5-531, MCA 1995; redes. 41-5-1421 by Sec. 47, Ch. 286, L. 1997.

41-5-1422. Modification of court orders — notice to department — hearing. (1) An order of the court may be modified at any time.

(2) In the case of a youth committed to the department, an order pertaining to the youth may be modified only upon notice to the department and a subsequent hearing.

History: En. Sec. 40, Ch. 550, L. 1997.

41-5-1423. Appeals. (1) Any party other than the state may appeal from a judgment of the court to the supreme court in the manner provided by law. The appeal shall be heard by the supreme court upon the files, records, and transcript of the evidence of the juvenile court.

(2) The appeal to the supreme court does not stay the judgment appealed from, but the supreme court may order a stay upon application and hearing consistent with the provisions of this chapter if suitable provision is made for the care and custody of the youth. If the order appealed from grants the legal custody of the youth to or withholds it from one or more of the parties to the appeal, the appeal shall be heard at the earliest practicable time.

History: En. 10-1225 by Sec. 25, Ch. 329, L. 1974; R.C.M. 1947, 10-1225; Sec. 41-5-532, MCA 1995; redes. 41-5-1423 by Sec. 47, Ch. 286, L. 1997.

41-5-1424 through 41-5-1430 reserved.

41-5-1431. Probation revocation proceeding — petition — hearing — disposition. (1) A youth on probation incident to an adjudication that the youth is a delinquent youth or a youth in need of intervention and that the youth has violated a term of probation may be proceeded against in a probation revocation proceeding. A proceeding to revoke probation must be done by filing in the original proceeding a petition styled "petition to revoke probation".

(2) Petitions to revoke probation must be screened, reviewed, and prepared in the same manner and must contain the same information as petitions alleging delinquency or need of intervention. Procedures of the Montana Youth Court Act regarding taking into custody and detention apply. The petition must state the terms of probation alleged to have been violated and the factual basis for the allegations.

(3) The standard of proof in probation revocation proceedings is the same standard used in probation revocation of an adult, and the hearing must be before the youth court without a jury. In all other respects, proceedings to revoke probation are governed by the procedures, rights, and duties applicable to proceedings on petitions alleging that the youth is delinquent or a youth in need of intervention. If a youth is found to have violated a term of probation, the youth court may make any judgment of disposition that could have been made in the original case.

History: En. 10-1228 by Sec. 28, Ch. 329, L. 1974; R.C.M. 1947, 10-1228; amd. Sec. 45, Ch. 550, L. 1997; Sec. 41-5-533, MCA 1995; redes. 41-5-1431 by Sec. 47, Ch. 286, L. 1997.

41-5-1432. Enforcement of restitution orders. If the court orders payment of restitution and the youth fails to pay the restitution in accordance with the payment schedule or structure established by the court or probation officer, the youth's probation officer may, on the officer's own motion or at the request of the victim, file a petition for violation of probation or ask the court to hold a hearing to determine whether the conditions of probation should be changed. The probation officer shall ask for a hearing if the restitution has not been paid prior to 60 days before the term of probation expires. The court shall schedule and hold the hearing before the youth's term of probation expires.

History: En. Sec. 12, Ch. 498, L. 1997.

Part 15

Formal Proceeding — Hearing — Disposition

Part Cross-References

Victims and witnesses of juvenile felony offenses — consultation — notification of proceedings, 41-5-1416.

41-5-1501. Consent decree with petition. (1) (a) Subject to the provisions of subsection (2), after the filing of a petition under 41-5-1402 and before the entry of a judgment, the court may, on motion of counsel for the youth or on the court's own motion, suspend the proceedings and continue the youth under supervision under terms and conditions negotiated with probation services and agreed to by all necessary parties. The court's order continuing the youth under supervision under this section is known as a "consent decree". Except as provided in subsection (1)(b), the procedures used and dispositions permitted under this section must conform to the procedures and dispositions specified in 41-5-1302 through 41-5-1304 relating to consent adjustments without petition and the responsibility of the youth's parents or guardians to pay a contribution for the costs of placement in substitute care.

(b) A youth may be placed in detention for up to 10 days on a space-available basis at the county's expense, which is not reimbursable under part 19 of this chapter.

(2) A consent decree under this section may not be used by the court unless the youth admits guilt for a charge of an offense set forth in the petition and accepts responsibility for the youth's actions.

(3) If the youth or the youth's counsel objects to a consent decree, the court shall proceed to findings, adjudication, and disposition of the case.

(4) If, either prior to discharge by probation services or expiration of the consent decree, a new petition alleging that the youth is a delinquent youth or a youth in need of intervention is filed against the youth or if the youth fails to fulfill the expressed terms and conditions of the consent decree, the petition under which the youth was continued under supervision may be reinstated in the discretion of the county attorney in consultation with probation services. In the event of reinstatement, the proceeding on the petition must be continued to conclusion as if the consent decree had never been entered.

(5) A youth who is discharged by probation services or who completes a period under supervision without reinstatement of the original petition may not again be proceeded against in any court for the same offense alleged in the petition, and the original petition must be dismissed with prejudice. This subsection does not preclude a civil suit against the youth for damages arising from the youth's conduct.

(6) If the terms of the consent decree extend for a period in excess of 6 months, the probation officer shall at the end of each 6-month period submit a report that must be reviewed by the court.

(7) A consent decree with petition under this section may not be used to dispose of a youth's alleged second or subsequent offense if that offense would be a felony if committed by an adult or third or subsequent offense if that offense would be a misdemeanor if committed by an adult unless it is recommended by the county attorney and accepted by the youth court judge.

History: En. 10-1224 by Sec. 24, Ch. 329, L. 1974; amd. Sec. 8, Ch. 100, L. 1977; R.C.M. 1947, 10-1224; amd. Sec. 5, Ch. 696, L. 1991; amd. Sec. 42, Ch. 550, L. 1997; Sec. 41-5-524, MCA 1995; redes. 41-5-1501 by Sec. 47, Ch. 286, L. 1997; amd. Sec. 2, Ch. 523, L. 1999; amd. Sec. 10, Ch. 532, L. 1999.

Compiler's Comments

1999 Amendments — Composite Section: Chapter 523 in (1)(a) in second sentence substituted "youth" for "child"; and made minor changes in style. Amendment effective October 1, 1999.

Chapter 532 in (1)(a) in second sentence substituted "youth" for "child"; and at end of (7) inserted "unless it is recommended by the county attorney and accepted by the youth court judge". Amendment effective October 1, 1999.

41-5-1502. Adjudicatory hearing. (1) Prior to any adjudicatory hearing, the court shall determine whether the youth admits or denies the offenses alleged in the petition. If the youth denies all offenses alleged in the petition, the youth or the youth's parent, guardian, or attorney may demand a jury trial on the contested offenses. In the absence of a demand, a jury trial is waived. If the youth denies some offenses and admits others, the contested offenses may be dismissed in the discretion of the youth court judge. The adjudicatory hearing must be set immediately and accorded a preferential priority.

(2) An adjudicatory hearing must be held to determine whether the contested offenses are supported by proof beyond a reasonable doubt in cases involving a youth alleged to be delinquent or in need of intervention. If the hearing is before a jury, the jury's function is to determine whether the youth committed the contested offenses. If the hearing is before the youth court judge without a jury, the judge shall make and record findings on all issues. If the allegations of the petitions are not established at the hearing, the youth court shall dismiss the petition and discharge the youth from custody.

(3) Prior to an adjudicatory hearing before a jury, the court shall conduct an omnibus hearing in accordance with 46-13-110.

(4) The jury trial must be conducted in accordance with Title 46, chapter 16.

(5) An adjudicatory hearing must be recorded verbatim by whatever means the court considers appropriate.

(6) The youth charged in a petition must be present at the hearing and, if brought from detention to the hearing, may not appear clothed in institutional clothing.

(7) In a hearing on a petition under this section, the general public may not be excluded, except that in the court's discretion, the general public may be excluded if the petition alleges that the youth is in need of intervention.

(8) If, on the basis of a valid admission by a youth of the allegations of the petition or after the hearing required by this section, a youth is found to be a delinquent youth or a youth in need of intervention, the court shall schedule a dispositional hearing under this chapter.

(9) When a jury trial is required in a case, it may be held before a jury selected as provided in Title 25, chapter 7, part 2, and in Rule 47, M.R.Civ.P.

History: En. 10-1220 by Sec. 20, Ch. 329, L. 1974; amd. Sec. 7, Ch. 100, L. 1977; amd. Sec. 1, Ch. 344, L. 1977; R.C.M. 1947, 10-1220; amd. Sec. 1, Ch. 668, L. 1979; amd. Sec. 1, Ch. 469, L. 1981; amd. Sec. 3, Ch. 466, L. 1995; amd. Sec. 26, Ch. 286, L. 1997; amd. Secs. 30, 76, Ch. 550, L. 1997; Sec. 41-5-521, MCA 1995; redes. 41-5-1502 by Sec. 47, Ch. 286, L. 1997.

41-5-1503. Medical or psychological evaluation of youth — urinalysis. (1) The youth court may order a youth to receive a medical or psychological evaluation at any time prior to final disposition if the youth waives the youth's constitutional rights in the manner provided for in 41-5-331. The county determined by the court as the residence of the youth is responsible for the cost of the evaluation, except as provided in subsection (2). A county may contract with the department or other public or private agencies to obtain evaluation services ordered by the court.

(2) The youth court shall determine the financial ability of the youth's parents or guardians to pay the cost of an evaluation ordered by the court under subsection (1). If they are financially able, the court shall order the youth's parents or guardians to pay all or part of the cost of the evaluation.

(3) Subject to 41-5-1512(15)(a), the youth court may not order an evaluation or placement of a youth at a state youth correctional facility unless

the youth is found to be a delinquent youth or is alleged to have committed an offense that is listed under 41-5-206.

(4) An evaluation of a youth may not be performed at the Montana state hospital unless the youth is transferred to the district court under 41-5-208 or 41-5-1605 or the jurisdiction of the youth court is terminated following the filing of an information in district court pursuant to 41-5-206.

(5) In a proceeding alleging a youth to be a delinquent youth, upon a finding of an offense related to use of alcohol or illegal drugs, the court may order the youth to undergo urinalysis for the purpose of determining whether the youth is using alcoholic beverages or illegal drugs.

History: En. Sec. 39, Ch. 550, L. 1997; amd. Sec. 11, Ch. 532, L. 1999.

Compiler's Comments

1999 Amendment: Chapter 532 inserted (5) concerning urinalysis. Amendment effective October 1, 1999.

41-5-1504. Finding of suffering from mental disorder and meeting other criteria — rights — limitation on placement. (1) A youth who is found to be suffering from a mental disorder, as defined in 53-21-102, and who meets the criteria in 53-21-126(1) is entitled to all rights provided by 53-21-114 through 53-21-119.

(2) A youth who, prior to placement or sentencing, is found to be suffering from a mental disorder, as defined in 53-21-102, and who meets the criteria in 53-21-126(1) may not be committed or sentenced to a state youth correctional facility.

(3) A youth who is found to be suffering from a mental disorder, as defined in 53-21-102, and who meets the criteria in 53-21-126(1) after placement in or sentencing to a state youth correctional facility must be moved to a more appropriate placement in response to the youth's mental health needs and consistent with the disposition alternatives available in 53-21-127.

History: En. Secs. 36, 78(1)(c), Ch. 550, L. 1997.

41-5-1505 through 41-5-1510 reserved.

41-5-1511. Dispositional hearing — contributions by parents or guardians for expenses. (1) As soon as practicable after a youth is found to be a delinquent youth or a youth in need of intervention, the court shall conduct a dispositional hearing. The dispositional hearing may involve a determination of the financial ability of the youth's parents or guardians to pay a contribution for the cost of the adjudication, disposition, supervision, care, commitment, and treatment of the youth as required in 41-5-1525, including the costs of necessary medical, dental, and other health care.

(2) Before conducting the dispositional hearing, the court shall direct that a youth assessment or predisposition report be made in writing by a probation officer or an assessment officer concerning the youth, the youth's family, the youth's environment, and other matters relevant to the need for care or rehabilitation or disposition of the case, including a statement by the victim or the victim's family. The youth court may have the youth examined, and the results of the examination must be made available to the court as part of the youth assessment or predisposition report. The court may order the examination of a parent or guardian whose ability to care for or supervise a

youth is at issue before the court. The results of the examination must be included in the youth assessment or predisposition report. The youth or the youth's parents, guardian, or counsel has the right to subpoena all persons who have prepared any portion of the youth assessment or predisposition report and has the right to cross-examine the parties at the dispositional hearing.

(3) Defense counsel must be furnished with a copy of the youth assessment or predisposition report and psychological report prior to the dispositional hearing.

(4) The dispositional hearing must be conducted in the manner set forth in 41-5-1502(5) through (7). The court shall hear all evidence relevant to a proper disposition of the case best serving the interests of the youth, the victim, and the public. The evidence must include but is not limited to the youth assessment and predisposition report provided for in subsection (2) of this section.

(5) If the court finds that it is in the best interest of the youth, the youth, the youth's parents or guardian, or the public may be temporarily excluded from the hearing during the taking of evidence on the issues of need for treatment and rehabilitation.

History: En. 10-1221 by Sec. 21, Ch. 329, L. 1974; R.C.M. 1947, 10-1221; amd. Sec. 4, Ch. 246, L. 1979; amd. Sec. 9, Ch. 567, L. 1979; amd. Sec. 5, Ch. 484, L. 1981; amd. Sec. 31, Ch. 465, L. 1983; amd. Sec. 10, Ch. 515, L. 1987; amd. Sec. 61, Ch. 609, L. 1987; amd. Sec. 10, Ch. 696, L. 1991; amd. Sec. 8, Ch. 528, L. 1995; amd. Sec. 27, Ch. 286, L. 1997; amd. Sec. 31, Ch. 550, L. 1997; Sec. 41-5-522, MCA 1995; redes. 41-5-1511 by Sec. 47, Ch. 286, L. 1997.

41-5-1512. Disposition of youth in need of intervention or youth who violate consent adjustments. If a youth is found to be a youth in need of intervention or to have violated a consent adjustment, the youth court may enter its judgment making one or more of the following dispositions:

(1) place the youth on probation. The youth court shall retain jurisdiction in a disposition under this subsection.

(2) place the youth in a residence that ensures that the youth is accountable, that provides for rehabilitation, and that protects the public. Before placement, the sentencing judge shall seek and consider placement recommendations from the youth placement committee. The judge may not place the youth in a residence unless the department informs the judge that resources are available for placement of the youth at that residence.

(3) commit the youth to the department for the purposes of funding a private, out-of-home, residential placement subject to the conditions in 41-5-1522. In an order committing a youth to the department, the court shall determine whether continuation in the youth's own home would be contrary to the welfare of the youth and whether reasonable efforts have been made to prevent or eliminate the need for removal of the youth from the youth's home.

(4) order restitution for damages that result from the offense for which the youth is disposed by the youth or by the person that contributed to the delinquency of the youth;

(5) require the performance of community service;

(6) require the youth, the youth's parents or guardians, or the persons having legal custody of the youth to receive counseling services;

(7) require the medical and psychological evaluation of the youth, the youth's parents or guardians, or the persons having legal custody of the youth;

(8) require the parents, guardians, or other persons having legal custody of the youth to furnish services the court may designate;

(9) order further care, treatment, evaluation, or relief that the court considers beneficial to the youth and the community and that does not obligate funding from the department for services outside the state of Montana without the department's approval, except that a youth may not be placed by a youth court in a residential treatment facility as defined in 50-5-101. Only the department may, pursuant to subsection (3) of this section, place a youth in a residential treatment facility.

(10) subject to the provisions of 41-5-1504, commit the youth to a mental health facility if, based upon the testimony of a professional person as defined in 53-21-102, the court finds that the youth is found to be suffering from a mental disorder, as defined in 53-21-102, and meets the criteria in 53-21-126(1);

(11) place the youth under home arrest as provided in Title 46, chapter 18, part 10;

(12) order confiscation of the youth's driver's license, if the youth has one, by the probation officer for a specified period of time, not to exceed 90 days. The probation officer shall notify the department of justice of the confiscation and its duration. The department of justice may not enter the confiscation on the youth's driving record. The probation officer shall notify the department of justice when the confiscated driver's license has been returned to the youth. A youth's driver's license may be confiscated under this subsection more than once. The probation officer may, in the probation officer's discretion and with the concurrence of a parent or guardian, return a youth's confiscated driver's license before the termination of the time period for which it had been confiscated. The confiscation may not be used by an insurer as a factor in determining the premium or part of a premium to be paid for motor vehicle insurance covering the youth or a vehicle or vehicles driven by the youth, nor may it be used as grounds for denying coverage for an accident or other occurrence under an existing policy.

(13) order the youth to pay a contribution covering all or a part of the costs for the adjudication, disposition, attorney fees for the costs of prosecuting or defending the youth, costs of detention, supervision, care, custody, and treatment of the youth, including the costs of counseling;

(14) order the youth to pay a contribution covering all or a part of the costs of a victim's counseling;

(15) defer imposition of sentence for up to 45 days for a placement evaluation at a suitable program or facility with the following conditions:

(a) The court may not order placement for evaluation at a youth correctional facility of a youth who has committed an offense that would not be a criminal offense if committed by an adult or a youth who has violated a consent adjustment.

(b) The placement for evaluation must be on a space-available basis at the county's expense, which is not reimbursable under part 19 of this chapter.

(c) The court may require the youth's parents or guardians to pay a contribution covering all or a part of the costs of the evaluation if the court determines after an examination of financial ability that the parents or guardians are able to pay the contribution. Any remaining unpaid costs of evaluation are the financial responsibility of the judicial district of the court that ordered the evaluation.

(16) order placement of a youth in a youth assessment center for up to 10 days;

(17) order the youth to participate in mediation that is appropriate for the offense committed.

History: En. 10-1222 by Sec. 22, Ch. 329, L. 1974; amd. Sec. 10, Ch. 571, L. 1977; R.C.M. 1947, 10-1222; amd. Sec. 2, Ch. 29, L. 1979; amd. Sec. 5, Ch. 246, L. 1979; amd. Sec. 2, Ch. 129, L. 1983; amd. Sec. 2, Ch. 233, L. 1983; amd. Sec. 27, Ch. 361, L. 1983; amd. Sec. 8, Ch. 363, L. 1983; amd. Sec. 5, Ch. 465, L. 1983; amd. Sec. 6, Ch. 531, L. 1985; amd. Sec. 1, Ch. 612, L. 1985; amd. Sec. 8, Ch. 14, Sp. L. June 1986; amd. Sec. 101, Ch. 370, L. 1987; amd. Sec. 11, Ch. 515, L. 1987; amd. Sec. 62, Ch. 609, L. 1987; amd. Sec. 1, Ch. 172, L. 1989; amd. Sec. 1, Ch. 210, L. 1989; amd. Sec. 7, Ch. 434, L. 1989; amd. Sec. 5, Ch. 616, L. 1989; amd. Sec. 9, Ch. 105, L. 1991; amd. Sec. 1, Ch. 201, L. 1991; amd. Sec. 1, Ch. 511, L. 1991; amd. Sec. 4, Ch. 696, L. 1991; amd. Sec. 1, Ch. 358, L. 1993; amd. Sec. 8, Ch. 438, L. 1995; amd. Sec. 195, Ch. 546, L. 1995; amd. Sec. 3, Ch. 185, L. 1997; amd. Sec. 1, Ch. 375, L. 1997; amd. Secs. 33, 78(1)(b), Ch. 550, L. 1997; Sec. 41-5-523, MCA 1995; redes. 41-5-1512 by Sec. 47, Ch. 286, L. 1997.

Cross-References

Suspending driving privileges of persons under age 18, 61-5-217.

41-5-1513. Disposition — delinquent youth — restrictions. (1) If a youth is found to be a delinquent youth, the youth court may enter its judgment making one or more of the following dispositions:

(a) any one or more of the dispositions provided in 41-5-1512;

(b) subject to 41-5-1504, 41-5-1512(15)(a), and 41-5-1522, commit the youth to the department for placement in a state youth correctional facility and recommend to the department that the youth not be released until the youth reaches 18 years of age. The court may not place a youth adjudicated delinquent in a state youth correctional facility for an offense that would be a misdemeanor if committed by an adult unless the court finds that the youth presents a danger to the public safety and that the placement is recommended by a mental health professional after evaluation of the youth.

(c) require a youth found to be a delinquent youth, as the result of the commission of an offense that would be a sexual offense or violent offense, as defined in 46-23-502, if committed by an adult, to register as a sexual or violent offender pursuant to Title 46, chapter 23, part 5. The youth court shall retain jurisdiction in a disposition under this subsection.

(d) in the case of a delinquent youth who is determined by the court to be a serious juvenile offender, the judge may specify that the youth be placed in a state youth correctional facility, subject to the provisions of subsection (2), if the judge finds that the placement is necessary for the protection of the public. The court may order the department to notify the court within 5 working days before the proposed release of a youth from a youth correctional facility. Once a youth is committed to the department for placement in a state youth correctional facility, the department is responsible for determining an appropriate date of release or an alternative placement.

(e) impose a fine as authorized by law if the violation alleged would constitute a criminal offense if committed by an adult.

(2) If a youth has been adjudicated for a sex offense, the youth court may require completion of sex offender treatment before a youth is discharged.

History: **En. Sec. 34, Ch. 550, L. 1997; amd. Sec. 12, Ch. 532, L. 1999.**

Compiler's Comments

1999 Amendment: Chapter 532 in (1)(b) at beginning of first sentence inserted "subject to 41-5-1504, 41-5-1512(15)(a), and 41-5-1522" and at end substituted "and recommend to the department that the youth not be released until the youth reaches 18 years of age" for "or in a correctional facility or a program operated by the department" and inserted second sentence concerning placement of youth adjudicated delinquent; deleted former (1)(c) that read: "(c) subject to 41-5-1504, 41-5-1512(15)(a), and 41-5-1522, sentence a youth to one of the state youth correctional facilities established under 52-5-101 and, as part of the sentence, deny the youth eligibility for release without the express approval of the sentencing judge until the youth reaches 18 years of age. A youth may not be sentenced to a state youth correctional facility unless the department informs the judge that space is available for the youth at that facility. Except as provided in subsection (2), the sentencing judge may not place limitations on the release unless recommended by the youth placement committee. The court may not place a youth adjudicated delinquent in a state youth correctional facility for an offense that would be a misdemeanor if committed by an adult, unless the court finds that the youth presents a danger to public safety and that the placement is recommended by a mental health professional after evaluation of the youth"; near end of first clause of (1)(c) substituted "sexual or violent offender" for "sex offender"; and made minor changes in style. Amendment effective October 1, 1999.

41-5-1514 through 41-5-1520 reserved.

41-5-1521. Restitution. (1) In determining whether restitution, as authorized by 41-5-1304, 41-5-1512, or 41-5-1513, is appropriate in a particular case, the following factors may be considered in addition to any other evidence:

(a) the age of the youth;

(b) the ability of the youth to pay;

(c) the ability of the parents, guardian, or those that contributed to the youth's delinquency or need for intervention to pay;

(d) the amount of damage to the victim; and

(e) legal remedies of the victim. However, the ability of the victim or the victim's insurer to stand any loss may not be considered.

(2) Restitution paid by a youth is subject to subrogation as provided in 46-18-248.

History: **En. Sec. 32, Ch. 550, L. 1997; amd. Sec. 76, Ch. 550, L. 1997.**

41-5-1522. Commitment to department — restrictions on placement. When a youth is committed to the department, the department shall determine the appropriate placement and rehabilitation program for the youth after considering the recommendations made under 41-5-123 by the youth placement committee. Placement is subject to the following limitations:

(1) A youth may not be held in a state youth correctional facility for a period of time in excess of the maximum period of imprisonment that could be imposed on an adult convicted of the offense or offenses that brought the youth under the jurisdiction of the youth court. This section does not limit the power of the department to enter into a parole agreement with the youth pursuant to 52-5-126.

(2) A youth may not be placed in or transferred to a state adult correctional facility or other facility used for the execution of sentences of adults convicted of crimes.

(3) The department may not place a youth in need of intervention, a youth adjudicated delinquent for commission of an act that would not be an offense if committed by an adult, or a youth who violates a consent adjustment in a state youth correctional facility.

History: **En. Sec. 35, Ch. 550, L. 1997.**

41-5-1523. Commitment to department — supervision. (1) A youth placed in a state youth correctional facility or other facility or program operated by the department or who signs a parole agreement under 52-5-126 must be supervised by the department.

(2) A youth who is placed in any private, out-of-home, residential placement by the youth court or the youth court's juvenile probation officer must be supervised by the probation officer of the youth court having jurisdiction over the youth under 41-5-205, whether or not the youth is committed to the department for purposes of funding a private, out-of-home, residential placement. Supervision by the youth probation officer includes but is not limited to:

(a) submitting information and documentation necessary for the person, committee, or team that is making the placement recommendation to determine an appropriate placement for the youth;

(b) securing approval for payment of special education costs from the youth's school district of residence or the office of public instruction, as required in Title 20, chapter 7, part 4;

(c) submitting an application to a facility in which the youth may be placed; and

(d) case management of the youth while in a private, out-of-home, residential placement and upon release until discharged by the department.

History: **En. Sec. 37, Ch. 550, L. 1997.**

41-5-1524. Commitment to department — transfer of records. Whenever the court commits a youth to the department, it shall transmit with the dispositional judgment copies of medical reports, social history material, youth assessment material, education records, and any other clinical, predisposition, or other reports and information pertinent to the care and treatment of the youth.

History: **En. Sec. 38, Ch. 550, L. 1997.**

41-5-1525. Contribution for costs — order for contribution — exceptions — collection. (1) If a youth is placed in substitute care, a youth assessment center, or detention requiring payment by any state or local government agency or committed to the department, the court shall examine the financial ability of the youth's parents or guardians to pay a contribution covering all or part of the costs for the adjudication, disposition, attorney fees for the costs of prosecuting or defending the youth, costs of detention, supervision, care, custody, and treatment of the youth, including the costs of necessary medical, dental, and other health care.

(2) If the court determines that a youth's parents or guardians are financially able to pay a contribution for adjudication, disposition, attorney fees for the costs of prosecuting or defending the youth, costs of detention, or supervision as provided in subsection (1), the court shall order the youth's parents or guardians to pay a specified amount. The order must state to which

state or local government agency all or a part of the contribution is due and in what order the payments must be made.

(3) If the court determines that the youth's parents or guardians are financially able to pay a contribution as provided in subsection (1), the court shall order the youth's parents or guardians to pay an amount attributable to care, custody, and treatment based on the uniform child support guidelines adopted by the department of public health and human services pursuant to 40-5-209.

(4) (a) Except as provided in subsection (4)(b), contributions ordered under subsection (3) and each modification of an existing order are enforceable by immediate or delinquency income withholding, or both, under Title 40, chapter 5, part 4. An order for contribution that is inconsistent with this section is nevertheless subject to withholding for the payment of the contribution without need for an amendment of the support order or for any further action by the court.

(b) A court-ordered exception from contributions under this section must be in writing and must be included in the order. An exception from the immediate income withholding requirement may be granted if the court finds that there is:

(i) good cause not to require immediate income withholding; or

(ii) an alternative arrangement between the department and the person who is ordered to pay contributions.

(c) A finding of good cause not to require immediate income withholding must, at a minimum, be based upon:

(i) a written determination and explanation by the court of the reasons why the implementation of immediate income withholding is not in the best interests of the youth; and

(ii) proof of timely payment of previously ordered support in cases involving modification of contributions ordered under this section.

(d) An alternative arrangement must:

(i) provide sufficient security to ensure compliance with the arrangement;

(ii) be in writing and be signed by a representative of the department and the person required to make contributions; and

(iii) if approved by the court, be entered into the record of the proceeding.

(5) Upon a showing of a change in the financial ability of the youth's parents or guardians to pay, the court may modify its order for the payment of contributions required under subsection (3).

(6) (a) If the court orders the payment of contributions under this section, the department shall apply to the department of public health and human services for support enforcement services pursuant to Title IV-D of the Social Security Act.

(b) The department of public health and human services may collect and enforce a contribution order under this section by any means available under law, including the remedies provided for in Title 40, chapter 5, parts 2 and 4.

History: **En. Sec. 41, Ch. 550, L. 1997.**

Part 16
Extended Jurisdiction Prosecution Act

Part Cross-References

Extended jurisdiction — transfer of youth to District Court after Youth Court prosecution — jurisdiction to age 25, 41-5-208.

41-5-1601. Short title. This part may be cited as the "Extended Jurisdiction Prosecution Act".

History: En. Sec. 1, Ch. 438, L. 1995; Sec. 41-5-1101, MCA 1995; redes. 41-5-1601 by Sec. 47, Ch. 286, L. 1997.

41-5-1602. Extended jurisdiction juvenile prosecution — designation. (1) A youth court case involving a youth alleged to have committed an offense that would be a felony if committed by an adult, except an offense punishable by death or life imprisonment or when a sentence of 100 years could be imposed, is an extended jurisdiction juvenile prosecution if:

(a) the youth was at least 14 years of age at the time of the alleged offense, the county attorney requests that the case be designated an extended jurisdiction juvenile prosecution, a hearing is held under 41-5-1603, and the court designates the case as an extended jurisdiction juvenile prosecution;

(b) the county attorney designates in the delinquency petition that the proceeding is an extended jurisdiction juvenile prosecution and the youth is alleged to have committed:

(i) an offense that is listed under 41-5-206, except an offense punishable by death or life imprisonment or when a sentence of 100 years could be imposed; or

(ii) any offense that would be a felony if committed by an adult, except an offense punishable by death or life imprisonment or when a sentence of 100 years could be imposed, in which the youth allegedly used a firearm, if the youth was at least 12 years of age at the time of the alleged offense; or

(c) after a hearing upon a motion for transfer of the matter of prosecution to the district court under 41-5-206, the court designates the case as an extended jurisdiction juvenile prosecution.

(2) To enforce the court's disposition in an extended jurisdiction juvenile prosecution, the court shall retain jurisdiction as provided in 41-5-205.

History: En. Sec. 2, Ch. 438, L. 1995; amd. Sec. 6, Ch. 498, L. 1997; Sec. 41-5-1102, MCA 1995; redes. 41-5-1602 by Sec. 47, Ch. 286, L. 1997; amd. Sec. 4, Ch. 537, L. 1999.

Compiler's Comments

1999 Amendment: Chapter 537 in three places in (1) inserted "except an offense punishable by death or life imprisonment or when a sentence of 100 years could be imposed"; and made minor changes in style. Amendment effective April 30, 1999.

41-5-1603. Hearing on request. (1) When a county attorney requests that a case be designated as an extended jurisdiction juvenile prosecution under 41-5-1602(1)(a), the court shall hold a hearing to consider the request.

(2) The hearing must be held within 30 days of the filing of the request unless good cause is shown by the county attorney or the youth that the hearing should be held later, in which case the hearing must be held within 90 days of the request.

(3) If the county attorney shows by clear and convincing evidence that designating the case as an extended jurisdiction juvenile prosecution serves

public safety, the court may, within 15 days after the hearing, designate the case as an extended jurisdiction juvenile prosecution. In determining whether public safety is served, the court shall consider the factors enumerated in 41-5-1606.

History: **En. Sec. 3, Ch. 438, L. 1995; amd. Sec. 7, Ch. 498, L. 1997; Sec. 41-5-1103, MCA 1995; redes. 41-5-1603 by Sec. 47, Ch. 286, L. 1997.**

41-5-1604. Disposition in extended jurisdiction juvenile prosecutions. (1) (a) After designation as an extended jurisdiction juvenile prosecution, the case must proceed with an adjudicatory hearing, as provided in 41-5-1502. If a youth in an extended jurisdiction juvenile prosecution admits to or is adjudicated to have committed an offense that would be a felony if committed by an adult, except an offense punishable by death or life imprisonment or when a sentence of 100 years could be imposed, the court shall, subject to subsection (1)(b), impose a single judgment consisting of:

(i) one or more juvenile dispositions under 41-5-1512 or 41-5-1513; and

(ii) any sentence allowed by the statute that establishes the penalty for the offense of which the youth is convicted and that would be permissible if the offender were an adult. The execution of the sentence imposed under this subsection must be stayed on the condition that the youth not violate the provisions of the disposition order and not commit a new offense.

(b) The combined period of time of a juvenile disposition under subsection (1)(a)(i) plus an adult sentence under subsection (1)(a)(ii) may not exceed the maximum period of imprisonment that could be imposed on an adult convicted of the offense or offenses that brought the youth under the jurisdiction of the youth court. This subsection does not limit the power of the department to enter into a parole agreement with the youth pursuant to 52-5-126.

(2) If a youth prosecuted as an extended jurisdiction juvenile after designation by the county attorney in the delinquency petition under 41-5-1602(1)(b) admits to or is adjudicated to have committed an offense that would be a felony if committed by an adult that is not an offense described in 41-5-1602(1)(b), except an offense punishable by death or life imprisonment or when a sentence of 100 years could be imposed, the court shall adjudicate the youth delinquent and order a disposition under 41-5-1513.

(3) If a youth in an extended jurisdiction juvenile prosecution admits to or is adjudicated to have committed an offense that would not be a felony if committed by an adult, the court shall impose a disposition as provided under subsection (1)(a).

History: **En. Sec. 4, Ch. 438, L. 1995; amd. Sec. 8, Ch. 498, L. 1997; amd. Sec. 52, Ch. 550, L. 1997; Sec. 41-5-1104, MCA 1995; redes. 41-5-1604 by Sec. 47, Ch. 286, L. 1997; amd. Sec. 5, Ch. 537, L. 1999.**

Compiler's Comments

1999 Amendment: Chapter 537 in two places in section inserted "except an offense punishable by death or life imprisonment or when a sentence of 100 years could be imposed"; at end of (1) after "shall" inserted "subject to subsection (1)(b), impose a single judgment consisting of"; inserted (1)(b) prohibiting combined time of juvenile disposition plus adult sentence from exceeding maximum period imposed on convicted adult or offenses bringing youth under youth court jurisdiction and clarifying power of department to enter into youth parole agreement; in (3) after "court" deleted "may impose, with the youth's consent, a disposition provided under subsection (1)(b). If the youth does not consent to disposition under subsection (1)(b), the court"; and made minor changes in style. Amendment effective April 30, 1999.

41-5-1605. Revocation of stay — disposition. (1) If a court has imposed on a youth a sentence stayed under 41-5-1604(1)(a)(ii) and the youth violates the conditions of the stay or is alleged to have committed a new offense, the court may, without notice, direct that the youth be taken into immediate custody. The court shall notify the youth, the youth's counsel, and the youth's parents, guardian, or custodian in writing of the reasons alleged to exist for revocation of the stay of execution of the sentence.

(2) (a) The court shall hold a revocation hearing at which the youth is entitled to receive:

(i) written notice of the alleged violation;

(ii) evidence of the alleged violation;

(iii) an opportunity to be heard in person and to present witnesses and evidence;

(iv) the right to cross-examine witnesses, unless the court finds good cause for not allowing confrontation; and

(v) the right to counsel.

(b) After the revocation hearing, if the court finds by a preponderance of the evidence presented that the conditions of the stay have been violated or that the youth has committed a new offense, the court shall provide the youth with a written statement of the evidence relied on and reasons for revocation and shall:

(i) continue the stay and place the youth on probation;

(ii) impose one or more dispositions under 41-5-1512 or 41-5-1513 if the youth is under 18 years of age; or

(iii) subject to 41-5-206(6) and (7) and 41-5-1604(1)(b), order execution of the sentence imposed under 41-5-1604(1)(a)(ii). The court shall order credit for any time served prior to revocation under a disposition under 41-5-1604(1)(a)(i).

(3) Upon revocation and disposition under subsection (2)(b)(iii), the youth court shall transfer the case to the district court. Upon transfer, the offender's extended jurisdiction juvenile status is terminated and youth court jurisdiction is terminated. Ongoing supervision of the offender is with the department, rather than the youth court's juvenile probation services.

History: En. Sec. 5, Ch. 438, L. 1995; amd. Secs. 9, 13, Ch. 498, L. 1997; amd. Sec. 53, Ch. 550, L. 1997; Sec. 41-5-1105, MCA 1995; redes. 41-5-1605 by Sec. 47, Ch. 286, L. 1997; amd. Sec. 6, Ch. 537, L. 1999.

Compiler's Comments

1999 Amendment: Chapter 537 in first sentence in (1) substituted "41-5-1604(1)(a)(ii)" for "41-5-1604(1)(b)"; at beginning of (2)(a) deleted "If the youth challenges the reasons for the revocation"; in (2)(b)(iii) inserted "41-5-1604(1)(b)" and substituted "41-5-1604(1)(a)(ii)" for "41-5-1604(1)(b)" and inserted second sentence requiring court to order credit for time served prior to revocation; and made minor changes in style. Amendment effective April 30, 1999.

41-5-1606. Public safety. (1) In determining whether the public safety is served by designating a case an extended jurisdiction juvenile prosecution, the court shall consider the following factors:

(a) the seriousness of the alleged offense in terms of community protection, including the existence of any aggravating factors, the use of a firearm, and the impact on the victim;

(b) the culpability of the youth in committing the alleged offense, including the level of the youth's participation in planning and carrying out the offense and the existence of mitigating factors;

(c) the youth's prior record of delinquency;

(d) the youth's treatment history, including the youth's past willingness to participate meaningfully in available treatment;

(e) the adequacy of the dispositions available in the juvenile justice system; and

(f) the dispositional options available for the youth.

(2) In considering the factors listed in subsection (1), the court shall give greater weight to the seriousness of the alleged offense and the youth's prior record of delinquency than to the other listed factors.

History: En. Sec. 10, Ch. 498, L. 1997.

41-5-1607. Proceedings — rights. A youth who is the subject of an extended jurisdiction juvenile prosecution has the right to a trial by jury and to the effective assistance of counsel, as provided in 41-5-1413.

History: En. Sec. 11, Ch. 498, L. 1997.

Part 17
Probation Officers

41-5-1701. Appointment of probation officers. The youth court judge of each judicial district shall appoint such necessary probation officers as are required to carry out the purpose and intent of this chapter. He shall appoint such part-time probation officers as shall be required. The qualifications for part-time probation officers must approximate those required for probation officers insofar as possible. A chief probation officer must be appointed by the judge to supervise the youth division offices in the judicial district. The judge shall also insure that the youth division offices are staffed with necessary office personnel and that the offices are properly equipped to effectively carry out the purpose and intent of this chapter. No person while serving as a law enforcement officer may be appointed or perform the duties of a full-time or part-time probation officer.

History: En. 10-1234 by Sec. 34, Ch. 329, L. 1974; amd. Sec. 1, Ch. 530, L. 1975; R.C.M. 1947, 10-1234(1); amd. Sec. 3, Ch. 29, L. 1979; Sec. 41-5-701, MCA 1995; redes. 41-5-1701 by Sec. 47, Ch. 286, L. 1997.

41-5-1702. Qualifications of probation officers. (1) Any person appointed as a chief probation officer must have the following qualifications:

(a) a master's degree in the behavioral sciences;

(b) a bachelor's degree from an accredited college or university in the behavioral sciences and at least 1 year's experience in work of a nature related to the duties of a probation officer as set forth in 41-5-1703; or

(c) a bachelor's degree in any field and at least 3 years' experience in work related to the duties of a probation officer as set forth in 41-5-1703.

(2) The judge may appoint any reputable person as a probation officer who has had experience in work of a nature related to the duties of a chief probation officer, provided preference must be given to persons with the qualifications set forth in subsection (1).

(3) Each person appointed as a chief probation officer or probation officer under this section or as a deputy probation officer under 41-5-1705 must obtain 16 hours a year of training in subjects relating to the powers and duties of probation officers in a program or course conducted by the department of justice or approved by the board of crime control under 41-5-1706.

History: En. 10-1234 by Sec. 34, Ch. 329, L. 1974; amd. Sec. 1, Ch. 530, L. 1975; R.C.M. 1947, 10-1234(2); amd. Sec. 1, Ch. 544, L. 1987; amd. Sec. 2, Ch. 205, L. 1995; Sec. 41-5-702, MCA 1995; redes. 41-5-1702 by Sec. 47, Ch. 286, L. 1997.

41-5-1703. Powers and duties of probation officers. (1) A probation officer shall:

(a) perform the duties set out in 41-5-1302;

(b) make predisposition studies and submit reports and recommendations to the court;

(c) supervise, assist, and counsel youth placed on probation or under the probation officer's supervision, including enforcement of the terms of probation or intervention;

(d) assist any public and private community and work projects engaged in by youth to pay fines, make restitution, and pay any other costs ordered by the court that are associated with youth delinquency or need for intervention;

(e) perform any other functions designated by the court.

(2) A probation officer does not have power to make arrests or to perform any other law enforcement functions in carrying out the probation officer's duties except that a probation officer may take into custody any youth who violates either the youth's probation or a lawful order of the court.

History: En. 10-1234 by Sec. 34, Ch. 329, L. 1974; amd. Sec. 1, Ch. 530, L. 1975; R.C.M. 1947, 10-1234(4), (5); amd. Secs. 48, 76, Ch. 550, L. 1997; Sec. 41-5-703, MCA 1995; redes. 41-5-1703 by Sec. 47, Ch. 286, L. 1997.

41-5-1704. Salary and expenses. (1) A chief probation officer must receive a salary specified by the court, depending on the formal training and experience of each respective officer; however, the salary may not be lower than $24,000 a year and may not be higher than $29,000 a year. In addition to the salary, the court shall, on or before July 1 of each year, adjust and fix the salary of the chief probation officer for a cost-of-living increase by adding to the chief probation officer's annual salary on July 1 of that year an increment, as determined by the county governing body using the applicable formula provided in 7-4-2504, of up to 100% of the previous calendar year's consumer price index for all urban consumers, U.S. department of labor, bureau of labor statistics, or other index that the bureau of business and economic research of the university of Montana-Missoula may in the future recognize as the successor to that index. The cost-of-living increment for each fiscal year must be added to all cost-of-living increments granted for previous years unless salaries were set for the fiscal year at the level of salaries received in the prior fiscal year by the county governing body. If that is the case, the cost-of-living increment that would have been received for the fiscal year, computed on the prior fiscal year, may not be added to previous increments. The salary of a chief probation officer must be apportioned among and paid by each of the counties in which the officer is appointed to act, in proportion to the cost allocation established under 41-5-104, except when the officer is appointed for one county, then that county shall pay the entire salary.

(2) In addition to the compensation provided in subsection (1), each chief probation officer with more than 5 years of service is entitled to receive an annual 1% longevity allowance; however, years of service during any year in which the salary was set at the same level as the salary of the prior fiscal year may not be included in any calculation of longevity increase. Each longevity allowance must be based on the officer's current salary and begins on the officer's annual employment anniversary date. The allowance must be paid in equal monthly installments.

(3) If the county governing body, in any subsequent fiscal year, restores for 1 or more years the annual cost-of-living increments withheld pursuant to subsection (1), the longevity increases provided for in subsection (2) must also be restored for those years that the cost-of-living increment was restored.

(4) For all authorized travel incident to a chief probation officer's official duties in connection with the investigation, supervision, and transportation of youth, the chief probation officer must, in addition to the officer's salary, be reimbursed as provided in 2-18-501 through 2-18-503.

History: En. 10-1234 by Sec. 34, Ch. 329, L. 1974; amd. Sec. 1, Ch. 530, L. 1975; R.C.M. 1947, 10-1234(part); amd. Sec. 1, Ch. 605, L. 1979; amd. Sec. 1, Ch. 534, L. 1981; amd. Sec. 1, Ch. 332, L. 1983; amd. Sec. 2, Ch. 580, L. 1985; amd. sec. 36, Ch. 308, L. 1995; amd. Sec. 1, Ch. 381, L. 1997; Sec. 41-5-704, MCA 1995; redes. 41-5-1704 by Sec. 47, Ch. 286, L. 1997.

41-5-1705. Deputy probation officers — salary. (1) The judge having jurisdiction of juvenile matters may appoint persons to serve as deputy probation officers as the judge considers necessary, giving preference to persons having the qualifications suggested for appointment as the chief probation officer. The salaries of deputy probation officers must be fixed by the judge. The salaries may not exceed 90% or be less than 60% of the salary of the chief probation officer, excluding the cost-of-living increase provided in subsection (2) and longevity payments provided in 41-5-1704.

(2) In addition to the salary, the judge shall, on or before July 1 of each year, adjust and fix the salary of the deputy probation officer for a cost-of-living increase by adding to the deputy probation officer's annual salary on July 1 of that year an increment, as determined by the county governing body using the applicable formula provided in 7-4-2504, of up to 100% of the previous calendar year's consumer price index for all urban consumers, U.S. department of labor, bureau of labor statistics, or other index that the bureau of business and economic research of the university of Montana-Missoula may in the future recognize as the successor to that index. The cost-of-living increment for each fiscal year must be added to all cost-of-living increments granted for previous years unless salaries were set for the fiscal year at the level of salaries received in the prior fiscal year by the county governing body. If that is the case, the cost-of-living increment that would have been received for the fiscal year, computed on the prior fiscal year, may not be added to previous increments. The salary of a deputy probation officer must be apportioned among and paid by each of the counties in which the officer is appointed to act, in proportion to the cost allocation established under 41-5-104, except when the officer is appointed for one county, then that county shall pay the entire salary.

(3) In addition to the compensation provided in subsections (1) and (2), each deputy probation officer with more than 5 years of service is entitled to receive an annual 1% longevity allowance; however, years of service during any

year in which the salary was set at the same level as the salary of the prior fiscal year may not be included in any calculation of longevity increase. Each longevity allowance must be based on the officer's current salary and begins on the officer's annual employment anniversary date. The allowance must be paid in equal monthly installments.

(4) If the county governing body, in any subsequent fiscal year, restores for 1 or more years the annual cost-of-living increments withheld pursuant to subsection (2), the longevity increases provided for in subsection (3) must also be restored for those years that the cost-of-living increment was restored.

(5) The salary of a deputy probation officer promoted to chief probation officer may not be decreased by the appointment. The deputy probation officer retains all longevity allowances earned during service as a deputy.

History: En. 10-1234 by Sec. 34, Ch. 329, L. 1974; amd. Sec. 1, Ch. 530, L. 1975; R.C.M. 1947, 10-1234(part); amd. Sec. 2, Ch. 605, L. 1979; amd. Sec. 2, Ch. 332, L. 1983; amd. Sec. 2, Ch. 381, L. 1997; Sec. 41-5-705, MCA 1995; redes. 41-5-1705 by Sec. 47, Ch. 286, L. 1997.

41-5-1706. Juvenile probation officer training. (1) The department of justice may conduct a 40-hour juvenile probation officer basic training program and other training programs and courses for juvenile probation officers. A 40-hour juvenile probation officer basic training program and other training programs and courses for juvenile probation officers may be offered by another public agency or by a private entity if the program or course is approved by the board of crime control. If funding is available, the department shall conduct a 40-hour basic training program once a year.

(2) A juvenile probation officer who successfully completes the 40-hour basic training program or another program or course must be issued a certificate by the board.

(3) A juvenile probation officer is entitled to the officer's salary while attending a program or training course and must be paid, by the district court, expenses as provided in 2-18-501. The court shall also pay any program or course registration fee.

(4) The board may adopt rules to implement this section.

History: En. Sec. 1, Ch. 205, L. 1995; Sec. 41-5-706, MCA 1995; redes. 41-5-1706 by Sec. 47, Ch. 286, L. 1997.

41-5-1707. Designation of assessment officers — qualifications — salary — duties. (1) The youth court judge of each judicial district may appoint and supervise the necessary assessment officers as are required to carry out the purpose and intent of this chapter. The qualifications for assessment officers must be established by the appointing judge. Assessment officers are county employees, and assessment officers' salaries must be fixed by the judge. An assessment officer may work out of the local police department or other local law enforcement office.

(2) An assessment officer shall perform the duties set out in 41-5-1201 and 41-5-1302.

(3) Proceedings under 41-5-1201 and 41-5-1302 that are held prior to adjudication satisfy the requirements of 20 U.S.C. 1232g(b)(1)(E)(ii)(I) of the Family Educational Rights and Privacy Act of 1974. Montana school districts may release education records to assessment officers. The assessment officer is responsible for ensuring that officials and authorities to whom such information is disclosed certify in writing to the school district that is releasing

the education records that the education records or information from the education records will not be disclosed to any other party without the prior written consent of the parent of the student.

History: **En. Sec. 72, Ch. 550, L. 1997.**

Part 18

Custodial Care

41-5-1801. Shelter care facilities. (1) Counties, cities, or nonprofit corporations may provide by purchase, lease, or otherwise, a shelter care facility.

(2) A shelter care facility may be used to provide an appropriately physically restricting setting for youth alleged or adjudicated to be a delinquent youth, a youth in need of intervention, or a youth in need of care.

(3) A shelter care facility must be physically separated from any facility housing adults accused or convicted of criminal offenses.

(4) State appropriations and federal funds may be received by counties, cities, or nonprofit corporations for establishment, maintenance, or operation of a shelter care facility.

(5) A shelter care facility must be furnished in a comfortable manner.

(6) A shelter care facility may be operated in conjunction with a youth detention facility.

(7) A shelter care facility may permit a school district to use the facility as an alternative education site provided that the school district provides the educational program and personnel necessary to instruct the youth. Public schools shall follow the requirements of the federal Individuals with Disabilities Education Act, 20 U.S.C. 1400, et seq., in making education placement decisions for youth with disabilities.

History: **En. Sec. 26, Ch. 227, L. 1943; Sec. 10-627, R.C.M. 1947; amd. and redes. 10-1237 by Sec. 37, Ch. 329, L. 1974; amd. Sec. 13, Ch. 571, L. 1977; R.C.M. 1947, 10-1237; amd. Sec. 11, Ch. 475, L. 1987; amd. Sec. 8, Ch. 434, L. 1989; amd. Sec. 23, Ch. 799, L. 1991; amd. Sec. 10, Ch. 528, L. 1995; amd. Sec. 49, Ch. 550, L. 1997; Sec. 41-5-802, MCA 1995; redes. 41-5-1801 by Sec. 47, Ch. 286, L. 1997.**

41-5-1802. Rules. The department shall adopt rules governing licensing procedures for regional and county detention facilities, including the requirement that a youth detention facility provide an educational program for youth in need of that service.

History: **En. Sec. 5, Ch. 475, L. 1987; amd. Sec. 15, Ch. 475, L. 1987; amd. Sec. 10, Ch. 434, L. 1989; amd. Sec. 24, Ch. 799, L. 1991; Sec. 41-5-809, MCA 1995; redes. 41-5-1802 by Sec. 47, Ch. 286, L. 1997; amd. Sec. 3, Ch. 536, L. 1999.**

Compiler's Comments

1999 Amendment: Chapter 536 at end inserted "including the requirement that a youth detention facility provide an educational program for youth in need of that service". Amendment effective April 29, 1999.

41-5-1803. County responsibility to provide youth detention services. (1) Each county shall provide services for the detention of youth in facilities separate from adult jails. The term "services" includes an educational program for youth in need of that service.

(2) In order to fulfill its responsibility under subsection (1), a county may:

(a) establish, operate, and maintain a holdover, a short-term detention center, or a youth detention facility at county expense;

(b) provide shelter care facilities as authorized in 41-5-1801;

(c) contract with another county for the use of an available shelter care facility, holdover, short-term detention center, or youth detention facility;

(d) establish and operate a network of holdovers in cooperation with other counties;

(e) establish a regional detention facility;

(f) enter into an agreement with a private party under which the private party will own, operate, or lease a shelter care facility or youth detention facility for use by the county. The agreement may be made in substantially the same manner as provided for in 7-32-2232 and 7-32-2233.

(g) contract with another state, political subdivision of another state, or an Indian tribe for use of a secure detention facility. Secure detention facilities contracted with for the purposes of this subsection (2)(g) must be licensed or certified by a state or federal agency with applicable licensing or certifying authority, or the contracting county shall determine that the out-of-state or tribal detention facility substantially complies with the licensing requirements contained in rules adopted by the department.

(3) Each county or regional detention facility must be licensed by the department in accordance with rules adopted under 41-5-1802.

(4) A county youth detention facility or a regional detention facility may contract with a school district for the provision of an educational program at the facility. The school district may use the facility as an alternative education site for the district. A contract authorized under this subsection must be made pursuant to the Interlocal Cooperation Act, Title 7, chapter 11, part 1, and must specify:

(a) that the school district is responsible for providing for the education of students enrolled in the school district;

(b) that the youth detention facility is responsible for providing for the education of youth held in lawful custody in the facility;

(c) the educational program and personnel necessary to provide instruction at the facility. The district and the detention facility shall follow the requirements of the Individuals with Disabilities Education Act, 20 U.S.C. 1400, et seq., in making educational placement decisions for youth with disabilities.

(d) the amount of funding to be contributed by the facility and the school district toward payment of the cost of establishing, operating, and maintaining the educational program.

History: En. Sec. 2, Ch. 799, L. 1991; Sec. 41-5-810, MCA 1995; redes. 41-5-1803 by Sec. 47, Ch. 286, L. 1997; amd. Sec. 13, Ch. 532, L. 1999; amd. Sec. 4, Ch. 536, L. 1999.

Compiler's Comments

1999 Amendments — Composite Section: Chapter 532 inserted (2)(g) concerning contracts for use of secure detention facilities; and made minor changes in style. Amendment effective October 1, 1999.

Chapter 536 in (1) inserted second sentence defining services; and inserted (4) concerning youth detention facility contracting with a school district for an education program. Amendment effective April 29, 1999.

41-5-1804. Regional detention facilities. (1) Two or more counties may, by contract, establish and maintain a regional detention facility.

(2) For the purpose of establishing and maintaining a regional detention facility, a county may:

(a) issue general obligation bonds for the acquisition, purchase, construction, renovation, and maintenance of a regional detention facility;

(b) subject to 15-10-420, levy and appropriate taxes, as permitted by law, to pay its share of the cost of equipping, operating, and maintaining the facility; and

(c) exercise all powers, under the limitations prescribed by law, necessary and convenient to carry out the purposes of 41-5-1803 and this section.

(3) Contracts authorized under subsection (1) must be made pursuant to the Interlocal Cooperation Act, Title 7, chapter 11, part 1.

(4) Contracts between counties participating in a regional detention facility must:

(a) specify the responsibilities of each county participating in the agreement;

(b) designate responsibility for operation of the regional detention facility;

(c) specify the amount of funding to be contributed by each county toward payment of the cost of establishing, operating, and maintaining the regional detention facility, including the necessary expenditures for the transportation of youth to and from the facility but excluding the education costs funded by a school district pursuant to 41-5-1807;

(d) include the applicable per diem charge for the detention of youth in the facility, as well as the basis for any adjustment in the charge;

(e) specify the number of beds to be reserved for the use of each county participating in the regional detention facility; and

(f) provide an educational program for youth held in the detention facility and in need of that service.

History: En. Sec. 3, Ch. 799, L. 1991; amd. Sec. 11, Ch. 528, L. 1995; Sec. 41-5-811, MCA 1995; redes. 41-5-1804 by Sec. 47, Ch. 286, L. 1997; amd. Sec. 5, Ch. 536, L. 1999; amd. Sec. 126, Ch. 584, L. 1999.

Compiler's Comments

1999 Amendments — Composite Section: Chapter 536 at end of (4)(c) inserted "but excluding the education costs funded by a school district pursuant to 41-5-1807"; inserted (4)(f) concerning educational program for youth in youth detention facility; and made minor changes in style. Amendment effective April 29, 1999.

Chapter 584 in (2)(b) inserted reference to 15-10-420. Amendment effective May 10, 1999.

Retroactive Applicability: Section 175, Ch. 584, L. 1999, provided that this section applies retroactively, within the meaning of 1-2-109, to tax years beginning after December 31, 1998.

41-5-1805. Creation of regions — requirements — limitation on number of regions. (1) Counties that wish to establish a regional detention facility shall form a youth detention region.

(2) Each youth detention region must:

(a) be composed of contiguous counties participating in the regional detention facility; and

(b) include geographical areas of the state that contain a substantial percentage of the total youth population in need of detention services, as determined by the board of crime control.

(3) There may be no more than five youth detention regions established in the state at any one time.

History: **En. Sec. 4, Ch. 799, L. 1991; Sec. 41-5-812, MCA 1995; redes. 41-5-1805 by Sec. 47, Ch. 286, L. 1997.**

41-5-1806. Contracts with nonparticipating counties. Counties participating in a regional detention facility may enter into agreements with nonparticipating counties to provide services for the detention of youth. The costs of services must be based upon a per diem charge for the detention of youth in the facility.

History: **En. Sec. 5, Ch. 799, L. 1991; Sec. 41-5-813, MCA 1995; redes. 41-5-1806 by Sec. 47, Ch. 286, L. 1997.**

41-5-1807. Responsibility for payment of detention costs. (1) Absent a contract or agreement between counties and except as provided in subsection (2), all costs for the detention of a youth in a county or regional detention facility, including medical costs incurred by the youth during detention, must be paid by the county at whose instance the youth is detained.

(2) A detention facility providing an educational program for youth held in lawful custody at the facility is eligible to receive education funding calculated as follows:

(a) Before the end of each fiscal year, the facility shall compile the following information by school district:

(i) the number of youth detained in the facility over 9 consecutive days during the prior year; and

(ii) the total number of days the youth in subsection (2)(a)(i) were detained.

(b) The facility shall calculate the school district's obligation for educational services by multiplying the number of youth detained and the total number of days detained as provided in subsection (2) by $20 a day for each youth. The calculation must be sent to the school district no later than June 30. The school district shall transmit the amount calculated to the county treasurer of the county where the facility is located no later than July 15.

(c) The funds are to be used by the county for educational services provided by certified personnel in the detention facility located in the county and is subject to the requirements of Title 7, chapter 6, part 23.

History: **En. Sec. 6, Ch. 799, L. 1991; Sec. 41-5-814, MCA 1995; redes. 41-5-1807 by Sec. 47, Ch. 286, L. 1997; amd. Sec. 6, Ch. 536, L. 1999.**

Compiler's Comments

1999 Amendment: Chapter 536 in middle of (1) inserted exception clause; inserted (2) concerning educational program for youth in lawful custody at a detention facility; and made minor changes in style. Amendment effective April 29, 1999.

Part 19

State Grants for Youth Detention Services

41-5-1901. Definitions. As used in this part, unless the context requires otherwise, the following definitions apply:

(1) "Attendant care" means the direct supervision of youth by a trained attendant in a physically unrestricting setting.

(2) "Board" means the board of crime control provided for in 2-15-2006.

(3) "County" means a county, city-county consolidated government, or a youth detention region created pursuant to 41-5-1805.

(4) "Home detention" means the use of a youth's home for the purpose of ensuring the continued custody of the youth pending adjudication or final disposition of his case.

(5) "Plan" means a county plan for providing youth detention services as required in 41-5-1903.

(6) "Secure detention" means the detention of youth in a physically restricting facility designed to prevent a youth from departing at will.

(7) "Youth detention service" means service for the detention of youth in facilities separate from adult jails. The term includes the services described in 41-5-1902.

History: En. Sec. 7, Ch. 799, L. 1991; Sec. 41-5-1001, MCA 1995; redes. 41-5-1901 by Sec. 47, Ch. 286, L. 1997.

41-5-1902. State grants to counties. (1) Within the limits of available funds, the board shall provide grants in accordance with 41-5-1903 through 41-5-1905 to assist counties in establishing and operating youth detention services, including but not limited to youth detention facilities, short-term detention centers, holdovers, attendant care, home detention, and programs for the transportation of youth to regional detention facilities.

(2) Grants available under subsection (1) consist of state appropriations and federal funds received by the board for the purpose of administering 41-5-1901 through 41-5-1905.

History: En. Sec. 8, Ch. 799, L. 1991; Sec. 41-5-1002, MCA 1995; redes. 41-5-1902 by Sec. 47, Ch. 286, L. 1997.

41-5-1903. Application for grants — county plans — obligation of counties receiving grants — review and monitoring. (1) In order to receive funds under 41-5-1902, a county shall submit an application to the board in a manner and form prescribed by the board.

(2) The application must include a written plan for providing youth detention services in the county. Each plan must include:

(a) an assessment of the need for services;

(b) a description of services to be provided, including alternatives to secure detention;

(c) the estimated number of youth who will receive services;

(d) criteria for the placement of youth in secure detention; and

(e) a budget describing proposed expenditures for youth detention services.

(3) If the application and plan are approved by the board, the county may receive a grant in the amount provided for in 41-5-1904.

(4) As a condition of receiving funds under 41-5-1902, each county shall, within a reasonable period of time, comply or substantially comply with state law and policies contained in the Montana Youth Court Act concerning the detention and placement of youth.

(5) The board shall periodically review and monitor counties receiving grants under 41-5-1902 to assure compliance or substantial compliance with the Montana Youth Court Act, as required under subsection (4). If, after notice and fair hearing, the board determines that a county is not in compliance or substantial compliance with the Montana Youth Court Act, the board shall terminate the grant to the county.

History: En. Sec. 9, Ch. 799, L. 1991; Sec. 41-5-1003, MCA 1995; redes. 41-5-1903 by Sec. 47, Ch. 286, L. 1997.

41-5-1904. Distribution of grants — limitation of funding — restrictions on use. (1) The board shall award grants on an equitable basis, giving preference to services that are to be used on a regional basis.

(2) The board shall award grants to eligible counties:

(a) in a block grant in an amount not to exceed 50% of the approved, estimated cost of secure detention; or

(b) on a matching basis in an amount not to exceed:

(i) 75% of the approved cost of providing holdovers, attendant care, and other alternatives to secure detention, except for shelter care. Shelter care costs must be paid as provided by law.

(ii) 50% of the approved cost of programs for the transportation of youth to appropriate detention or shelter care facilities, including regional detention facilities.

(3) Based on funding available after the board has funded block grants under subsection (2), the board shall, in cases of extreme hardship in which the transfer of youth court cases to the adult system has placed considerable financial strain on a county's resources, award grants to eligible counties to fund up to 75% of the actual costs of secure detention of youth awaiting transfer. Hardship cases will be addressed at the end of the fiscal year and will be awarded by the board based upon a consideration of the applicant county's past 3 years' expenditures for youth detention and upon consideration of the particular case or cases that created the hardship expenditure for which the hardship grant is requested.

(4) Grants under 41-5-1902 may not be used to pay for the cost of youth evaluations. The cost of evaluations must be paid as provided for in 41-5-1503.

History: En. Sec. 10, Ch. 799, L. 1991; amd. Sec. 1, Ch. 8, L. 1995; amd. Sec. 50, Ch. 550, L. 1997; Sec. 41-5-1004, MCA 1995; redes. 41-5-1904 by Sec. 47, Ch. 286, L. 1997.

41-5-1905. Allocation of grants. (1) Each fiscal year, the board shall allocate grants under 41-5-1902 for distribution to eligible counties based upon:

(a) the relative population of youth residing in geographical areas of the state, as determined by the board; and

(b) the estimated cost of youth detention services in each county eligible for funding under 41-5-1902.

(2) A county is not automatically entitled to receive a grant from funds available under 41-5-1902.

History: En. Sec. 11, Ch. 799, L. 1991; Sec. 41-5-1005, MCA 1995; redes. 41-5-1905 by Sec. 47, Ch. 286, L. 1997.

41-5-1906. Amendment of state plan. The board shall amend the state plan required under section 223 of the federal Juvenile Justice and Delinquency Prevention Act of 1974, as amended (42 U.S.C. 5633), to reflect the contents of approved county plans for providing youth detention services.

History: En. Sec. 12, Ch. 799, L. 1991; Sec. 41-5-1006, MCA 1995; redes. 41-5-1906 by Sec. 47, Ch. 286, L. 1997.

41-5-1907. Compliance with federal requirements. The board shall administer federal funds available under section 222 of the federal Juvenile Justice and Delinquency Prevention Act of 1974, as amended (42 U.S.C. 5632), in compliance with the requirements of 42 U.S.C. 5633(a)(21) and 42 U.S.C. 5674.

History: En. Sec. 13, Ch. 799, L. 1991; Sec. 41-5-1007, MCA 1995; redes. 41-5-1907 by Sec. 47, Ch. 286, L. 1997.

41-5-1908. Rulemaking authority. The board may adopt rules necessary to implement the provisions of 41-5-1805 and 41-5-1901 through 41-5-1908 and to establish requirements for approved holdovers consistent with the definition of holdover provided in 41-5-103.

History: En. Sec. 14, Ch. 799, L. 1991; amd. Sec. 192, Ch. 42, L. 1997; amd. Sec. 51, Ch. 550, L. 1997; Sec. 41-5-1008, MCA 1995; redes. 41-5-1908 by Sec. 47, Ch. 286, L. 1997.

Parts 20 through 24 reserved

Part 25

Criminally Convicted Youth Act

Part Compiler's Comments

Effective Date: This part is effective October 1, 1999.

41-5-2501. Short title. This part may be cited as the "Criminally Convicted Youth Act".

History: En. Sec. 17, Ch. 532, L. 1999.

41-5-2502. Purpose. The criminally convicted youth act must be interpreted and construed to effectuate the following express legislative purposes:

(1) to protect the public;

(2) to hold youth who commit offenses that may be filed directly in district court pursuant to 41-5-206 accountable for their actions;

(3) to provide for the custody, assessment, care, supervision, treatment, education, rehabilitation, and work and skill development of youth convicted in district court; and

(4) to comply with the legislative purposes set forth in 41-5-102.

History: En. Sec. 18, Ch. 532, L. 1999.

41-5-2503. Disposition of criminally convicted youth. (1) The district court, in sentencing a youth adjudicated in district court pursuant to 41-5-206, shall:

(a) impose any sentence allowed by the statute that established the penalty for the offense of which the youth is convicted as if the youth were an adult and any conditions or restrictions allowed by statute;

(b) retain jurisdiction over the case until the criminally convicted youth reaches the age of 21;

(c) order the department to submit a status report to the court, county attorney, defense attorney, and juvenile probation officer every 6 months until the youth attains the age of 21. The report must include a recommendation from the department regarding the disposition of the criminally convicted youth.

(2) The district court shall review the criminally convicted youth's sentence pursuant to 41-5-2510 before the youth reaches the age of 21 if a hearing has not been requested under 41-5-2510.

History: En. Sec. 19, Ch. 532, L. 1999.

41-5-2504 through 41-5-2509 reserved.

41-5-2510. Sentence review hearing. (1) When a youth has been convicted as an adult pursuant to the provisions of 41-5-206, except for offenses punishable by death or life imprisonment or when a sentence of 100 years could be imposed, the county attorney, defense attorney, or youth may, at any time before the youth reaches the age of 21, request a hearing to review the sentence imposed on the youth. The department shall notify the court of the youth's impending birthday no later than 90 days before the youth's 21st birthday.

(2) After reviewing the status report and upon motion for a hearing, the court shall determine whether to hold a criminally convicted youth sentence review hearing. If the court, in its discretion, determines that a sentence review hearing is warranted or is required under 41-5-2503, the hearing must be held within 90 days after the filing of the request or determination. The sentencing court or county attorney shall notify the victim of the offense pursuant to Title 46, chapter 24.

(3) The sentencing court shall review the department's records, youth court records, victim statements, and any other pertinent information.

(4) The sentencing court, after considering the criminal, social, psychological, and any other records of the youth; any evidence presented at the hearing; and any statements by the victim and by the parent or parents or guardian of the youth and any other advocates for the youth shall determine whether the criminally convicted youth has been substantially rehabilitated based upon a preponderance of the evidence.

(5) In the event that the sentencing court determines that the youth has been substantially rehabilitated, the court shall determine whether to:

(a) suspend all or part of the remaining portion of the sentence, impose conditions and restrictions pursuant to 46-18-201, and place the youth on probation under the direction of the department, unless otherwise specified;

(b) impose all or part of the remaining sentence and make any additional recommendations to the department regarding the placement and treatment of the criminally convicted youth; or

(c) impose a combination of options allowed under subsections (5)(a) and (5)(b), not to exceed the total sentence remaining.

(6) The sentencing court may revoke a suspended sentence of a criminally convicted youth pursuant to 46-18-203.

History: En. Sec. 20, Ch. 532, L. 1999.

CHAPTER 6

INTERSTATE COMPACT ON JUVENILES

Part 1 — Text of Compact

41-6-101. Enactment — provisions.
41-6-102. Juvenile compact administrator.
41-6-103. Supplementary agreements.
41-6-104. Financial arrangements.
41-6-105. Responsibilities of courts, state departments, agencies, and officers.
41-6-106. Additional procedures not precluded.

Part 1
Text of Compact

41-6-101. Enactment — provisions. The Interstate Compact on Juveniles as contained herein is hereby enacted into law and entered into by this state with all other jurisdictions legally joining therein in the form substantially as follows:

The contracting states solemnly agree that:

Article I. Findings and Purposes

(1) Juveniles who are not under proper supervision and control or who have absconded, escaped, or run away are likely to endanger their own health, morals, and welfare and the health, morals, and welfare of others. The cooperation of the states party to this compact is therefore necessary to provide for the welfare and protection of juveniles and of the public with respect to:

(a) cooperative supervision of delinquent juveniles on probation or parole;

(b) the return, from one state to another, of delinquent juveniles who have escaped or absconded;

(c) the return, from one state to another, of nondelinquent juveniles who have run away from home; and

(d) additional measures for the protection of juveniles and of the public which any two or more of the party states may find desirable to undertake cooperatively.

(2) In carrying out the provisions of this compact the party states shall be guided by the noncriminal, reformative, and protective policies which guide their laws concerning delinquent, neglected, or dependent juveniles generally. It shall be the policy of the states party to this compact to cooperate and observe their respective responsibilities for the prompt return and acceptance of juveniles and delinquent juveniles who become subject to the provisions of this compact. The provisions of this compact shall be reasonably and liberally construed to accomplish the foregoing purposes.

Article II. Existing Rights and Remedies

All remedies and procedures provided by this compact shall be in addition to and not in substitution for other rights, remedies, and procedures and shall not be in derogation of parental rights and responsibilities.

Article III. Definitions

For the purposes of this compact, "delinquent juvenile" means any juvenile who has been adjudged delinquent and who, at the time the provisions of this compact are invoked, is still subject to the jurisdiction of the court that has made such adjudication or to the jurisdiction or supervision of an agency or institution pursuant to an order of such court; "probation or parole" means any kind of conditional release of juveniles authorized under the laws of the states party hereto; "court" means any court having jurisdiction over delinquent, neglected, or dependent children; "state" means any state, territory, or possessions of the United States, the District of Columbia, and the commonwealth of Puerto Rico; and "residence" or any variant thereof means a place at which a home or regular place of abode is maintained.

Article IV. Return of Runaways

(1) The parent, guardian, person, or agency entitled to legal custody of a juvenile who has not been adjudged delinquent but who has run away without the consent of such parent, guardian, person, or agency may petition the appropriate court in the demanding state for the issuance of a requisition for his return. The petition shall state the name and age of the juvenile, the name of the petitioner and the basis of entitlement to the juvenile's custody, the circumstances of his running away, his location if known at the time application is made, and such other facts as may tend to show that the juvenile who has run away is endangering his own welfare or the welfare of others and is not an emancipated minor. The petition shall be verified by affidavit, shall be executed in duplicate, and shall be accompanied by two certified copies of the document or documents on which the petitioner's entitlement to the juvenile's custody is based, such as birth certificates, letters of guardianship, or custody decrees. Such further affidavits and other documents as may be deemed proper may be submitted with such petition. The judge of the court to which this application is made may hold a hearing thereon to determine whether for the purposes of this compact the petitioner is entitled to the legal custody of the juvenile, whether or not it appears that the juvenile has in fact run away without consent, whether or not he is an emancipated minor, and whether or not it is in the best interest of the juvenile to compel his return to the state. If the judge determines, either with or without a hearing, that the juvenile should be returned, he shall present to the appropriate court or to the executive authority of the state where the juvenile is alleged to be located a written requisition for the return of such juvenile. Such requisition shall set forth the name and age of the juvenile, the determination of the court that the juvenile has run away without the consent of a parent, guardian, person, or agency entitled to his legal custody, and that it is in the best interest and for the protection of such juvenile that he be returned. In the event that a proceeding for the adjudication of the juvenile as a delinquent, neglected, or dependent juvenile is pending in the court at the time when such juvenile runs away, the court may issue a requisition for the return of such juvenile upon its own motion, regardless of the consent of the parent, guardian, person, or agency entitled to legal custody, reciting therein the nature and circumstances of the pending proceeding. The requisition shall in every case be executed in duplicate and shall be signed by the judge. One copy of the requisition shall be filed with the compact administrator of the demanding state, there to remain on file subject to the provisions of law governing records of such court. Upon receipt of a requisition demanding the return of a juvenile who has run away, the court or the executive authority to whom the requisition is addressed shall issue an order to any peace officer or other appropriate person directing him to take into custody and detain such juvenile. Such detention order must substantially recite the facts necessary to the validity of its issuance hereunder. No juvenile detained upon such order shall be delivered over to the officer whom the court demanding him shall have appointed to receive him unless he shall first be taken forthwith before a judge of a court in the state, who shall inform him of the demand made for his return and who may appoint counsel or guardian ad litem for him. If the judge of such court shall find that the requisition is in order, he shall deliver

such juvenile over to the officer whom the court demanding him shall have appointed to receive him. The judge, however, may fix a reasonable time to be allowed for the purpose of testing the legality of the proceeding.

(2) Upon reasonable information that a person is a juvenile who has run away from another state party to this compact without the consent of a parent, guardian, person, or agency entitled to his legal custody, such juvenile may be taken into custody without a requisition and brought forthwith before a judge of the appropriate court, who may appoint counsel or guardian ad litem for such juvenile and who shall determine after a hearing whether sufficient cause exists to hold the person, subject to the order of the court, for his own protection and welfare, for such a time not exceeding 90 days as will enable his return to another state party to this compact pursuant to a requisition for his return from a court of that state. If, at the time when a state seeks the return of a juvenile who has run away, there is pending in the state wherein he is found any criminal charge or any proceeding to have him adjudicated a delinquent juvenile for an act committed in such state or if he is suspected of having committed within such state a criminal offense or an act of juvenile delinquency, he shall not be returned without the consent of such state until discharged from prosecution or other form of proceeding, imprisonment, detention, or supervision for such offense of juvenile delinquency. The duly accredited officers of any state party to this compact, upon the establishment of their authority and the identity of the juvenile being returned, shall be permitted to transport such juvenile through any and all states party to this compact, without interference. Upon his return to the state from which he ran away, the juvenile shall be subject to such further proceedings as may be appropriate under the laws of that state.

(3) The state to which a juvenile is returned under this article shall be responsible for payment of the transportation costs of such return.

(4) "Juvenile" as used in this article means any person who is a minor under the law of the state of residence of the parent, guardian, person, or agency entitled to the legal custody of such minor.

Article V. Return of Escapees and Absconders

(1) The appropriate person or authority from whose probation or parole supervision a delinquent juvenile has absconded or from whose institutional custody he has escaped shall present to the appropriate court or to the executive authority of the state where the delinquent juvenile is alleged to be located a written requisition for the return of such delinquent juvenile. Such requisition shall state the name and age of the delinquent juvenile, the particulars of his adjudication as a delinquent juvenile, the circumstances of the breach of the terms of his probation or parole or of his escape from an institution or agency vested with his legal custody or supervision, and the location of such delinquent juvenile if known at the time the requisition is made. The requisition shall be verified by affidavit, shall be executed in duplicate, and shall be accompanied by two certified copies of the judgment, formal adjudication, or order of commitment which subjects such delinquent juvenile to probation or parole or to the legal custody of the institution or agency concerned. Such further affidavits and other documents as may be deemed proper may be submitted with such requisition. One copy of the requisition shall be filed with the

compact administrator of the demanding state, there to remain on file subject to the provisions of law governing records of the appropriate court. Upon the receipt of a requisition demanding the return of a delinquent juvenile who has absconded or escaped, the court or the executive authority to whom the requisition is addressed shall issue an order to any peace officer or other appropriate person directing him to take into custody and detain such delinquent juvenile. Such detention order must substantially recite the facts necessary to the validity of its issuance hereunder. No delinquent juvenile detained upon such order shall be delivered over to the officer whom the appropriate person or authority demanding him shall have appointed to receive him unless he shall first be taken forthwith before a judge of an appropriate court in the state, who shall inform him of the demand made for his return and who may appoint counsel or guardian ad litem for him. If the judge of such court shall find that the requisition is in order, he shall deliver such delinquent juvenile over to the officer whom the appropriate person or authority demanding him shall have appointed to receive him. The judge, however, may fix a reasonable time to be allowed for the purpose of testing the legality of the proceeding.

(2) Upon reasonable information that a person is a delinquent juvenile who has absconded while on probation or parole or escaped from an institution or agency vested with his legal custody or supervision in any state party to this compact, such person may be taken into custody in any other state party to this compact without a requisition. But in such event, he must be taken forthwith before a judge of the appropriate court, who may appoint counsel or guardian ad litem for such person and who shall determine, after a hearing, whether sufficient cause exists to hold the person subject to the order of the court for such a time not exceeding 90 days as will enable his detention under a detention order issued on a requisition pursuant to this article. If, at the time when a state seeks the return of a delinquent juvenile who has either absconded while on probation or parole or escaped from an institution or agency vested with his legal custody or supervision, there is pending in the state wherein he is detained any criminal charge or any proceeding to have him adjudicated a delinquent juvenile for an act committed in such state or if he is suspected of having committed within such state a criminal offense or an act of juvenile delinquency, he shall not be returned without the consent of such state until discharged from prosecution or other form of proceeding, imprisonment, detention, or supervision for such offense or juvenile delinquency. The duly accredited officers of any state party to this compact, upon the establishment of their authority and the identity of the delinquent juvenile being returned, shall be permitted to transport such delinquent juvenile through any and all states party to this compact, without interference. Upon his return to the state from which he escaped or absconded, the delinquent juvenile shall be subject to such further proceedings as may be appropriate under the laws of that state.

(3) The state to which a delinquent juvenile is returned under this article shall be responsible for payment of the transportation cost of such return.

Article VI. Voluntary Return Procedure

Any delinquent juvenile who has absconded while on probation or parole or escaped from an institution or agency vested with his legal custody or supervision in any state party to this compact and any juvenile who has run away from any state party to this compact, who is taken into custody without a requisition in another state party to this compact under the provisions of Article IV(1) and (2) or of Article V(1) and (2), may consent to his immediate return to the state from which he absconded, escaped, or ran away. Such consent shall be given by the juvenile or delinquent juvenile and his counsel or guardian ad litem, if any, by executing or subscribing a writing, in the presence of a judge of the appropriate court, which states that the juvenile or delinquent juvenile and his counsel or guardian ad litem, if any, consent to his return to the demanding state. Before such consent shall be executed or subscribed, however, the judge, in the presence of counsel or guardian ad litem, if any, shall inform the juvenile or delinquent juvenile of his rights under this compact. When the consent has been duly executed, it shall be forwarded to and filed with the compact administrator of the state in which the court is located, and the judge shall direct the officer having the juvenile or delinquent juvenile in custody to deliver him to the duly accredited officer or officers of the state demanding his return and shall cause to be delivered to such officer or officers a copy of the consent. The court may, however, upon the request of the state to which the juvenile or delinquent juvenile is being returned, order him to return unaccompanied to such state and shall provide him with a copy of such court order; in such event a copy of the consent shall be forwarded to the compact administrator of the state to which said juvenile or delinquent juvenile is ordered to return.

Article VII. Cooperative Supervision of Probationers and Parolees

(1) The duly constituted judicial and administrative authorities of a state party to this compact (herein called "sending state") may permit any delinquent juvenile within such state, placed on probation or parole, to reside in any other state party to this compact (herein called "receiving state") while on probation or parole, and the receiving state shall accept such delinquent juvenile, if the parent, guardian, or person entitled to the legal custody of such delinquent juvenile is residing or undertakes to reside within the receiving state. Before granting such permission, opportunity shall be given to the receiving state to make such investigations as it deems necessary. The authorities of the sending state shall send to the authorities of the receiving state copies of pertinent court orders, social case studies, and all other available information which may be of value to and assist the receiving state in supervising a probationer or parolee under this compact. A receiving state, in its discretion, may agree to accept supervision of a probationer or parolee in cases where the parent, guardian, or person entitled to the legal custody of the delinquent juvenile is not a resident of the receiving state, and if so accepted, the sending state may transfer supervision accordingly.

(2) Each receiving state will assume the duties of visitation and of supervision over any such delinquent juvenile and in the exercise of those duties will be governed by the same standards of visitation and supervision that prevail for its own delinquent juveniles released on probation or parole.

(3) After consultation between the appropriate authorities of the sending state and of the receiving state as to the desirability and necessity of returning

such a delinquent juvenile, the duly accredited officers of a sending state may enter a receiving state and there apprehend and retake any such delinquent juvenile on probation or parole. For that purpose, no formalities will be required, other than establishing the authority of the officer and the identity of the delinquent juvenile to be retaken and returned. The decision of the sending state to retake a delinquent juvenile on probation or parole shall be conclusive upon and not reviewable within the receiving state, but if, at the time the sending state seeks to retake a delinquent juvenile on probation or parole, there is pending against him within the receiving state any criminal charge or any proceeding to have him adjudicated a delinquent juvenile for any act committed in such state or if he is suspected of having committed within such state a criminal offense or an act of juvenile delinquency, he shall not be returned without the consent of the receiving state until discharged from prosecution or other form of proceeding, imprisonment, detention, or supervision for such offense or juvenile delinquency. The duly accredited officers of the sending state shall be permitted to transport delinquent juveniles being so returned through any and all states party to this compact, without interference.

(4) The sending state shall be responsible under this article for paying the costs of transporting any delinquent juvenile to the receiving state or of returning any delinquent juvenile to the sending state.

Article VIII. Responsibility for Costs

(1) The provisions of Articles IV(3), V(3), and VII(4) of this compact shall not be construed to alter or affect any internal relationship among the departments, agencies, and officers of and in the government of a party state or between a party state and its subdivisions as to the payment of cost or responsibilities therefor.

(2) Nothing in this compact shall be construed to prevent any party state or subdivision thereof from asserting any right against any person, agency, or other entity in regard to costs for which such party state or subdivision thereof may be responsible pursuant to Articles IV(3), V(3), or VII(4) of this compact.

Article IX. Detention Practices

To every extent possible, it shall be the policy of states party to this compact that no juvenile or delinquent juvenile shall be placed or detained in any prison, jail, or lockup or be detained or transported in association with criminal, vicious, or dissolute persons.

Article X. Supplementary Agreements

The duly constituted administrative authorities of a state party to this compact may enter into supplementary agreements with any other state or states party hereto for the cooperative care, treatment, and rehabilitation of delinquent juveniles whenever they shall find that such agreements will improve the facilities or programs available for such care, treatment, and rehabilitation. Such care, treatment, and rehabilitation may be provided in an institution located within any state entering into such supplementary agreement. Such supplementary agreements shall:

(1) provide the rates to be paid for the care, treatment, and custody of such delinquent juveniles, taking into consideration the character of facilities, services, and subsistence furnished;

(2) provide that the delinquent juvenile shall be given a court hearing prior to his being sent to another state for care, treatment, and custody;

(3) provide that the state receiving such a delinquent juvenile in one of its institutions shall act solely as agent for the state sending such delinquent juvenile;

(4) provide that the sending state shall at all times retain jurisdiction over delinquent juveniles sent to an institution in another state;

(5) provide for reasonable inspection of such institutions by the sending state;

(6) provide that the consent of the parent, guardian, person, or agency entitled to the legal custody of said delinquent juvenile shall be secured prior to his being sent to another state; and

(7) make provision for such other matters and details as shall be necessary to protect the rights and equities of such delinquent juveniles and of the cooperating states.

Article XI. Acceptance of Federal and Other Aid

Any state party to this compact may accept any and all donations, gifts, and grants of money, equipment, and services from the federal or any local government or any agency thereof and from any person, firm, or corporation for any of the purposes and functions of this compact and may receive and utilize the same subject to the terms, conditions, and regulations governing such donations, gifts, and grants.

Article XII. Compact Administrators

The governor of each state party to this compact shall designate an officer who, acting jointly with like officers of other party states, shall promulgate rules to carry out more effectively the terms and provisions of this compact.

Article XIII. Execution of Compact

This compact shall become operative immediately upon its execution by any state as between it and any other state or states so executing. When executed it shall have the full force and effect of law within such state, the form of execution to be in accordance with the laws of the executing state.

Article XIV. Renunciation

This compact shall continue in force and remain binding upon each executing state until renounced by it. Renunciation of this compact shall be by the same authority which executed it, by sending 6 months' notice in writing of its intention to withdraw from the compact to the other states party hereto. The duties and obligations of a renouncing state under Article VII hereof shall continue as to parolees and probationers residing therein at the time of withdrawal until retaken or finally discharged. Supplementary agreements entered into under Article X hereof shall be subject to renunciation as provided by such supplementary agreements and shall not be subject to the 6 months' renunciation notice of the present article.

Article XV. Severability

The provisions of this compact shall be severable and if any phrase, clause, sentence, or provision of this compact is declared to be contrary to the constitution of any participating state or of the United States or the applicability thereof to any government, agency, person, or circumstance is held invalid, the validity of the remainder of this compact and the applicability thereof to any government, agency, person, or circumstance shall not be affected thereby. If this compact shall be held contrary to the constitution of any state participating therein, the compact shall remain in full force and effect as to the remaining states and in full force and effect as to the state affected as to all severable matters.

Article XVI. Rendition

(1) This amendment shall provide additional remedies and shall be binding only as among and between those party states which specifically execute the same.

(2) All provisions and procedures of Articles V and VI of this compact shall be construed to apply to any juvenile charged with being a delinquent by reason of a violation of any criminal law. Any juvenile charged with being a delinquent by reason of violating any criminal law shall be returned to the requesting state upon a requisition to the state where the juvenile may be found. A petition in such case shall be filed in a court of competent jurisdiction in the requesting state where the violation of criminal law is alleged to have been committed. The petition may be filed regardless of whether the juvenile has left the state before or after the filing of the petition. The requisition described in Article V of this compact shall be forwarded by the judge of the court in which the petition has been filed.

History: En. Sec. 1, Ch. 76, L. 1967; R.C.M. 1947, 10-1001; amd. Sec. 1, Ch. 436, L. 1989.

Cross-References

Appointment of guardian ad litem — Montana Youth Court Act, 41-5-1411.

Right to counsel, 41-5-1413.

Disposition of youth in need of intervention or youth who violate consent adjustments, 41-5-1512.

Probation revocation — disposition, 41-5-1431.

Circumstances in which peace officer may make arrest, 46-6-210.

Uniform Criminal Extradition Act, Title 46, ch. 30.

Department to supervise importation and exportation of children, 52-2-114.

Commitment expenses — arrangement for transportation, 52-5-109.

Publication of information to facilitate return of youth leaving state youth correctional facility or program without permission, 52-5-113.

Hearing on alleged violation of parole agreement — right to appeal outcome, 52-5-129.

41-6-102. Juvenile compact administrator. Pursuant to said compact, the governor is hereby authorized and empowered to designate an officer who shall be the compact administrator and who, acting jointly with like officers of other party states, shall promulgate rules to carry out more effectively the terms of the compact. Said compact administrator shall serve subject to the pleasure of the governor. The compact administrator is hereby authorized, empowered, and directed to cooperate with all departments, agencies, and officers of and in the government of this state and its subdivisions in facilitating the proper administration of the compact or of any supplementary agreement or agreements entered into by this state thereunder.

History: En. Sec. 2, Ch. 76, L. 1967; R.C.M. 1947, 10-1002.

Cross-References

Appointing power, Art. VI, sec. 8, Mont. Const.

Powers and duties of Governor, 2-15-201.

41-6-103. Supplementary agreements. The compact administrator is hereby authorized and empowered to enter into supplementary agreements with appropriate officials of other states pursuant to the compact. In the event that such supplementary agreement shall require or contemplate the use of any institution or facility of this state or require or contemplate the provision of any service by this state, said supplementary agreement shall have no force or effect until approved by the head of the department or agency under whose jurisdiction said institution or facility is operated or whose department or agency will be charged with the rendering of such service.

History: En. Sec. 3, Ch. 76, L. 1967; R.C.M. 1947, 10-1003.

Cross-References

Powers and duties of Department of Corrections, 53-1-203.

41-6-104. Financial arrangements. The compact administrator, subject to the approval of the department of administration, may make or arrange for any payments necessary to discharge any financial obligations imposed upon this state by the compact or by any supplementary agreement entered into thereunder.

History: En. Sec. 4, Ch. 76, L. 1967; amd. Sec. 98, Ch. 326, L. 1974; R.C.M. 1947, 10-1004.

Cross-References

Authorization for disbursements — submission of claim to Department of Administration, 17-8-201.

41-6-105. Responsibilities of courts, state departments, agencies, and officers. The courts, departments, agencies, and officers of this state and its subdivisions shall enforce this compact and shall do all things appropriate to the effectuation of its purposes and intent which may be within their respective jurisdictions.

History: En. Sec. 5, Ch. 76, L. 1967; R.C.M. 1947, 10-1005.

41-6-106. Additional procedures not precluded. In addition to any procedure provided in Articles IV and VI of the compact for the return of any runaway juvenile, the particular states, the juvenile or his parents, the courts or other legal custodian involved may agree upon and adopt any other plan or procedure legally authorized under the laws of this state and the other respective party states for the return of any such runaway juvenile.

History: En. Sec. 6, Ch. 76, L. 1967; R.C.M. 1947, 10-1006.

Cross-References

Uniform Criminal Extradition Act, Title 46, ch. 30.

CHAPTER 7

MONTANA FAMILY POLICY ACT

Part 1 — Family Policy Act

41-7-101. Short title.
41-7-102. Policy and guiding principles.

Chapter Cross-References

Offenses against the family, Title 45, ch. 5, part 6.

Family Services, Title 52.

Part 1

Family Policy Act

41-7-101. Short title. Section 41-7-102 and this section may be cited as the "Montana Family Policy Act".

History: En. Sec. 1, Ch. 98, L. 1993.

41-7-102. Policy and guiding principles. (1) It is the policy of the state of Montana to support and preserve the family as the single most powerful influence for ensuring the healthy social development and mental and physical well-being of Montana's children.

(2) The following principles must guide the actions of state government, state agencies, and agents of the state that serve children and families:

(a) Family support and preservation must be guiding philosophies when the state, state agencies, or agents of the state plan or implement services for children or families. The state shall promote the establishment of a range of services to children and families, including the following components:

(i) supporting families toward healthy development by providing a community network that offers a range of family support services, activities, and programs designed to promote family well-being, with services that include prenatal care, parenting education, parent aides, and visiting nurses; early childhood screening and developmental services; child care; and family recreation;

(ii) assisting vulnerable families before crises emerge by providing specialized services to strengthen and preserve families experiencing problems before they become acute and by providing early intervention and family support services, such as respite care, health and mental health services, and home-based rehabilitation services linked to services in subsection (2)(a)(i);

(iii) protecting and caring for children in crisis by providing intensive services to protect children who have suffered or are at risk of suffering serious harm from child abuse and neglect, by providing care for children at risk of out-of-home placement for emotional disturbances or behavior problems, and by providing family support services to ensure that reasonable efforts are made to safely maintain children in their own homes or to provide temporary or permanent care for children who are removed from their families. These services include family-based services to avoid removal from the home whenever possible and to provide out-of-home care, reunification services, adoption services, and long-term substitute care.

(b) To maximize resources and establish a range of services driven by the needs of families rather than by a predetermined array of categorical services, the state, state agencies, and agents of the state shall work toward a system of comprehensive and coordinated services to children and families through joint agency planning, joint financing, joint service delivery, common intake and assessment, and other arrangements that promote more effective support for families.

(c) Needed services to children and families should be provided as close as possible to the home community. The state, state agencies, and agents of the state shall encourage community planning and collaboration. State agencies shall cooperate to support collaborative programs.

(d) The state encourages all sectors of society to participate in building the community capacity to meet the needs of children and families.

(3) The family policy objectives described in this section are intended to guide the state's efforts to provide services to children and families. This section may not be construed to require a service or a particular level of service or to grant a right of action to enforce this section or other law.

History: En. Sec. 2, Ch. 98, L. 1993.

Cross-References

Conviction of youth in District Court — commitment to Department of Corrections, 41-5-206.

TITLE 42

ADOPTION

Ch.
1. General Adoption Provisions.
2. Adoption of Child.
3. Requirements of Parties in Adoption.
4. Placements for Adoption.
5. Legal Proceedings.
6. Records.
7. Fees and Prohibited Activities Related to Adoption.
8. Licensing of Child Placement Agency.
Chapter 9 reserved.
10. Subsidized Adoptions.

CHAPTER 1

GENERAL ADOPTION PROVISIONS

Part 1 — Adoption Policy and Procedures

42-1-101. Short title.
42-1-102. Adoption policy.
42-1-103. Definitions.
42-1-104. Venue.
42-1-105. Who may be adopted.
42-1-106. Who may adopt.
42-1-107. Adoption prohibited if child not legally free.
42-1-108. Rights and responsibilities of parties in adoption proceedings.
42-1-109. Need for finality — balancing of interests.
42-1-110. Presumed knowledge that child may be adopted without notice.
42-1-111. Unmarried birth mother's right of privacy.

Part 1
Adoption Policy and Procedures

42-1-101. Short title. This title may be cited as the "Montana Adoption Act".

History: En. Sec. 1, Ch. 480, L. 1997.

42-1-102. Adoption policy. (1) It is the policy of the state of Montana to ensure that the best interests of the child are met by adoption proceedings.

(2) The primary purpose of adoption is to help a child become a permanent member of a nurturing family that can give the child the care, protection, and opportunities essential for healthy personal growth and development.

(3) The well-being of the adopted child is the main objective in the placement of a child for adoption. The needs of the child must be the primary focus of adoption proceedings, with full recognition of the interdependent needs and interests of birth parents and adoptive parents.

(4) It is the policy of the state of Montana to support relationships between adoptees and their birth families when desired by the affected parties.

History: En. Sec. 2, Ch. 480, L. 1997.

42-1-103. Definitions. As used in this title, unless the context requires otherwise, the following definitions apply:

(1) "Adoptee" means an adopted person or a person who is the subject of adoption proceedings that are intended to result in the adoptee becoming the legal child of another person.

(2) "Adoption" means the act of creating the legal relationship between parent and child when it does not exist genetically.

(3) "Adoptive parent" means an adult who has become the mother or father of a child through the legal process of adoption.

(4) "Agency" means a public or nonprofit entity that is licensed by any jurisdiction of the United States and that is expressly empowered to place children preliminary to a possible adoption.

(5) "Birth parent" means the woman who gave birth to the child or the father of genetic origin of the child.

(6) "Child" means any person under 18 years of age.

(7) "Confidential intermediary" means a person certified by the department and under contract with or employed by a nonprofit entity with expertise in adoption.

(8) "Court" means a court of record in a competent jurisdiction and in Montana means a district court or a tribal court.

(9) "Department" means the department of public health and human services, provided for in 2-15-2201.

(10) "Direct parental placement adoption" means an adoption in which the parent of the child places the child with a prospective adoptive parent personally known and selected by the parent independent of an agency.

(11) "Extended family member" means a person who is or was the adoptee's parent, grandparent, aunt or uncle, brother or sister, or child.

(12) "Identifying information" means information that directly reveals or indirectly indicates the identity of a person and includes the person's name or address.

(13) "Nonidentifying information" means information that does not directly reveal or indirectly indicate the identity of a person, including:

(a) medical information and information related to general physical characteristics;

(b) family information, including marital status and the existence of siblings;

(c) religious affiliation;

(d) educational background information that does not reveal specific programs or institutions attended;

(e) general occupation;

(f) hobbies; and

(g) photographs provided by any of the parties involved that were specifically intended to be provided to another party.

(14) "Parent" means the birth or adoptive mother or the birth, adoptive, or legal father whose parental rights have not been terminated.

(15) "Placing parent" means a parent who is voluntarily making a child available for adoption.

(16) "Preplacement evaluation" means the home study process conducted by the department or a licensed child-placing agency that:

(a) assists a prospective adoptive parent or family to assess its own readiness to adopt; and

(b) assesses whether the prospective adoptive parent or family and home meet applicable standards.

(17) "Records" means all documents, exhibits, and data pertaining to an adoption.

(18) "Relinquishment" means the informed and voluntary release in writing of all parental rights with respect to a child by a parent to an agency or individual.

History: En. Sec. 3, Ch. 480, L. 1997.

Cross-References

Minors and adults defined, 41-1-101.

42-1-104. Venue. (1) Proceedings for adoption must be brought in the district court of the county where the petitioners reside.

(2) Petitions for appointment of a confidential intermediary may be filed:

(a) in the county where the decree of adoption was issued;

(b) in the county of residence of the petitioner; or

(c) if the petitioner resides out of state, in any county.

History: En. Sec. 4, Ch. 480, L. 1997.

Cross-References

Rules for determining residency, 1-1-215.

Venue, Title 25, ch. 2.

42-1-105. Who may be adopted. (1) A child is legally free for adoption if:

(a) the child does not have a living parent;

(b) the parental rights of the living parents of the child have been terminated according to the laws of this state or of another jurisdiction; or

(c) the living parents, guardian authorized by the court, or department or agency with custody of the child consent to the adoption.

(2) An adult may be adopted as provided in 42-4-401 through 42-4-405.

(3) A stepchild may be adopted as provided in 42-4-301 through 42-4-304 and 42-4-309 through 42-4-312.

History: En. Sec. 5, Ch. 480, L. 1997; amd. Sec. 1, Ch. 257, L. 1999.

Compiler's Comments

1999 Amendment: Chapter 257 in (3) substituted "42-4-304" for "42-4-305". Amendment effective April 5, 1999.

42-1-106. Who may adopt. The following individuals who otherwise meet the requirements of this title are eligible to adopt a child:

(1) a husband and wife jointly or either the husband or wife if the other spouse is a parent of the child;

(2) an unmarried individual who is at least 18 years of age; or

(3) a married individual at least 18 years of age who is legally separated from the other spouse or whose spouse has judicially been declared incompetent.

History: En. Sec. 6, Ch. 480, L. 1997.

Cross-References

Husband and wife, Title 40, ch. 2.

Legal separation, 40-4-104.

Minors and adults defined, 41-1-101.

42-1-107. Adoption prohibited if child not legally free. (1) An adoption decree may not be entered if the child who is the subject of an adoption proceeding is not legally free for adoption.

(2) A child may be placed for adoption only by:

(a) the department or another agency to which the child has been relinquished for purposes of adoption;

(b) the department or another agency expressly authorized to place the child for adoption by a court order terminating the relationship between the child and the child's parent or guardian;

(c) the child's parents; or

(d) a guardian expressly authorized by the court to place the child for adoption.

History: En. Sec. 7, Ch. 480, L. 1997.

42-1-108. Rights and responsibilities of parties in adoption proceedings. (1) The legislature finds that the rights and interests of all parties affected by an adoption proceeding must be considered and balanced in determining the necessary constitutional protection and appropriate processes.

(2) The legislature finds that:

(a) every child deserves to be raised by a family in which support and care are promptly provided by one or more parents in a nurturing environment on a regular and ongoing basis;

(b) the state has a compelling interest in providing stable and permanent homes for adoptive children in a prompt manner, in preventing the disruption of adoptive placements, and in holding parents accountable for meeting the needs of children;

(c) an unmarried mother, faced with the responsibility of making crucial decisions about the future of a newborn child, is entitled to privacy, has the right to make timely and appropriate decisions regarding the mother's future and the future of the child, and is entitled to assurance regarding the permanence of an adoptive placement;

(d) adoptive children have a right to permanence and stability in adoptive placements;

(e) adoptive parents have a constitutionally protected liberty and privacy interest in retaining custody of an adopted child; and

(f) a birth father who is not married to the child's mother has the primary responsibility to protect the father's rights. The father's inchoate interest in the child requires constitutional protection only when the father has demonstrated a timely commitment to the responsibilities of parenthood, both during pregnancy and upon the child's birth. The state has a compelling interest in requiring a birth father to demonstrate that commitment by:

(i) timely and consistently providing financial support;

(ii) complying with the requirements of the putative father registry; and

(iii) demonstrating the establishment of a substantial relationship with the child as described in 42-2-610.

(3) If a birth father who is not married to the child's mother fails to grasp the opportunities that are available to the father to establish a relationship with the child, the father's parental rights will be lost entirely by the failure to

timely exercise it or by the failure to comply with the available legal steps to substantiate the parental interest.

History: **En. Sec. 8, Ch. 480, L. 1997.**

42-1-109. Need for finality — balancing of interests. Finality is necessary in order to facilitate the state's compelling interest. The legislature finds that the interests of the child outweigh the interests of the state, the mother, the adoptive parents, and a birth father who is not married to the child's mother.

History: **En. Sec. 9, Ch. 480, L. 1997.**

42-1-110. Presumed knowledge that child may be adopted without notice. A birth father who is not married to the mother of the child is presumed to know that the child may be adopted without the father's consent and that the father is required to comply with the provisions of this title and manifest a commitment to the father's parental responsibilities.

History: **En. Sec. 10, Ch. 480, L. 1997.**

42-1-111. Unmarried birth mother's right of privacy. An unmarried birth mother has a right of privacy with regard to the mother's pregnancy and adoption plan. Birth mothers are encouraged to provide all known information about the birth father of any child for whom an adoption is planned.

History: **En. Sec. 11, Ch. 480, L. 1997.**

Cross-References

Right of privacy, Art. II, sec. 10, Mont. Const.

CHAPTER 2

ADOPTION OF CHILD

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42-2-409. Counseling requirements.
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42-2-411. Conditional relinquishment and consent.
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Part 1
Policy and Legislative Intent

42-2-101. Recognition of adoption in another jurisdiction. (1) A decree or order of adoption has the same effect as a decree or order of adoption issued by a court of this state if the decree or order is:

(a) issued by a court of any other state that is entitled to full faith and credit in this state; or

(b) entered by a court or administrative entity in another country acting pursuant to:

(i) that country's law; or

(ii) to any convention or treaty on intercountry adoption that the United States has ratified.

(2) The rights and obligations of the parties as to matters within the jurisdiction of this state must be determined as though the decree or order were issued by a court of this state.

History: En. Sec. 12, Ch. 480, L. 1997.

Cross-References

Uniform Enforcement of Foreign Judgments Act, Title 25, ch. 9, part 5.

Uniform Foreign Money-Judgments Recognition Act, Title 25, ch. 9, part 6.

Foreign adoption decrees, 42-5-205.

42-2-102. Proceedings subject to Indian Child Welfare Act. A proceeding under this title that pertains to an Indian child, as defined in the Indian Child Welfare Act of 1978, 25 U.S.C. 1901, et seq., is subject to that act.

History: En. Sec. 13, Ch. 480, L. 1997.

42-2-103. Interstate placement. The Interstate Compact on the Placement of Children, Title 41, chapter 4, governs:

(1) an adoption in this state of a child brought into this state from another state by a prospective adoptive parent;

(2) a person residing in or an agency doing business from another state who places the child for adoption in this state; and

(3) the placement of a Montana child in another state.

History: En. Sec. 14, Ch. 480, L. 1997.

Cross-References

Foreign adoption decrees, 42-5-205.

42-2-104. International placement. An adoption in this state of a child brought into this state from another country by a prospective adoptive parent or by a person who places the child for adoption in this state is governed by this title and is subject to any convention or treaty governing adoption that the United States has ratified and to any relevant federal law.

History: En. Sec. 15, Ch. 480, L. 1997.

Cross-References

Foreign adoption decrees, 42-5-205.

42-2-105. Fees for services — special revenue account — statutory appropriation. (1) The department shall establish fees that it may charge and that are reasonably related to the cost incurred by the department in completing or contracting for adoption services.

(2) The department may contract with licensed social workers or licensed child-placing agencies for the purposes of completing the preplacement or postplacement evaluation or for providing postplacement supervision.

(3) An agency contracting to perform the services may set and charge a reasonable fee commensurate with the services provided.

(4) There is an adoption services account in the state special revenue fund. The fees collected by the department under this title and from the district court filing fee pursuant to 25-1-201(1)(q) must be deposited into this account and may be used by the department for adoption services. The money in the account is statutorily appropriated, as provided in 17-7-502, to the department.

History: En. Sec. 16, Ch. 480, L. 1997.

Cross-References

State treasury fund structure, 17-2-102.

42-2-106. Rulemaking authority. The department may adopt rules to implement the administration and purposes of this title.

History: En. Sec. 17, Ch. 480, L. 1997.

Cross-References

Adoption and publication of rules, Title 2, ch. 4, part 3.

Part 2

Putative Father Registration

42-2-201. Definitions. As used in this part, unless the context requires otherwise, the following definitions apply:

(1) "Child" includes an unborn child.

(2) (a) "Putative father" means an individual who may be a child's birth father but who:

(i) is not married to the child's mother on or before the date that the child is born; or

(ii) has not established paternity of the child prior to the filing of a petition for termination of parental rights to the child for purposes of adoption.

(b) The term includes an individual who is:

(i) less than 18 years of age; and

(ii) not married to the child's mother even though the individual is a presumed father within the meaning of 40-6-105.

(3) "Registry" means the putative father registry established under 42-2-202.

History: En. Sec. 18, Ch. 480, L. 1997.

42-2-202. Putative father registry. The putative father registry is established within the vital statistics bureau of the department. The department shall adopt rules to administer the registry.

History: En. Sec. 19, Ch. 480, L. 1997.

42-2-203. Purpose of registry. (1) The purpose of the putative father registry is to provide notice of termination of parental rights to a putative father who asserts a parental interest in a child so that the putative father may appear in a proceeding and have an opportunity to establish that the putative father's inchoate rights in the child have vested because a substantial relationship with the child has been established as provided in 42-2-610.

(2) In addition to any other notice to which the putative father is entitled, a putative father of a child who complies with the requirements of the putative father registry is entitled to notice of any proceedings involving termination of parental rights to the child.

History: **En. Sec. 20, Ch. 480, L. 1997.**

42-2-204. Presumed knowledge of pregnancy — duty to register to be afforded notice — putative and presumed fathers. (1) A person who engages in sexual relations with a member of the opposite sex is presumed to know that a pregnancy could result.

(2) In addition to any other notice to which the putative father is entitled, a putative father is entitled to notice of termination of parental rights proceedings for the purposes of adoption if the putative father has complied with the requirements of the putative father registry.

(3) An individual who is not married to the mother but who is presumed to be a father under 40-6-105 and registers in accordance with this part is entitled to receive notice of a termination of parental rights proceeding.

History: **En. Sec. 21, Ch. 480, L. 1997.**

42-2-205. Registration. (1) In addition to any other notice to which the putative father is entitled, a putative father is entitled to notice of any proceedings to terminate parental rights involving a child whom the putative father might have fathered if the putative father timely files the following information with the department:

(a) the putative father's:

(i) full name;

(ii) address at which the putative father may be served by certified mail, return receipt requested, with notice of a proceeding to terminate parental rights;

(iii) social security number;

(iv) date of birth; and

(v) tribal affiliation if applicable;

(b) the mother's:

(i) name, including all other names known to the putative father that the mother uses; and

(ii) address, social security number, and date of birth, if known;

(c) the child's:

(i) name and place of birth, if known; or

(ii) the approximate date and location of a possible conception and the approximate expected date of delivery.

(2) If a putative father does not have an address where the putative father can receive notice of a termination of parental rights proceeding, the putative father may designate another person as an agent for the purpose of receiving notice. The putative father shall provide the department with the agent's name and the address at which the agent may be served. Service of notice by certified

mail, return receipt requested, constitutes service of notice upon the putative father.

(3) A putative father shall register under this section on a registration form prescribed by the department or with a legibly typed or handwritten statement that provides the required information and that is submitted to the department pursuant to 42-2-207. The registration must be signed by the putative father and notarized.

(4) A putative father who registers under this section is responsible for providing written updates regarding any change of the putative father's name or address.

History: **En. Sec. 22, Ch. 480, L. 1997.**

42-2-206. When putative father to register — actual knowledge of pregnancy not required. (1) In order to be entitled, because of registration, to receive notice of a termination of parental rights proceeding, a putative father's registration form complying with the requirements of 42-2-205 must be received by the department not later than 72 hours after the child's birth.

(2) A putative father may file all information required by 42-2-205 before a child's birth even though the putative father has no actual knowledge that a pregnancy has occurred or that a pregnancy has continued through gestation.

History: **En. Sec. 23, Ch. 480, L. 1997; amd. Sec. 2, Ch. 257, L. 1999.**

Compiler's Comments

1999 Amendment: Chapter 257 at end of (1) substituted "72 hours after the child's birth" for "5 days prior to a hearing to terminate parental rights". Amendment effective April 5, 1999.

42-2-207. How registration submitted. A putative father shall submit a registration form:

(1) in person; or

(2) by facsimile transmission, mail, private courier, or express delivery service.

History: **En. Sec. 24, Ch. 480, L. 1997.**

42-2-208. Burden of putative father to preserve rights upon receipt of notice. When a putative father receives notice that a child in whom the putative father claims a parental interest is the subject of a termination of parental rights proceeding, the putative father must appear at the hearing held on the petition to terminate parental rights and demonstrate, at a minimum, that the criteria set out in 42-2-610 for determining whether the putative father has made reasonable efforts to establish a substantial relationship with the child who is the subject of the proceedings have been met.

History: **En. Sec. 25, Ch. 480, L. 1997.**

42-2-209. Presumption created — admissibility in other proceedings. A person filing a registration form is presumed to be the father of the child for purposes of adoption unless the mother denies that the registrant is the father. The registration or any revocation that is filed is admissible in a paternity proceeding and creates a rebuttable presumption as to the paternity of the child. The registration creates a rebuttable presumption as to paternity of the child for purposes of an abuse or neglect proceeding under Title 41, chapter 3, or a child support enforcement action under Title 40, chapter 5.

History: **En. Sec. 26, Ch. 480, L. 1997.**

42-2-210 through 42-2-213 reserved.

42-2-214. Duties of department. (1) The department shall:

(a) prescribe a registration form for the information that a putative father submits under 42-2-205; and

(b) make the registration forms available through:

(i) the department;

(ii) each clerk of a district court; and

(iii) each local health department.

(2) A notice provided by the department that informs the public about the purpose and operation of the registry must be posted in a conspicuous place by each:

(a) clerk of a district court;

(b) driver's examination station of the motor vehicle division of the department of justice;

(c) local health department; and

(d) county clerk and recorder.

(3) The notice under subsection (2) must include information regarding:

(a) where to obtain a registration form;

(b) where to register;

(c) the circumstances under which a putative father is required to register;

(d) the period under 42-2-206 during which a putative father is required to register in order to entitle the putative father to receive notice of an adoption;

(e) the information that must be provided for the registry and what other actions the putative father is required to take to preserve a right to notice;

(f) the consequences of not submitting a timely registration; and

(g) the penalties for filing a false claim with the putative father registry.

History: En. Secs. 27, 28, Ch. 480, L. 1997.

42-2-215. Information maintained in registry. The department shall maintain the following information in the registry:

(1) the registration information provided by the putative father under 42-2-205;

(2) the date that the department receives a putative father's registration;

(3) the name and affiliation of any person who requests that the department search the registry to determine whether a putative father is registered in relation to a mother whose child is or may be the subject of a termination proceeding and the date the request is submitted; and

(4) any other information that the department determines is necessary to access the information in the registry.

History: En. Sec. 29, Ch. 480, L. 1997.

42-2-216. Storage of data. The department shall store the registry's data in a manner so that the data is accessible through:

(1) the putative father's name;

(2) the mother's name, including her maiden name, if known;

(3) the date of birth of the putative father, the mother, and the child, if known;

(4) the child's name, if known; and

(5) the social security number for the putative father, the mother, and the child, if known.

History: En. Sec. 30, Ch. 480, L. 1997.

42-2-217. Registry search — request — affidavit. (1) The following persons may at any time request that the department search the registry to determine whether a putative father is registered in relation to a child who is or may be the subject of a proceeding to terminate parental rights:

(a) a representative of the department;

(b) a representative of an agency when the agency is or may be arranging an adoption;

(c) a prospective adoptive parent or an attorney representing a prospective adoptive parent in a direct parental placement adoption who has the notarized consent of the birth mother; or

(d) any woman who is the subject of a registration.

(2) Upon request of a person listed in subsection (1), the department shall submit an affidavit pursuant to the requirements of subsections (4) and (5).

(3) A request for information about a registration from the department must be in writing.

(4) Not later than 5 days after receiving a request for a registry search, the department shall submit an affidavit to the requestor verifying whether a putative father has registered within the period allowed under 42-2-206 in relation to a mother whose child or expected child is the subject of the termination proceeding.

(5) Whenever the department finds that one or more putative fathers are registered, the department shall:

(a) submit a copy of each registration form with the department's affidavit; and

(b) include in the affidavit the date that the department representative, agency, or attorney submitted the request for the search.

(6) A court may not issue an order terminating parental rights unless the department's affidavit under subsection (5) is filed with the court.

History: En. Sec. 31, Ch. 480, L. 1997; amd. Sec. 3, Ch. 257, L. 1999.

Compiler's Comments

1999 Amendment: Chapter 257 substituted (2) concerning departmental affidavit upon request for former text that read: "(2) When a petition to terminate parental rights for purposes of an adoption is filed, the petitioner shall:

(a) request that the department search the registry at least 1 day after the expiration of the period specified under 42-2-206; and

(b) file an affidavit prepared by the department in response to a request under subsection (2)(a) with the court presiding over the termination of parental rights proceeding under 42-2-603. The affidavit must meet the requirements of subsections (4) and (5)"; and in (4) near beginning substituted "for a registry search" for "under subsection (2)(a)". Amendment effective April 5, 1999.

42-2-218. Duties of department upon receipt of request. (1) Whenever the department receives a request, the department shall:

(a) search its records of putative father registrations and search its records for any acknowledgment of paternity filed pursuant to 40-6-105; and

(b) notify the requestor as to whether a paternity action has been filed and a paternity order issued to the department requiring the issuance of a new birth certificate concerning a child who is or may be the subject of an adoption that the attorney or agency is arranging.

(2) The department may charge a reasonable fee for responding to a request under this section.

History: En. Sec. 32, Ch. 480, L. 1997.

42-2-219 through 42-2-221 reserved.

42-2-222. Failure of agency to post notice. Failure of an agency to post a proper notice under 42-2-214 does not relieve a putative father of the obligation to register with the department in accordance with the putative father registry in order to entitle the putative father, because of registration, to notice of proceedings involving a child who may have been fathered by the putative father.

History: En. Sec. 33, Ch. 480, L. 1997.

42-2-223. Revocation of registration. Unless a support order has been issued, a putative father may revoke a registration at any time by submitting to the department a signed, notarized statement revoking the registration.

History: En. Sec. 34, Ch. 480, L. 1997.

42-2-224. Certified copy of registration form to be furnished upon request. The department shall furnish a certified copy of the putative father's registration form upon written request by:

(1) a putative father whose name appears on the registration form being requested;

(2) a mother whose name appears on the registration form being requested;

(3) upon reaching majority, a person who was the subject of a registration;

(4) a prospective adoptive parent or an attorney representing a prospective adoptive parent in a direct parental placement adoption who has the notarized consent of the birth mother;

(5) a licensed child-placing agency;

(6) a court that presides over a pending adoption;

(7) the child support enforcement division of the department; or

(8) a representative of the department involved in an adoption or a neglect and dependency proceeding under Title 41, chapter 3.

History: En. Sec. 35, Ch. 480, L. 1997.

42-2-225. Information confidential. Except as otherwise provided in this part, information contained within the registry is confidential.

History: En. Sec. 36, Ch. 480, L. 1997.

42-2-226. Registration of false information — criminal and civil penalties A person who purposely or knowingly registers false information or requests confidential information in violation of a putative father registry commits a misdemeanor and may be civilly liable for damages.

History: En. Sec. 37, Ch. 480, L. 1997.

42-2-227 through 42-2-229 reserved.

42-2-230. Responsibility of each party to protect interests — putative fathers — fraud no defense. (1) The legislature finds no practical way to remove all risk of fraud or misrepresentation in adoption proceedings and has provided protection of a putative father's rights. In balancing the rights and interests of the state and of all parties affected by fraud, specifically the child, the adoptive parents, and the putative father, the legislature determines that the putative father is in the best position to prevent or ameliorate the effects of fraud and that, therefore, the burden of establishing fraud against the putative father by clear and convincing evidence must be born by the putative father.

(2) Each parent of a child conceived or born outside of marriage to the other parent is responsible for that parent's own actions and assertion of their parental rights notwithstanding any action, statement, or omission of the other parent or third parties.

(3) A person injured by fraudulent representations or actions in connection with an adoption is entitled to pursue civil or criminal penalties. A fraudulent representation is not a defense for failure to comply with the requirements of the putative father registry and is not a basis for dismissal of a petition for adoption, vacation of an adoption decree, or an automatic grant of custody to the injured party.

(4) A putative father who resides in another state may contest an adoption prior to issuance of a decree of adoption and may assert the putative father's interest in the child. If the adoption is contested, the court shall hold an evidentiary hearing to determine if:

(a) the putative father resides and has resided in another state where the unmarried mother lived or resided either at the time of conception or through a portion of the pregnancy;

(b) the mother left that state, concealing the location from the putative father regarding where the mother could be contacted or located;

(c) the father has, through every reasonable means, attempted to locate the mother but has been unable to do so; and

(d) the putative father has complied with the requirements of the state where the mother previously resided or was located in order to protect and preserve the putative father's parental interest and rights concerning the child in cases of adoption.

History: **En. Sec. 38, Ch. 480, L. 1997.**

Part 3
Consent for Adoption

42-2-301. Consent required. An adoption of a child may be decreed when written consents to adoption have been executed by:

(1) the birth mother;

(2) the husband of the birth mother if the husband is the presumed father of the child under 40-6-105;

(3) any other person whose parental rights have been established by a court;

(4) the department or an agency that has custody of the child and the authority to place the child for adoption;

(5) the legal guardian of the child if both parents are dead or their rights have been judicially terminated and the guardian has authority by order of the court appointing the guardian to consent to the adoption;

(6) the child, either in writing or in court, if the child is 12 years of age or older unless the child does not have the mental capacity to consent.

History: **En. Sec. 39, Ch. 480, L. 1997.**

42-2-302. Persons whose consent not required. Consent to adoption of a child is not required from:

(1) an individual whose parental relationship to the child has been judicially terminated for unfitness or has been determined not to exist or who has waived parental rights;

(2) a parent who has been judicially declared incompetent;

(3) an individual who has not been married to the mother of the child and who, after the conception of the child, executes a notarized statement denying paternity or a notarized statement acknowledging paternity and denying any interest in the child; or

(4) the personal representative of a deceased parent's estate.

History: **En. Sec. 40, Ch. 480, L. 1997.**

42-2-303. Form of consent. The consents required by 42-2-301 must be acknowledged before an officer authorized to take acknowledgments or witnessed by a representative of the department, an agency, or the court.

History: **En. Sec. 41, Ch. 480, L. 1997.**

Cross-References

Taking acknowledgments and affidavits, 3-1-404.

Part 4

Voluntary Relinquishment and Consent to Adopt

42-2-401. Child available for adoption — voluntary acts of parents. A parent may voluntarily make a child available for adoption by:

(1) executing a voluntary relinquishment and consent to adoption;

(2) executing a denial of paternity; or

(3) submitting a notarized acknowledgment of paternity and a denial of any interest in custody of the child.

History: **En. Sec. 42, Ch. 480, L. 1997.**

42-2-402. Voluntary relinquishment — validity. (1) A voluntary relinquishment is not valid unless the parent specifically relinquishes custody of the child to the department, a licensed child-placing agency, or a specifically identified prospective adoptive parent and:

(a) the department or agency to whom the child is being relinquished has agreed in writing to accept custody of the child until the child is adopted; or

(b) the identified prospective adoptive parent has agreed in writing to accept temporary custody and to provide support and care to the child until that person's adoption petition is granted or denied.

(2) A voluntary relinquishment of a parent's rights solely to the child's other parent does not relieve the parent executing the relinquishment of any duty owed to the child or for the child's support.

History: **En. Sec. 43, Ch. 480, L. 1997.**

42-2-403. Arrearages of child support — responsibility to child. (1) A voluntary relinquishment of a parent's rights and responsibilities toward a child does not cancel any responsibility to pay arrearages of child support unless the party to whom the arrearages are owed agrees in writing to waive the payment of the arrearages.

(2) A parent who executes a voluntary relinquishment of rights and responsibilities toward a child remains financially responsible for the child until a court actually terminates parental rights to the child.

History: En. Sec. 44, Ch. 480, L. 1997.

42-2-404. Who may relinquish — to whom. (1) A parent or guardian whose consent to the adoption of a child is required may relinquish to the department or an agency all rights with respect to the child, including legal and physical custody and the right to consent to the child's adoption.

(2) A parent or guardian whose consent to the adoption of a child is required and who has filed a notice of parental placement under 42-4-103 for a direct parental placement adoption may:

(a) relinquish to the prospective adoptive parent all rights with respect to the child, including legal and physical custody; and

(b) consent to the child's adoption by the prospective adoptive parents.

History: En. Sec. 45, Ch. 480, L. 1997.

42-2-405. Relinquishment by minor parent — separate legal counsel in direct parental placement adoption. (1) A parent who is a minor has the right to relinquish all rights to that minor parent's child and to consent to the child's adoption. The relinquishment is not subject to revocation by reason of minority.

(2) In a direct parental placement adoption, a relinquishment and consent to adopt executed by a parent who is a minor is not valid unless the minor parent has been advised by an attorney who does not represent the prospective adoptive parent. Legal fees charged by the minor parent's attorney are an allowable expense that may be paid by prospective adoptive parents under 42-7-101, subject to the limitations in 42-7-102.

History: En. Sec. 46, Ch. 480, L. 1997.

Cross-References

Minors and adults defined, 41-1-101.

42-2-406 and 42-2-407 reserved.

42-2-408. Time and prerequisites for execution of relinquishment and consent to adoption — copy of preplacement evaluation — notarization. (1) A parent whose consent to the adoption of a child is required may execute a relinquishment and consent to adoption only after the following criteria have been met:

(a) the child has been born;

(b) not less than 72 hours have elapsed since the birth of the child;

(c) the parent has received counseling in accordance with 42-2-409; and

(d) in a direct parental placement adoption:

(i) the parent has been informed that fees for any required counseling and legal fees are allowable expenses that may be paid by a prospective adoptive parent under 42-7-101, subject to the limitations set in 42-7-102;

(ii) if the parent is a minor, the parent has been represented by separate legal counsel; and

(iii) prior to the execution of the relinquishment, the parent has been provided a copy of the preplacement evaluation prepared pursuant to 42-3-204 pertaining to the prospective adoptive parent.

(2) A guardian may execute a relinquishment and consent to adopt at any time after being authorized by a court.

(3) The department or a licensed child-placing agency may execute a consent for the adoption at any time before or during the hearing on the petition for adoption.

(4) A child whose consent is required may execute a consent at any time before or during the hearing on the petition to adopt.

(5) Except as provided in this section, a relinquishment and consent to adopt must be a separate instrument executed before a notary public.

(6) If the person from whom a relinquishment and consent to adopt is required is a member of the armed services or is in prison, the relinquishment may be executed and acknowledged before any person authorized by law to administer oaths.

History: En. Sec. 47, Ch. 480, L. 1997.

42-2-409. Counseling requirements. (1) Counseling of the birth mother is required in department, agency, and direct parental placement adoptions. If any other parent is involved in an adoptive placement, counseling of that parent is encouraged.

(2) Counseling must be performed by a person employed by the department or by a staff person of a licensed child-placing agency designated to provide this type of counseling. Unless the counseling requirement is waived for good cause by a court, a minimum of 3 hours of counseling must be completed prior to execution of a relinquishment of parental rights and consent to adopt. A relinquishment and consent to adopt executed prior to completion of required counseling is void.

(3) During counseling, the counselor shall offer an explanation of:

(a) adoption procedures and options that are available to a parent through the department or licensed child-placing agencies;

(b) adoption procedures and options that are available to a parent through direct parental placement adoptions, including the right to an attorney and that legal expenses are an allowable expense that may be paid by a prospective adoptive parent as provided in 42-7-101 and 42-7-102;

(c) the alternative of parenting rather than relinquishing the child for adoption;

(d) the resources that are available to provide assistance or support for the parent and the child if the parent chooses not to relinquish the child;

(e) the legal and personal effect and impact of terminating parental rights and of adoption;

(f) the options for contact and communication between the birth family and the adoptive family;

(g) postadoptive issues, including grief and loss;

(h) the reasons for and importance of providing accurate medical and social history information under 42-3-101;

(i) the operation of the confidential intermediary program; and

(j) the fact that the adoptee may be provided with a copy of the original birth certificate upon request after reaching 18 years of age, unless the birth parent has specifically requested in writing that the vital statistics bureau withhold release of the original birth certificate.

(4) The counselor shall prepare a written report containing a description of the topics covered and the number of hours of counseling. The report must specifically include the counselor's opinion of whether or not the parent understood all of the issues and was capable of informed consent. The report must, on request, be released to the person counseled, to the department, to an agency, or with the consent of the person counseled, to an attorney for the prospective adoptive parents.

History: **En. Sec. 48, Ch. 480, L. 1997.**

42-2-410. Revocation of relinquishment and consent. (1) The parent who executed the relinquishment and consent to adopt and the department, agency, or prospective adoptive parent named or described in the relinquishment and consent to adopt may mutually agree to its revocation prior to the issuance of an order terminating parental rights.

(2) A relinquishment may not be revoked if an order has been issued terminating parental rights.

History: **En. Sec. 49, Ch. 480, L. 1997.**

42-2-411. Conditional relinquishment and consent. (1) A relinquishment and consent to adopt may provide that it not take effect only if:

(a) the other parent does not execute a relinquishment and consent to adopt within a specified period; or

(b) a court decides to not terminate another individual's parental relationship to the child.

(2) A relinquishment and consent to adopt may not be conditioned on whether or not existing agreements for matters, including but not limited to visitation and ongoing communication with the child, are later performed.

History: **En. Sec. 50, Ch. 480, L. 1997.**

42-2-412. Content of relinquishment and consent to adopt. (1) A relinquishment and consent to adopt must be in writing and must contain:

(a) the date, place, and time of the execution of relinquishment and consent to adopt;

(b) the name, date of birth, and current mailing address of the individual executing the relinquishment and consent to adopt;

(c) the date of birth and the name of the child to be adopted; and

(d) the name, address, and telephone numbers of the department or agency to which the child is being relinquished or the name, address, and telephone numbers of the prospective adoptive parent with whom the individual executing the relinquishment and consent has placed or intends to place the child for adoption.

(2) A relinquishment and consent to adopt executed by a parent or guardian must state that the parent or guardian executing the document is voluntarily and unequivocally consenting to the:

(a) permanent transfer of legal and physical custody of the child to the department or agency for the purposes of adoption; or

(b) transfer of permanent legal and physical custody to, and the adoption of the child by, a specific identified adoptive parent whom the parent or guardian has selected.

(3) A relinquishment and consent to adopt must state:

(a) that after the document is signed or confirmed in substantial compliance with this section, it is final and, except under a circumstance stated in 42-2-411, may not be revoked or set aside for any reason, including the failure of an adoptive parent to permit the individual executing the relinquishment and consent to adopt to visit or communicate with the child;

(b) that the relinquishment will result in the extinguishment of all parental rights and obligations that the individual executing the relinquishment and consent to adopt has with respect to the child, except for arrearages of child support unless the arrearages are waived by the person to whom they are owed, and that the relinquishment will remain valid whether or not any agreement for visitation or communication with the child is later performed;

(c) that the individual executing the relinquishment and consent to adopt has:

(i) received a copy of the relinquishment and consent to adopt;

(ii) received a copy of a written agreement by the department, agency, or prospective adoptive parent to accept temporary custody and to provide support and care to the child until an adoption petition is granted or denied;

(iii) if required, received counseling services pursuant to 42-2-409 explaining the meaning and consequences of an adoption;

(d) in direct parental placement adoptions, that the individual has:

(i) if a minor parent, been advised by a lawyer who is not representing the adoptive parent;

(ii) if an adult, been advised of the right to have a lawyer who is not representing the adoptive parent;

(iii) been advised that the attorney fees are allowable expenses that can be paid by the prospective adoptive parents; and

(iv) been provided with a copy of the prospective adoptive parent's preplacement evaluation;

(e) in agency and direct parental placement adoptions, that the individual has:

(i) been advised of the obligation to provide the medical and social history information required under 42-3-101 pertaining to disclosures; and

(ii) not received or been promised any money or anything of value for execution of the relinquishment and consent to adopt, except for payments authorized by 42-7-101 and 42-7-102.

(4) A relinquishment and consent to adopt may provide that the individual who is relinquishing waives notice of any proceeding for adoption.

History: En. Sec. 51, Ch. 480, L. 1997; amd. Sec. 4, Ch. 257, L. 1999.

Compiler's Comments

1999 Amendment: Chapter 257 in (1)(d) near middle after "adoptive parent" deleted "or the lawyer representing the prospective adoptive parent"; in (3)(b) at beginning substituted "relinquishment will result in the extinguishment of" for "adoption will extinguish"; in (3)(c)(iii) after "services" deleted "and information about adoption"; and made minor changes in style. Amendment effective April 5, 1999.

42-2-413. Consequences of relinquishment and consent to adopt. Except under a circumstance stated in 42-2-411 a relinquishment and consent to the adoption of a child that is executed by a parent or guardian in substantial compliance with 42-2-412 is final and irrevocable. The relinquishment and consent to adopt:

(1) unless a court orders otherwise to protect the welfare of the child, entitles the department, agency, or prospective adoptive parent named or described to the legal and physical custody of the child and imposes on that department, agency, or prospective adoptive parent responsibility for the support and medical and other care of the child;

(2) terminates, as provided in 42-2-403, any duty of the parent who executed the document with respect to the child except for arrearages of child support; and

(3) terminates any right of the parent or guardian who executed the document to:

(a) object to the placement of the child for adoption by the department or agency; and

(b) object to the child's adoption by the prospective adoptive parent.

History: **En. Sec. 52, Ch. 480, L. 1997.**

42-2-414 through 42-2-416 reserved.

42-2-417. Grounds for court to set aside relinquishment and consent. (1) The court shall set aside a relinquishment and consent to adopt if the individual who executed the relinquishment and consent establishes:

(a) by clear and convincing evidence, before a decree of adoption is issued, that the consent was obtained by fraud or duress; or

(b) by a preponderance of the evidence, that a condition permitting revocation has occurred, as expressly provided for in 42-2-411.

(2) A verbatim record of testimony must be made.

History: **En. Sec. 53, Ch. 480, L. 1997.**

42-2-418. Remedy when relinquishment and consent to adopt revoked or set aside — expediency. (1) If a relinquishment and consent to adopt that was executed by an individual is revoked or set aside, the department, agency, or prospective adoptive parent shall immediately return the child to the individual's custody and move to dismiss a proceeding for adoption or termination of the individual's parental rights to the child unless:

(a) the department has legal custody pursuant to a court order;

(b) there are grounds for the department to seek a court order under the provisions of Title 41, chapter 3; or

(c) the individual did not have legal custody of the child at the time the relinquishment and consent to adopt was executed.

(2) In the circumstances described in subsections (1)(a) through (1)(c) and when there is no existing court order providing for care and custody, the court shall issue an order providing for the care and custody of the child according to the best interests of the child under any law applicable to the circumstances of the case.

(3) Except as provided in subsection (1), if after revocation or the setting aside of a relinquishment or consent a child is not returned immediately by the department, agency, or prospective adoptive parent, the individual may petition the court for appropriate relief. The action must take precedence over other cases and matters in the court. The court shall examine the petition, hear the case, and render a decision as soon as possible.

History: **En. Sec. 54, Ch. 480, L. 1997.**

42-2-419 and 42-2-420 reserved.

42-2-421. Notarized denial of paternity — no entitlement to notice. (1) Execution of a notarized denial of paternity of a child is a voluntary act that constitutes a waiver of all parental rights to the child, except for the duty to pay support if paternity is established or presumed.

(2) A notarized denial of paternity is irrevocable when executed. An individual who has executed a denial of paternity toward a child who is the subject of adoption proceedings is not entitled to notice of either the hearing to terminate parental rights or the hearing on an adoption petition.

History: En. Sec. 55, Ch. 480, L. 1997.

Cross-References

Presumption of paternity, 40-6-105.

42-2-422. Notarized acknowledgment of paternity and denial of interest in custody — no entitlement to notice. (1) Submission of a notarized acknowledgment of paternity and a denial of any interest in the custody of the child is a voluntary act that constitutes a waiver of all parental rights to the child but does not absolve the person of the duty to pay support.

(2) An individual who has executed an acknowledgment of paternity and denial of interest in the custody in a child who is the subject of adoption proceedings is not entitled to notice of either the hearing to terminate parental rights or the hearing on an adoption petition unless, subsequent to execution of the acknowledgment of paternity and denial of interest in custody, the individual has complied with all of the requirements of 42-2-205 and has done so within the time limits established in 42-2-206.

History: En. Sec. 56, Ch. 480, L. 1997.

Cross-References

Presumption of paternity, 40-6-105.

Part 5
Involuntary Termination of Parental Rights

Part Cross-References

Parent and child, Title 40, ch. 6.

42-2-501. Timing of proceedings to terminate. (1) In order to provide notice to a putative father at the earliest possible time of an expectant mother's intent to release an expected child for adoption and in order to facilitate early placement of a child for adoption, an expectant mother may initiate proceedings to terminate paternal rights by filing a petition of intent to place a child for adoption prior to the birth of the child.

(2) A petition to terminate parental rights may also be filed after a child is born.

History: En. Sec. 57, Ch. 480, L. 1997.

42-2-502. Expected child — filing of petition indicating intent to release or consent to adoption. (1) A pregnant individual may file a petition with the court indicating the intention to place an expected child for adoption.

(2) The petition must include the following information:

(a) the individual's intent to release the expected child for adoption;

(b) the approximate date and location of conception;

(c) the expected date of delivery;

(d) any information concerning the identity and whereabouts of any putative or presumed father of the expected child; and

(e) in a situation in which there is a presumed father, the grounds upon which the individual relies in contending that the nonexistence of the father and child relationship can be established in an action brought under 40-6-107.

(3) The petition may allege more than one putative or presumed father.

(4) The petition must be signed by the petitioner and notarized.

History: En. Sec. 58, Ch. 480, L. 1997.

Cross-References

Presumption of paternity, 40-6-105.

42-2-503. Notice to any named father of intent to release child for adoption. (1) Upon the filing of the petition under 42-2-502, the court shall issue a notice of intent to release a child for adoption.

(2) The notice must be served by the petitioner, in the manner provided by the Montana Rules of Civil Procedure, upon each putative or presumed father at least 20 days prior to the expected date of birth of the child. Proof of service must be filed with the court.

(3) A notice of intent to release directed to a putative father must indicate the approximate date and location of conception of the child and the expected date of birth and must inform the putative father:

(a) that the putative father is required to appear at the hearing at the time and date set by the court;

(b) of the rights and responsibilities to which the putative father will be entitled upon registering with the putative father registry; and

(c) that the failure to timely comply with all requirements of filing with the putative father registry:

(i) constitutes a waiver of the right to receive the notice provided for in 42-2-205; and

(ii) may result in the court's termination of the putative father's rights to the child.

(4) In addition to the information contained in subsection (3), a notice of intent to release directed to an individual presumed to be the father under 40-6-105 must also indicate the intention of the mother to ask for a declaration establishing the nonexistence of the father and child relationship and the grounds for seeking the declaration.

History: En. Secs. 59, 60, Ch. 480, L. 1997.

Part 6

Petition to Terminate Parental Rights

Part Cross-References

Parent and child, Title 40, ch. 6.

42-2-601. Venue. Proceedings to terminate parental rights may be filed in the court in the county in which a petitioner resides, the child resides, or an office of the agency that is placing the child is located.

History: En. Sec. 61, Ch. 480, L. 1997.

Cross-References

Venue, Title 25, ch. 2.

42-2-602. Necessity for parental rights to be terminated. A child is not legally free for adoption until the parental rights of the birth parent or parents have been terminated by a court:

(1) as provided in this title;

(2) pursuant to Title 41, chapter 3; or

(3) of competent jurisdiction in another state or country.

History: En. Sec. 62, Ch. 480, L. 1997.

42-2-603. Petition for termination of parental rights. (1) Pending the termination or other disposition of the rights of the father of the child, the birth mother may execute a relinquishment and consent to adoption.

(2) The department, a licensed child-placing agency, the prospective adoptive parent to whom the relinquishment is issued, or a guardian with custody of the child shall file with the court a signed and notarized petition for termination of parental rights pursuant to Title 41, chapter 3, or pursuant to this title.

(3) At the request of the relinquishing parent, the execution of a relinquishment may be conditioned as set forth in 42-2-411.

(4) Pending disposition of the petition, the court may enter an order authorizing temporary care of the child.

History: En. Sec. 63, Ch. 480, L. 1997.

42-2-604. Contents of petition for termination of parental rights. (1) The petition for termination of parental rights must state:

(a) the identity of the petitioner;

(b) the date and location of the birth of the child;

(c) the date of the relinquishment by the birth mother or relinquishing parent;

(d) the current location of the child;

(e) the names and locations, if known, of any putative or presumed father of the child;

(f) whether a parent is one from whom consent is not required;

(g) whether court orders from any other proceeding have been issued terminating parental rights to the child that is the subject of the petition;

(h) any other evidence supporting termination of the legal rights that a person has with regard to the child; and

(i) a request for temporary custody of the child prior to the adoption.

(2) The petitioner shall file with the petition for termination of parental rights the following documents received in support of the petition:

(a) any relinquishments and consents to adoption;

(b) any denials of paternity;

(c) any acknowledgments of paternity and denial of parental rights;

(d) any affidavits from the putative father registry that have been executed by the department;

(e) a counseling report required under 42-2-409;

(f) proof of prior service of any notice or acknowledgment of service or waiver of service received; and

(g) proof of compliance with the Indian Child Welfare Act of 1978 and Interstate Compact on the Placement of Children, if applicable.

History: En. Secs. 64, 65, Ch. 480, L. 1997.

Cross-References

Interstate Compact on the Placement of Children, Title 41, ch. 4.

42-2-605. Notice of hearing — service. (1) Notice of a hearing to be held on the petition for termination of parental rights must be served in any manner appropriate under the Montana Rules of Civil Procedure or in any manner that the court may direct on:

(a) a putative or presumed father who has timely and properly complied with the putative father registry;

(b) a putative father who was not served with a notice of intent to release at least 20 days before the expected date of birth as specified in the notice of intent to release;

(c) a person adjudicated, in Montana, to be the father of the child for the purpose of child support;

(d) a person who is recorded on the child's birth certificate as the child's father;

(e) a person who is openly living with the child and the child's mother at the time that the proceeding is initiated or at the time the child was placed in the care of an authorized agency and who is representing to the public that the person is the child's father;

(f) a spouse, if the parent relinquishing the child for adoption was married to that person at the time of conception of the child or at any time after conception but prior to birth; or

(g) a parent or legal guardian of the child in question who has not waived notice.

(2) The notice of hearing must inform the putative or presumed father or other parent that failure to appear at the hearing constitutes a waiver of the individual's interest in custody of the child and will result in the court's termination of the individual's rights to the child.

(3) Proof of service of the notice of hearing must be filed with the court. A notarized acknowledgment of service by the party to be served is proof of personal service. Proof of service is not required if the putative father is present at the hearing. A waiver of notice of the hearing by an individual entitled to receive notice is sufficient.

(4) If the court finds that the father of the child is a person who did not receive either a timely notice of intent to release pursuant to 42-2-205 or a notice required pursuant to this section and who has not waived the right to notice of hearing and that person is not present at the hearing, the court shall adjourn further proceedings until that person is served with a notice of hearing.

History: En. Secs. 66, 67, Ch. 480, L. 1997.

Cross-References

Service of process and other papers, Rules 4D and 5, M.R.Civ.P. (see Title 25, ch. 20).

Presumption of paternity, 40-6-105.

Legitimacy of children born in wedlock, 40-6-201.

Legitimacy of children born after dissolution of marriage, 40-6-202.

Putative father registration, Title 42, ch. 2, part 2.

42-2-606. Hearing on petition to terminate parental rights. (1) The court shall hold a hearing as soon as practical to determine the identity of and terminate the parental rights of the parents of the child.

(2) If a putative father has not been named and no one has registered with the putative father registry, the court shall cause inquiry to be made in an effort to identify any legal father. The inquiry must include whether the mother was married at the time of conception of the child or at any time after conception and prior to birth.

(3) Based on the evidence received and the court's inquiry, the court shall enter a finding identifying the father or declaring that the identity of the father could not be determined.

(4) Based on the grounds set forth in 42-2-607 and the evidence received at the hearing, the court shall enter an order concerning the parental rights to the child.

(5) If the court terminates the parental rights to the child and the department, agency, or prospective adoptive parent has agreed to accept custody of the child until the child is adopted, the court shall issue an order awarding custody of the child to the petitioner.

History: En. Secs. 68, 69, Ch. 480, L. 1997.

Cross-References

Service of process and other papers, Rules 4D and 5, M.R.Civ.P. (see Title 25, ch. 20).

Presumption of paternity, 40-6-105.

Legitimacy of children born in wedlock, 40-6-201.

Legitimacy of children born after dissolution of marriage, 40-6-202.

Putative father registration, Title 42, ch. 2, part 2.

42-2-607. Grounds for termination of parental rights. The court may terminate a parent's rights to a child who is the subject of an adoption proceeding based upon:

(1) the voluntary acts of the parent in:

(a) executing a voluntary relinquishment and consent to adopt;

(b) submitting a notarized denial of paternity executed pursuant to 42-2-421; or

(c) submitting a notarized acknowledgment of paternity and denial of interest in custody of the child executed pursuant to 42-2-422;

(2) a determination under 42-2-608 that the parent is unfit;

(3) a determination under 42-2-609 that the relationship of parent and child does not exist;

(4) a determination under 42-2-610 that a putative father has failed to establish and maintain a substantial relationship with the child; or

(5) a determination that the parent has irrevocably waived parental rights by failing to timely act to protect the rights.

History: En. Sec. 70, Ch. 480, L. 1997; amd. Sec. 5, Ch. 257, L. 1999.

Compiler's Comments

1999 Amendment: Chapter 257 inserted (4) concerning determination that putative father has failed to establish and maintain substantial relationship with child; and made minor changes in style. Amendment effective April 5, 1999.

42-2-608. Finding of unfitness. (1) The court may terminate parental rights for purposes of making a child available for adoption on the grounds of unfitness if:

(a) the court makes a determination that the parent has been judicially deprived of custody of the child on account of abuse or neglect toward the child;

(b) the parent has willfully abandoned the child, as defined in 41-3-102, in Montana or in any other jurisdiction of the United States;

(c) it is proven to the satisfaction of the court that the parent, if able, has not contributed to the support of the child for an aggregate period of 1 year before the filing of a petition for adoption;

(d) it is proven to the satisfaction of the court that the parent is in violation of a court order to support either the child that is the subject of the adoption proceedings or other children with the same birth mother;

(e) the parent has been found guilty by a court of competent jurisdiction of:

(i) aggravated assault on the adoptee, as provided in 45-5-202;

(ii) sexual assault on a child, as provided in 45-5-502;

(iii) sexual intercourse without consent, as provided in 45-5-503, if the victim was a child;

(iv) incest, as provided in 45-5-507, if the victim was a child;

(v) homicide of a child, as provided in 45-5-102 or 45-5-103;

(vi) sexual abuse of a child, as provided in 45-5-625; or

(vii) ritual abuse of a minor, as provided in 45-5-627;

(f) the child has been maintained by a public or private children's institution, a charitable agency, a licensed child-placing agency, or the department for a period of 1 year without the parent contributing to the support of the child during that period, if able;

(g) a finding is made for a parent who is given proper notice of hearing:

(i) that the parent has been convicted of a crime of violence or of violating a restraining or protective order; and

(ii) the facts of the crime or violation and the parent's behavior indicate that the parent is unfit to maintain a relationship of parent and child with the child;

(h) a finding is made for a parent who is given proper notice of hearing and is a respondent to the petition to terminate parental rights and:

(i) by a preponderance of the evidence, it is found that termination is in the best interests of the child; and

(ii) upon clear and convincing evidence, it is found that one of the following grounds exists:

(A) if the child is not in the legal and physical custody of the other parent, that the respondent is not able or willing to promptly assume legal and physical custody of the child and to pay for the child's support in accordance with the respondent's financial means;

(B) if the child is in the legal and physical custody of the other parent and a stepparent who is the prospective adoptive parent, that the respondent is not able or willing to promptly establish and maintain contact with the child and to pay for the child's support in accordance with the respondent's financial means;

(C) placing the child in the respondent's legal and physical custody would pose a risk of substantial harm to the physical or psychological well-being of the child because the circumstances of the child's conception, the respondent's behavior during the mother's pregnancy or since the child's birth, or the respondent's behavior with respect to other children indicates that the respondent is unfit to maintain a relationship of parent and child with the child; or

(D) failure to terminate the relationship of parent and child would be detrimental to the child.

(2) In making a determination under subsection (1)(h)(ii)(D), the court shall consider any relevant factor, including the respondent's efforts to obtain or maintain legal and physical custody of the child, the role of other persons in thwarting the respondent's efforts to assert parental rights, the respondent's ability to care for the child, the age of the child, the quality of any previous relationship between the respondent and the child and between the respondent and any other children, the duration and suitability of the child's present custodial environment, and the effect of a change of physical custody on the child.

History: En. Sec. 71, Ch. 480, L. 1997; amd. Sec. 77, Ch. 51, L. 1999; amd. Sec. 19, Ch. 566, L. 1999.

Compiler's Comments

1999 Amendments — Composite Section: Chapter 51 in (1)(b) near beginning after "parent has" deleted "in the state of Montana or in any other jurisdiction of the United States" and near middle after "41-3-102" substituted "(9)(f)" for "(7)(e)" (rendered void by Ch. 566); and made minor changes in style. Amendment effective March 15, 1999.

Chapter 566 in (1)(b) substituted "41-3-102" for "41-3-102(7)(e)". Amendment effective October 1, 1999.

42-2-609. Determination that no parent and child relationship exists. For purposes of making a child available for adoption, the court may terminate the parental rights of a putative father on the grounds that the parent and child relationship does not exist if:

(1) a judicial determination is made under 40-6-107 that the parent and child relationship does not exist. This includes the termination of the parental rights of the husband of the mother who is placing the child for adoption or the parental rights of an individual who is a presumed father of the child.

(2) a determination is made that:

(a) an individual has not timely registered with the putative father registry;

(b) an individual has not been adjudicated, in Montana, to be the father of the child for the purpose of child support;

(c) an individual has not been recorded on the child's birth certificate as the child's father;

(d) an individual has not openly lived with the child and the child's mother at the time that the proceeding is initiated or at the time that the child was placed in the care of an authorized agency and an individual is not representing to the public that the individual is the child's father; and

(e) the child's mother was not married to the person who is the subject of the termination proceedings at the probable time of the child's conception or at the time that the child was born; or

(3) a putative father appears at the hearing but is unable to establish by a preponderance of the evidence the minimum requirements provided in 42-2-610 for demonstrating the establishment of a substantial relationship with the child.

History: En. Sec. 72, Ch. 480, L. 1997; amd. Sec. 6, Ch. 257, L. 1999.

Compiler's Comments

1999 Amendment: Chapter 257 throughout section substituted "individual" for "person"; in (2)(e) after "married" inserted "to the person who is the subject of the termination proceedings"; and made minor changes in style. Amendment effective April 5, 1999.

Cross-References

Birth certificates, Title 50, ch. 15, part 2.

42-2-610. Putative father — termination based upon failure to establish substantial relationship. (1) The parental rights of a putative father may be terminated by the court if the putative father has failed to timely establish and maintain a substantial relationship with the child.

(2) A putative father who is not married to the child's mother but who has openly lived with the child since the child's birth or for a period of 6 months immediately preceding placement of the child with adoptive parents and has openly claimed to be the father of the child during that period is considered to have developed a substantial relationship with the child and to have otherwise met the requirements of this section.

(3) In order to meet the minimal showing of having established a substantial relationship with regard to a child who is the subject of an adoption proceeding, a putative father has the burden of showing that the putative father has:

(a) demonstrated a full commitment to the responsibilities of parenthood by providing financial support for the child in a fair and reasonable sum and in accordance with the putative father's ability and by either:

(i) visiting the child at least monthly when physically and financially able to do so; or

(ii) having regular contact with the child or with the person or agency having the care and custody of the child when physically and financially able to do so; and

(b) manifested an ability and willingness to assume legal and physical custody of the child if the child was not in the physical custody of the other parent.

(4) In order to meet the minimal showing of having established a substantial relationship with regard to a child who is the subject of an adoption proceeding involving a child who is under 6 months of age at the time that the child becomes the subject of adoption proceedings, a putative father has the burden to show that the putative father has manifested a full commitment to parental responsibilities by:

(a) performing all of the acts described in this subsection (4) prior to the time that the mother executed a relinquishment and consent to adopt;

(b) if the putative father had actual knowledge of the pregnancy, paying a fair and reasonable amount of the expenses incurred in connection with the pregnancy and the child's birth in accordance with the putative father's means when not prevented from doing so by the person or authorized agency having lawful custody of the child;

(c) making reasonable and consistent payments, in accordance with the putative father's means, for the support of the child since birth;

(d) visiting regularly with the child; and

(e) manifesting an ability and willingness to assume legal and physical custody of the child if, during this time, the child was not in the physical custody of the mother.

(5) The subjective intent of a putative father, whether expressed or otherwise, unsupported by evidence of acts specified in this section does not

preclude a determination that the father failed to meet the requirements of this section.

History: En. Sec. 73, Ch. 480, L. 1997; amd. Sec. 7, Ch. 257, L. 1999.

Compiler's Comments

1999 Amendment: Chapter 257 in (4)(a) at end substituted "to adopt" for "for adoption, including registering with the putative father registry"; and made minor changes in style. Amendment effective April 5, 1999.

42-2-611. Irrevocable waiver of parental rights. (1) The court may find an irrevocable waiver of parental rights of:

(a) a putative father who was timely served with notice of intent to release if the court is provided with proof of service and proof that the putative father failed to timely comply with the requirements of the putative father registry;

(b) a parent or putative father who is served with notice of proceedings and fails to appear at the hearing; or

(c) a parent or putative father who is served with notice of proceedings and appears and denies any interest in custody of the child.

(2) The court may terminate parental rights under this section upon a finding of irrevocable waiver of all rights to the child.

History: En. Secs. 74, 75, Ch. 480, L. 1997.

42-2-612 through 42-2-615 reserved.

42-2-616. Appearance of parent at hearing — determination of custody. (1) If a parent appears at the hearing on the petition to terminate parental rights, objects to the termination of rights, and requests custody of the child, the court shall set deadlines that allow the parties to complete discovery and shall set a hearing on the determination of the parent's rights to the child.

(2) At the hearing, the court shall consider whether there is a basis for terminating parental rights and whether the best interests of the child will be served by granting custody to the respondent parent, the department, a licensed child-placing agency, or a prospective adoptive parent in a direct parental placement adoption.

(3) If the petitioner has established that there are grounds for terminating parental rights and it is in the best interests of the child for termination to occur, those rights must be terminated.

History: En. Sec. 76, Ch. 480, L. 1997.

42-2-617. Effect of order terminating parental rights. (1) An order granting the petition for termination of parental rights:

(a) terminates the parent and child relationship except for an obligation for arrearages of child support;

(b) terminates the jurisdiction of the court over the child in any dissolution or separate maintenance action;

(c) extinguishes any right the parent had to withhold consent to a proposed adoption of the child or to further notice of a proceeding for adoption; and

(d) awards custody of the child to the department, agency, or prospective adoptive parent to whom the relinquishment was given if the department, agency, or prospective adoptive parent has agreed in writing to accept custody of the child until the adoption is finalized.

(2) A person accepting custody is responsible for the support of the child.

History: En. Sec. 77, Ch. 480, L. 1997.

42-2-618. Appeal. An order terminating parental rights is a final order for purposes of appeal.

History: En. Sec. 78, Ch. 480, L. 1997.

42-2-619. Expediency. A contested termination of parental rights action must take precedence over other cases and matters in the court or on appeal. The court shall examine any issues raised in challenging termination of a parent's rights or regarding the validity of any adoption decree and shall render a decision as soon as possible.

History: En. Sec. 79, Ch. 480, L. 1997; amd. Sec. 8, Ch. 257, L. 1999.

Compiler's Comments

1999 Amendment: Chapter 257 near middle of second sentence before "adoption decree" deleted "interlocutory or final". Amendment effective April 5, 1999.

42-2-620. Finality. Subject to the disposition of a timely appeal, upon expiration of 6 months after an order terminating parental rights has been issued, the order may not be questioned by any person, in any manner, or upon any ground, including fraud, misrepresentation, failure to give any required notice, or lack of jurisdiction of the parties or the subject matter.

History: En. Sec. 80, Ch. 480, L. 1997.

CHAPTER 3

REQUIREMENTS OF PARTIES IN ADOPTION

Part 1 — Duty of Placing Party to Disclose Information

42-3-101. Duty to disclose information — form — availability — filing.
42-3-102. Retention of disclosures.

Part 2 — Requirements of Prospective Adoptive Parents

42-3-201. Preplacement evaluation — timing.
42-3-202. Initiation of preplacement evaluation — who conducts evaluation — payment of fees.
42-3-203. Information to be reviewed in conducting preplacement evaluation.
42-3-204. Contents of preplacement evaluation.
42-3-205. Recommendation.
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Part 3 — Requirements of Department or Licensed Child-Placing Agency

42-3-301. Requirement for preplacement evaluation.

Part 1

Duty of Placing Party to Disclose Information

Part Cross-References

Right to know, Art. II, sec. 9, Mont. Const.

Right of privacy, Art. II, sec. 10, Mont. Const.

42-3-101. Duty to disclose information — form — availability — filing. (1) Except for an adoption proceeding by a stepparent, in any adoption under this title, a birth parent, the department, or an agency shall provide a prospective adoptive parent with social and medical histories of the birth families, including tribal affiliation, if applicable.

(2) In a direct parental placement adoption, the birth family social and medical histories must be completed on a form provided by the department and filed with the court when the adoption petition is filed.

(3) The department shall make a form available to agencies and court administrators for public distribution.

History: En. Sec. 81, Ch. 480, L. 1997.

42-3-102. Retention of disclosures. (1) In a direct parental placement adoption, the disclosures required by 42-3-101 must be filed with the court in support of the notice of parental placement filed pursuant to 42-4-103 and must be permanently maintained.

(2) In an adoption arranged by the department or an agency, the disclosures required by 42-3-101 must be permanently maintained in the files of the department or the agency.

History: En. Sec. 82, Ch. 480, L. 1997.

Part 2

Requirements of Prospective Adoptive Parents

Part Cross-References

Right to know, Art. II, sec. 9, Mont. Const.

Right of privacy, Art. II, sec. 10, Mont. Const.

42-3-201. Preplacement evaluation — timing. (1) A child may not be placed for purposes of adoption unless the person with whom a child is proposed to be placed has had a preplacement evaluation completed to determine fitness and readiness as an adoptive parent.

(2) In a direct parental placement adoption, the placing parent must be provided with a copy of the preplacement evaluation prior to execution of a relinquishment and consent to adoption of the child.

(3) The required preplacement evaluation must provide all pertinent information pertaining to the topics identified in 42-3-203.

History: En. Sec. 83, Ch. 480, L. 1997.

42-3-202. Initiation of preplacement evaluation — who conducts evaluation — payment of fees. (1) A prospective adoptive parent who wishes to adopt a child may initiate the process by:

(a) establishing a client relationship with the department or a licensed child-placing agency; or

(b) requesting a preplacement evaluation from either the department or a licensed child-placing agency.

(2) The department may contract with a licensed social worker or a licensed child-placing agency to conduct the evaluation.

(3) The prospective adoptive parent and the home of the prospective adoptive parent must be studied and evaluated according to the department's or licensed child-placing agency's standards for placement of a child.

(4) A department or agency from which an individual is seeking to adopt a child may require the individual to be evaluated by its own qualified employee or independent contractor even if the individual has received a favorable preplacement evaluation from another evaluator.

(5) Fees for the study and report are set by the entity completing them and must be paid for by the prospective adoptive parent.

History: **En. Sec. 84, Ch. 480, L. 1997.**

42-3-203. Information to be reviewed in conducting preplacement evaluation. (1) A preplacement evaluation must include a review of the following information about the prospective adoptive parent:

(a) a check of criminal conviction data, data on substantiated abuse or neglect of a child under Title 41, chapter 3, and data pertaining to any involvement in incidents of domestic violence;

(b) medical and social history and current health;

(c) assessment of potential parenting skills;

(d) assessment of ability to provide adequate financial support for a child; and

(e) assessment of the level of knowledge and awareness of adoption issues, including, when appropriate, matters relating to open, interracial, cross-cultural, and special needs adoptions.

(2) (a) The prospective adoptive parent, the department of justice, and other state, county, and local agencies, after written notice to the subject of the study, shall give the evaluator completing the adoption study substantiated data pertaining to criminal convictions and any reports concerning domestic violence and substantiated abuse or neglect of children or vulnerable adults.

(b) The adoption study may also include a check of the youth court records of any person living in the prospective home. Pursuant to 41-5-215 and 41-5-216, the youth court shall release the requested information to the evaluator completing the adoption study. If applicable, the study must include an evaluation of the effect of a conviction, adjudication, or finding of substantiated abuse or neglect on the ability to care for a child.

(3) The preplacement evaluation must include at least one in-home visit with the prospective adoptive parent and at least one interview with each family member.

History: **En. Sec. 85, Ch. 480, L. 1997; amd. Sec. 9, Ch. 257, L. 1999.**

Compiler's Comments

1999 Amendment: Chapter 257 at end of (1)(a) deleted "by any person over the age of 13 living in the prospective home"; near middle of (2)(a) after "give the" substituted "evaluator" for "department or agency"; in (2)(b) in first sentence near beginning after "study" substituted "may" for "must" and substituted "any person" for "each person over the age of 13", near middle of second sentence substituted "evaluator" for "agency or department", and at beginning of third sentence inserted "if applicable"; and made minor changes in style. Amendment effective April 5, 1999.

42-3-204. Contents of preplacement evaluation. (1) The preplacement evaluation report must contain the following information if available:

(a) age and date of birth, nationality, racial or ethnic background, and any religious affiliation;

(b) marital status and family history, including the age and location of any child of the individual and the identity of and relationship to anyone else living in the individual's household;

(c) physical and mental health and any history of abuse of alcohol or drugs;

(d) educational and employment history and any special skills;

(e) property and income, including outstanding financial obligations as indicated in a current credit report or financial statement furnished by the individual;

(f) any previous request for an evaluation or involvement in an adoptive placement and the outcome of the evaluation or placement;

(g) whether the individual has been charged with or convicted of domestic violence or has been involved in a substantiated charge of child abuse or neglect or elder abuse or neglect and the disposition of the charges;

(h) whether the individual is subject to a court order restricting the individual's right to custody or visitation with a child;

(i) whether the individual has been convicted of a crime other than a minor traffic violation;

(j) whether the individual has located a parent interested in placing a child with the individual for adoption and, if so, a brief description of the parent and the child; and

(k) any other fact or circumstance that may be relevant in determining whether the individual is suited to be an adoptive parent, including the quality of the environment in the individual's home and the functioning of other children in the individual's household.

(2) The report must contain recommendations regarding the suitability of the subject of the study to be an adoptive parent.

(3) A preplacement evaluation is valid for 1 year following its date of completion and must be updated if there is a significant change in circumstances.

(4) Prior to accepting physical custody of a child for purposes of adoption, a prospective adoptive parent must have the preplacement evaluation completed by the evaluator, and the evaluation must specifically address the appropriateness of placing the specifically identified child or children who will be the subject of the adoption proceedings with the prospective adoptive parent.

History: En. Sec. 86, Ch. 480, L. 1997.

Cross-References

Criminal justice information, Title 44, ch. 5.

42-3-205. Recommendation. (1) An evaluator shall assess the information required by 42-3-203 to determine if it raises a specific concern that placement of any child or a particular child in the home of the individual would pose a significant risk of harm to the physical or psychological well-being of the child.

(2) If an evaluator determines that the information assessed does not raise a specific concern, the evaluator shall find that the individual is suited to be an adoptive parent. The evaluator may comment about any factor that in the evaluator's opinion makes the individual suited in general or for a particular child.

(3) If an evaluator determines that the information assessed raises a specific concern, the evaluator, on the basis of the original or any further investigation, shall find that the individual is or is not suited to be an adoptive parent. The evaluator shall support the finding with a written explanation.

History: En. Sec. 87, Ch. 480, L. 1997.

42-3-206. Distribution of evaluation — retention — immunity for evaluator. (1) The evaluator shall furnish a copy of the evaluation to a department, agency, or other person authorized to place a child for adoption and, upon payment by the person evaluated of the cost of the evaluation services, to the person evaluated.

(2) An evaluator shall retain the original of a completed or incomplete preplacement evaluation and a list of each source for each item of information in the evaluation. An evaluator who ceases to do business in Montana shall give the evaluator's records to the department for retention.

(3) An evaluator, except a department evaluator, who conducted an evaluation in good faith is not subject to civil liability for anything contained in the evaluation.

History: En. Sec. 88, Ch. 480, L. 1997.

42-3-207. Action by department. If, before a decree of adoption is issued, the department learns from an evaluator or another person that a child has been placed for adoption with an individual who is the subject of a preplacement evaluation on file with the department containing a finding of unsuitability, the department shall immediately review the evaluation and make a determination of whether the department has authority pursuant to Title 41, chapter 3, to intervene.

History: En. Sec. 89, Ch. 480, L. 1997.

42-3-208 through 42-3-211 reserved.

42-3-212. Court waiver for relatives. In a direct parental placement adoption, if the court is satisfied that adoption is in the best interests of the child, the court may waive the requirement of a preplacement evaluation when a parent or guardian places a child for adoption directly with an extended family member of the child. A postplacement evaluation must be conducted during the pendency of a proceeding for adoption.

History: En. Sec. 90, Ch. 480, L. 1997; amd. Sec. 10, Ch. 257, L. 1999.

Compiler's Comments

1999 Amendment: Chapter 257 at beginning of first sentence inserted "In a direct parental placement adoption, if the court is satisfied that adoption is in the best interests of the child". Amendment effective April 5, 1999.

42-3-213. Filing of evaluation in adoption proceedings. (1) In a direct parental placement adoption, the preplacement evaluation report must be filed with the court in support of the petition to terminate parental rights for purposes of adoption.

(2) In an adoption arranged by the department or a licensed child-placing agency, the preplacement evaluation report must be permanently maintained in the files of the department or the licensed child-placing agency.

History: En. Sec. 91, Ch. 480, L. 1997; amd. Sec. 11, Ch. 257, L. 1999.

Compiler's Comments

1999 Amendment: Chapter 257 in (1) and (2) after "evaluation" inserted "report". Amendment effective April 5, 1999.

Part 3

Requirements of Department or Licensed Child-Placing Agency

42-3-301. Requirement for preplacement evaluation. (1) Before the department or licensed child-placing agency may place a child for purposes of adoption, the prospective adoptive parent and the home of the prospective adoptive parent must be studied and evaluated as provided in 42-3-202.

(2) The department or agency shall prepare a written report containing the results of its evaluation.

History: En. Sec. 92, Ch. 480, L. 1997.

CHAPTER 4

PLACEMENTS FOR ADOPTION

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Part 1
Direct Parental Placements

Part Cross-References

Parent and child, Title 40, ch. 6.

42-4-101. Parties to direct parental placement adoption. A parent of a child may directly place the child for adoption with a specifically identified prospective adoptive parent who:

(1) resides in Montana or in another state that allows direct parental placement;

(2) is known to and has been personally selected by the parent; and

(3) has previously obtained a favorable preplacement evaluation.

History: **En. Sec. 93, Ch. 480, L. 1997.**

Cross-References

Rules for determining residency, 1-1-215.

42-4-102. Duties of placing parent. (1) A parent who is directly placing a child for adoption shall execute a voluntary relinquishment and consent to adopt, including:

(a) receiving the counseling required by 42-2-409; and

(b) if the parent is a minor, being advised by legal counsel other than the attorney representing the prospective adoptive parent.

(2) A placing parent shall identify and provide information on the location of any other legal parent or guardian of the child and any other person required to receive notice under 42-2-605, including:

(a) any current spouse;

(b) any spouse who is the other birth parent and to whom the parent was married at the probable time of conception or birth of the child; and

(c) any adoptive parent.

(3) A placing parent shall identify and provide information pertaining to any Indian heritage of the child that would bring the child within the jurisdiction of the Indian Child Welfare Act, 25 U.S.C. 1901, et seq.

(4) A parent placing a child for adoption in a direct parental placement adoption shall provide:

(a) the disclosures of medical and social history required pursuant to 42-3-101;

(b) a certified copy of the child's birth certificate or other document certifying the place and date of the child's birth; and

(c) a certified copy of any existing court orders pertaining to custody or visitation of the child.

(5) A parent placing a child for adoption in a direct parental placement adoption shall file a notice of parental placement.

(6) A parent placing a child for adoption in a direct parental placement adoption shall file a disclosure of all disbursements made to or for the benefit of the parent by the prospective adoptive parent or any person acting on behalf of the prospective adoptive parent.

(7) Subject to the limitations set in 42-7-102, counseling expenses, legal fees, and the reasonable costs of preparing reports documenting the required disclosures of medical and social history and the disclosures documenting disbursements are allowable expenses that can be paid for by the prospective adoptive parent.

History: **En. Sec. 94, Ch. 480, L. 1997.**

Cross-References

Birth certificates, Title 50, ch. 15, part 2.

42-4-103. Direct parental placement — information to be filed. (1) A parent who proposes to place a child for adoption with a prospective adoptive parent who resides in Montana and who is not the child's stepparent or an extended family member shall file with the court of the county in which the prospective adoptive parent or the parent making the placement resides the following:

(a) a notice of parental placement containing the following information:

(i) the name and address of the placing parent;

(ii) the name and address of each prospective adoptive parent;

(iii) the name and address or expected date and place of birth of the child;

(iv) the identity and information on the location of any other legal parent or guardian of the child and any other person required to receive notice under 42-2-605, including any current spouse, any spouse who is the other birth parent and to whom the parent was married at the probable time of conception or birth of the child, and any adoptive parent;

(v) all relevant information pertaining to any Indian heritage of the child that would bring the child within the jurisdiction of the Indian Child Welfare Act, 25 U.S.C. 1901, et seq.; and

(vi) the name and address of counsel, a guardian ad litem, or other representative, if any, of each of the parties mentioned in subsections (1)(a)(i) through (1)(a)(iii);

(b) a relinquishment and consent to adoption of the child by the adoptive parent;

(c) the counseling report required by 42-2-409;

(d) the medical and social history disclosures required by 42-3-101;

(e) a report of disbursements identifying all payments made to or to the benefit of the placing parent by the prospective adoptive parent or anyone acting on the parent's behalf that contains a statement by each person furnishing information in the report attesting to the truthfulness of the information furnished by that person;

(f) a certified copy of the child's birth certificate or other document certifying the place and date of the child's birth;

(g) a certified copy of any existing court orders pertaining to custody or visitation of the child; and

(h) the preplacement evaluation.

(2) The notice of parental placement must be signed by the parent making the placement.

History: En. Sec. 95, Ch. 480, L. 1997.

Cross-References

Birth certificates, Title 50, ch. 15, part 2.

42-4-104 and 42-4-105 reserved.

42-4-106. Duty of prospective adoptive parent to provide preplacement evaluation. (1) Prior to taking custody of a child whom the prospective adoptive parent intends to adopt, the prospective adoptive parent shall obtain a favorable preplacement evaluation.

(2) A placing parent must be provided with a copy of the preplacement evaluation prior to execution of a relinquishment and consent to adoption of the child.

History: En. Sec. 96, Ch. 480, L. 1997.

42-4-107 through 42-4-109 reserved.

42-4-110. Duty to promptly petition. (1) Within 30 days after the filing of a notice of parental placement or the execution of a relinquishment and consent to the adoption of the child, whichever is later, a prospective adoptive parent shall promptly act to resolve the child's legal status by filing:

(a) a petition for termination of parental rights for purposes of adoption, including a request for custody, that includes:

(i) the relinquishment and consent to adopt executed by any legal parent other than the placing parent who has filed the notice of parental placement;

(ii) a certified copy of any court order terminating the rights and duties of any parent or guardian of the child; and

(iii) any other evidence supporting termination of the legal rights a person has with regard to the child;

(b) a petition to adopt the child who is the subject of the proceedings;

(c) a copy of the preplacement evaluation pertaining to the adoptive parent;

(d) a copy of an agreement with the department or a licensed child-placing agency agreeing to accept supervision over the postplacement evaluation period and to prepare the postplacement evaluation;

(e) a disclosure of all disbursements made with regard to the adoptive placement to date; and

(f) an affidavit from the department reporting on whether any individual has registered with the putative father registry and claims an interest in the child.

(2) The prospective adoptive parent shall request that the court promptly notice the matters provided for in subsection (1) for hearing in a timely manner.

History: En. Sec. 97, Ch. 480, L. 1997.

Cross-References

Taking acknowledgments and affidavits, 3-1-404.

Affidavits, Title 26, ch. 1, part 10.

42-4-111. Custody order. (1) The court shall consider the petition to adopt and shall make a determination as to whether temporary custody should be awarded to the petitioner. In making that determination, the court shall consider:

(a) the preplacement evaluation that pertains specifically to placement of the child who is the subject of the adoption petition with the petitioner; and

(b) if any significant change in the petitioner's or child's circumstances has occurred since preparation of the preplacement evaluation.

(2) Upon a determination that it is in the best interests of the child, the court shall enter an order granting temporary custody to the prospective adoptive parent.

(3) Upon a determination that it is not in the best interests of the child to place custody with the prospective adoptive parent, the court shall deny the petition to terminate parental rights of the placing parent and shall make any other order with regard to the custody of the child that is necessary to protect the well-being of the child.

History: En. Sec. 98, Ch. 480, L. 1997.

42-4-112. Period for postplacement supervision. (1) In a direct parental placement adoption, the court shall maintain jurisdiction over the placement during a postplacement evaluation period and issue an order for postplacement supervision and a postplacement evaluation.

(2) The postplacement evaluation period must be supervised and evaluated by a qualified person appointed, contracted with, or employed by:

(a) the department, if the department has accepted supervision of the placement; or

(b) a licensed child-placing agency.

(3) The court shall provide the evaluator with copies of the petition for adoption and the items filed with the petition.

(4) A decree of adoption may not be entered for at least 6 months from the date an order is entered granting temporary custody during the pendency of the proceedings.

History: En. Sec. 99, Ch. 480, L. 1997.

42-4-113. Postplacement evaluation for direct parental placement adoption. (1) An evaluation must be based on a personal interview with the prospective adoptive parent in the prospective parent's home and an observation of the relationship between the child and the prospective adoptive parent.

(2) An evaluation must be in writing.

(3) At a minimum, the evaluation must include the following information:

(a) assessment of adaptation by the prospective adoptive parent to parenting the child;

(b) assessment of the health and well-being of the child in the prospective adoptive home;

(c) analysis of the level of incorporation by the child into the prospective adoptive parent's home, extended family, and community;

(d) assessment of the level of incorporation of the child's previous history into the prospective adoptive home, such as cultural or ethnic practices, or contact with former foster parents or biological relatives; and

(e) an account of any change in the prospective adoptive parent's marital status or family history, physical or mental health, home environment, property, income, or financial obligations since the filing of the preplacement evaluation.

(4) The evaluation must contain a definite recommendation stating the reasons for or against the proposed adoption.

History: En. Sec. 100, Ch. 480, L. 1997.

42-4-114. Time and filing of evaluation. (1) Unless the court for good cause allows an earlier or later filing, the evaluator shall file a complete written evaluation with the court within not less than 90 days and not more than 180 days after receipt of the court's order for an evaluation.

(2) If an evaluation raises a specific concern, as described in 42-3-205, the evaluation must be filed immediately and must explain why the concern poses a significant risk of harm to the physical or psychological well-being of the child.

(3) An evaluator shall give the prospective adoptive parent a copy of the evaluation when it is filed with the court and shall permanently retain a copy of the evaluation and a list of every source for each item of information in the evaluation. If the evaluator ceases to conduct business in Montana, all evaluations in the evaluator's possession must be forwarded to the department for permanent retention.

History: En. Sec. 101, Ch. 480, L. 1997.

42-4-115. Motion to enter adoption decree. (1) The prospective adoptive parent may file a motion for entry of an adoption decree no sooner than 6 months after the court has granted temporary custody to the prospective adoptive parent.

(2) The motion must be supported by the following documents:

(a) the postplacement evaluation prepared pursuant to 42-4-113; and

(b) an updated list of all disbursements made in connection with the adoption proceeding.

(3) A notice of hearing is not required for any party whose parental rights have been terminated in prior proceedings.

(4) The court shall consider the petition and shall grant or deny the petition pursuant to the provisions of 42-4-405 and 42-5-101 through 42-5-109.

(5) If the petition to adopt is denied, the court shall provide notice to the placing parent that the petition has been denied and shall take appropriate action for placement of the child pursuant to 42-5-106.

(6) Finality of the decree or the order denying the decree and the time for appeal are determined pursuant to 42-5-203.

History: En. Sec. 102, Ch. 480, L. 1997.

42-4-116. Records. All records filed with the court in a direct parental placement adoption must be permanently maintained by the court.

History: En. Sec. 103, Ch. 480, L. 1997.

Cross-References

Right to know, Art. II, sec. 9, Mont. Const.

Right of privacy, Art. II, sec. 10, Mont. Const.

Public records, Title 2, ch. 6.

Part 2

Placements by Department or Licensed Child-Placing Agency

Part Cross-References

Licensing of child placement agencies, Title 42, ch. 8.

42-4-201. Factors to be considered — best interests of child. (1) All relevant factors must be considered in determining the best interests of the child in an adoption proceeding. Factors relevant to the determination of a prospective adoptive parent's parenting ability, the future security for a child, and familial stability must be considered. In determining the best interests of the child, the following factors with regard to a prospective adoptive parent may be considered:

(a) age, as it relates to health, earning capacity, provisions for the support of a child, or other relevant circumstances;

(b) marital status, as it relates to the ability to serve as a parent in particularized circumstances; and

(c) religion, as it relates to the ability to provide the child with an opportunity for religious or spiritual and ethical development and as it relates to the express preference of a birth parent or a child to be placed with an adoptive parent of a particular religious faith or denomination.

(2) For purposes of ensuring that the best interests of the child are met, the department or a licensed child-placing agency is authorized to gather and use, in an appropriate, nonarbitrary manner, information concerning the age, marital status, and religious beliefs of a prospective adoptive parent. The authority granted by this subsection includes the authority to receive and to consider, consistent with the best interests of the child, the preferences of birth parents relating to the age, marital status, or religious beliefs of an adoptive parent.

(3) Consideration of religious factors by a licensed child-placing agency that is affiliated with a particular religious faith is not arbitrary consideration of religion within the meaning of this section.

History: En. Sec. 104, Ch. 480, L. 1997.

42-4-202. Parties to department or agency placement. A parent of a child may relinquish the child for adoption to the department or a licensed child-placing agency. The department or agency shall agree in writing to accept the relinquishment of a placing parent as provided in 42-2-402 before the relinquishment is valid.

History: En. Sec. 105, Ch. 480, L. 1997.

42-4-203. Duties of placing parent. (1) A parent who is placing a child for adoption shall comply with the provisions for executing a voluntary relinquishment and consent to adopt.

(2) A parent placing a child for adoption shall identify and provide information on the location of:

(a) any other legal parent or guardian of the child and any other person required to receive notice under 42-2-605, including any current spouse; and

(b) any spouse who is the other birth parent and to whom the parent was married at the probable time of conception or birth of the child.

(3) A parent placing a child for adoption shall identify and provide information pertaining to any Indian heritage of the child that would bring the child within the jurisdiction of the Indian Child Welfare Act, 25 U.S.C. 1901, et seq.

(4) A parent placing a child for adoption shall provide:

(a) the disclosures of medical and social history;

(b) a certified copy of the child's birth certificate or other document certifying the place and date of the child's birth; and

(c) a certified copy of any existing court orders pertaining to custody or visitation of the child.

History: **En. Sec. 106, Ch. 480, L. 1997.**

Cross-References

Birth certificates, Title 50, ch. 15, part 2.

42-4-204. Counseling requirements. To the extent required by this title and the department's or agency's standards, the department or agency shall provide counseling to the parties involved in the adoption.

History: **En. Sec. 107, Ch. 480, L. 1997.**

42-4-205. Waiting period following placement of child. (1) Once the department or agency has received custody of the child and placed the child for adoption, the department or agency shall supervise and evaluate the placement during a 6-month postplacement evaluation period.

(2) The department or agency may recommend in the postplacement evaluation filed with the petition for adoption that the court issue a decree of adoption sooner than the 6-month postplacement evaluation period if:

(a) (i) a period of at least 6 months has elapsed since the department or agency placed the child in the prospective adoptive home; and

(ii) the department or agency has completed a postplacement evaluation during that period; or

(b) (i) a postplacement evaluation has been completed and filed with the court; and

(ii) there are detailed extenuating circumstances supporting a waiver of the 6-month postplacement evaluation period.

(3) The department or an agency may recommend the waiver of the 6-month postplacement evaluation period and the postplacement evaluation if the adoptee has been in the petitioner's home as a foster child for at least 1 year.

History: **En. Sec. 108, Ch. 480, L. 1997.**

42-4-206. Petition for adoption filed by prospective adoptive parent. After the child has been placed by the department or agency with the prospective adoptive parent, the parent shall file a petition for adoption.

History: **En. Sec. 109, Ch. 480, L. 1997.**

42-4-207 and 42-4-208 reserved.

42-4-209. Postplacement department or agency evaluation. (1) The department or agency shall complete a written postplacement evaluation. The postplacement evaluation must be conducted according to the department's or agency's standards for placement of a child and at a minimum must include a personal interview with the prospective adoptive parent in that person's home and observation of the relationship between the child and the prospective adoptive parent.

(2) Upon the filing of a petition for adoption by the prospective adoptive parent, the department or agency shall file the postplacement evaluation.

(3) The evaluation must include the following information:

(a) whether the child is legally free for adoption;

(b) whether the proposed home is suitable for the child;

(c) a statement that the medical and social histories of the birth parents and child have been provided to the prospective adoptive parent;

(d) an assessment of adaptation by the prospective adoptive parent to parenting the child;

(e) a statement that the 6-month postplacement evaluation period has been complied with or should be waived;

(f) any other circumstances and conditions that may have a bearing on the adoption and of which the court should have knowledge;

(g) whether the agency waives notice of the proceeding;

(h) a statement that any applicable provision of law governing an interstate or intercountry placement of the child has been complied with; and

(i) a statement of compliance with any applicable provisions of the Indian Child Welfare Act, 25 U.S.C. 1901, et seq.

(4) The evaluation must contain a definite recommendation stating the reasons for or against the proposed adoption.

History: En. Sec. 110, Ch. 480, L. 1997.

42-4-210. Consent to adoption. (1) Upon the filing of the petition for adoption by the prospective adoptive parent, the department or agency that has custody of the child shall file its consent to adoption.

(2) Except as provided in subsection (3), the withdrawal of a consent for an adoption filed by the department or an agency in connection with that petition for adoption is not permitted.

(3) Upon a motion to withdraw consent, notice and opportunity to be heard must be given to the petitioner and to the person seeking to withdraw consent. The court may, if it finds that the best interests of the child will be furthered, issue a written order permitting the withdrawal of the consent.

(4) The entry of a decree of adoption renders a consent irrevocable.

History: En. Sec. 111, Ch. 480, L. 1997.

Part 3

Stepparent Adoption

Part Cross-References

Parent and child, Title 40, ch. 6.
Minors and adults defined, 41-1-101.
Limited emancipation, 41-3-408.

42-4-301. Relinquishment to stepparent. (1) A parent may relinquish parental rights for the purposes of adoption of a child by the child's stepparent or a member of the child's extended family. The relinquishment must be executed in accordance with 42-2-401 through 42-2-405 and 42-2-408 through

42-2-413. The relinquishment may be executed at any time after the child is 72 hours old.

(2) The stepparent or extended family member shall accept the relinquishment in writing.

History: En. Sec. 112, Ch. 480, L. 1997.

42-4-302. Standing to adopt stepchild. (1) A stepparent has standing to file a petition for adoption of a minor child of the stepparent's spouse if:

(a) the spouse has legal and physical custody of the child and the child has been in the physical custody of the spouse and the stepparent during the 60 days preceding the filing of a petition for adoption;

(b) the spouse is deceased or mentally incompetent but, before dying or being judicially declared mentally incompetent, had legal and physical custody of the child, and the child has resided primarily with the stepparent during the 12 months preceding the filing of the petition; or

(c) the department or an agency placed the child with the stepparent.

(2) For good cause shown, a court may allow an individual who is not the stepparent but who has the consent of the custodial parent of a child to file a petition for adoption. The petition must be treated as if the petitioner were a stepparent.

(3) A petition for adoption by a stepparent may be joined with a petition for termination of parental rights.

History: En. Sec. 113, Ch. 480, L. 1997; amd. Sec. 12, Ch. 257, L. 1999.

Compiler's Comments

1999 Amendment: Chapter 257 in (1) substituted "child" for "stepchild"; and in (1)(a) near beginning before "legal" deleted "sole". Amendment effective April 5, 1999.

42-4-303. Consent to adoption. (1) Upon the filing of the petition for adoption by the stepparent, the child's custodial parent shall file consent to adoption executed pursuant to 42-4-304.

(2) If the child has attained 12 years of age, the child shall consent to the adoption.

History: En. Sec. 114, Ch. 480, L. 1997; amd. Sec. 13, Ch. 257, L. 1999.

Compiler's Comments

1999 Amendment: Chapter 257 in (1) near middle before "parent" inserted "custodial" and at end deleted "or 42-4-305"; and made minor changes in style. Amendment effective April 5, 1999.

42-4-304. Consent to adoption — stepparent's spouse. (1) A consent to adoption executed by a parent who is the stepparent's spouse must be signed in the presence of an individual authorized to take acknowledgments.

(2) A consent must be in writing and must state that:

(a) the parent executing the consent has legal and physical custody of the child and voluntarily and unequivocally consents to the adoption of the child by the stepparent;

(b) the adoption will not terminate the parental relationship between the parent executing the consent and the child; and

(c) the parent executing the consent understands and agrees that:

(i) the adoption will terminate the relationship of parent and child between the child's other parent and the child and will terminate any existing court order for custody, visitation, or communication with the child;

(ii) the child and any descendant of the child will retain rights of inheritance from or through the child's other parent; and

(iii) a court order for visitation or communication with the child by an individual related to the child through the parent executing the relinquishment or an agreement or order concerning another individual that is approved by the court survives the decree of adoption, but that failure to comply with the terms of the order or agreement is not a ground for revoking or setting aside the consent or the adoption.

History: En. Sec. 115, Ch. 480, L. 1997; amd. Sec. 14, Ch. 257, L. 1999.

Compiler's Comments

1999 Amendment: Chapter 257 in (2)(a) after "custody of the" deleted "parent's"; and near middle of (2)(c)(iii) substituted "relinquishment" for "consent". Amendment effective April 5, 1999.

Cross-References

Taking acknowledgments and affidavits, 3-1-404.

42-4-305. Repealed. Sec. 20, Ch. 257, L. 1999.

History: En. Sec. 116, Ch. 480, L. 1997.

42-4-306 through 42-4-308 reserved.

42-4-309. Preplacement and postplacement evaluation period — waiver. In a stepparent adoption, if the court is satisfied that the adoption is in the best interests of the child, the court may waive the requirement of a preplacement evaluation and the 6-month postplacement evaluation and report and grant a decree of adoption.

History: En. Sec. 117, Ch. 480, L. 1997; amd. Sec. 15, Ch. 257, L. 1999.

Compiler's Comments

1999 Amendment: Chapter 257 at beginning substituted "In a stepparent adoption, if the court is" for "If the child is a stepchild or a member of the extended family of the petitioner, the court may, if", near middle after "waive" inserted "the requirement of a preplacement evaluation", and near end substituted "evaluation and report" for "evaluation period and the postplacement evaluation". Amendment effective April 5, 1999.

42-4-310. Petition for adoption — notice — hearing. A stepparent who desires to adopt a stepchild shall obtain an order of termination of parental rights of the child's noncustodial parent prior to or contemporaneously with the petition to adopt. Any necessary consents must be filed with the petition for adoption. Notice of the hearing on the petition must be given, and the stepparent shall attend the hearing conducted by the court.

History: En. Sec. 118, Ch. 480, L. 1997; amd. Sec. 16, Ch. 257, L. 1999.

Compiler's Comments

1999 Amendment: Chapter 257 near beginning substituted "shall obtain an order of termination of parental rights of the child's noncustodial parent prior to or contemporaneously with the petition to adopt. Any necessary consents must be filed with the" for "must file a" and after "adoption" deleted "any necessary consents, any required postplacement evaluation" and in second sentence inserted "stepparent shall"; and made minor changes in style. Amendment effective April 5, 1999.

42-4-311. Legal consequences of adoption of stepchild. (1) Except as provided in subsections (2) and (3), the legal consequences of an adoption of a stepchild by a stepparent are the same as the consequences under 42-5-202.

(2) An adoption by a stepparent does not affect:

(a) the relationship between the adoptee and the adoptee's parent who is the adoptive stepparent's spouse or deceased spouse;

(b) an existing court order for visitation or communication with a child by an individual related to the adoptee through either parent; or

(c) the right of the adoptee or a descendant of the adoptee to inheritance or intestate succession through or from the adoptee's former parent.

(3) Failure to comply with an agreement or order is not a ground for challenging the validity of an adoption by a stepparent.

History: En. Sec. 119, Ch. 480, L. 1997.

42-4-312. Arrearages of child support. A termination of a parent's rights and responsibilities toward a child does not cancel any responsibility to pay arrearages of child support unless the party to whom the arrearages are owed agrees in writing to waive payment.

History: En. Sec. 120, Ch. 480, L. 1997.

Cross-References

Order for child support to be made, 40-4-204.

Enforcement of support, Title 40, ch. 5.

Part 4

Adoption of Adults and Emancipated Minors

42-4-401. Adoption of adult. A person who has attained the age of legal majority may be adopted without the consent of the person's parents.

History: En. Sec. 121, Ch. 480, L. 1997.

42-4-402. Who may adopt adult or emancipated minor. (1) An adult may adopt another adult or an emancipated minor pursuant to this section. However, an adult may not adopt the adult's spouse. An adoption of an incompetent individual of any age must comply with all requirements set by law for the adoption of a child.

(2) An individual who has adopted an adult or emancipated minor may not adopt another adult or emancipated minor within 1 year after the adoption unless the prospective adoptee is a sibling of the adoptee.

History: En. Sec. 122, Ch. 480, L. 1997.

42-4-403. Consent to adoption. (1) Consent to the adoption of an adult or emancipated minor is required only of:

(a) the adoptee;

(b) the prospective adoptive parent; and

(c) the spouse of the prospective adoptive parent unless:

(i) the spouse and the prospective adoptive parent are legally separated; or

(ii) the court finds that the spouse is not capable of giving consent or is withholding consent contrary to the best interests of the adoptee and the prospective adoptive parent.

(2) The consent of the adoptee and the prospective adoptive parent must:

(a) be in writing and be signed in the presence of the court or an individual authorized to take acknowledgments;

(b) state that the parties agree to assume toward each other the legal relationship of parent and child and to have all of the rights and be subject to all of the duties of that relationship; and

(c) state that the parties understand the consequences that the adoption may have for any right of inheritance, property, or support.

(3) The consent of the spouse of the prospective adoptive parent:

(a) must be in writing and be signed in the presence of the court or an individual authorized to take acknowledgments;

(b) must state that the spouse:

(i) consents to the proposed adoption; and

(ii) understands the consequences that the adoption may have for any right of inheritance, property, or support that the spouse has; and

(c) may contain a waiver of notice of any proceeding for adoption.

History: En. Sec. 123, Ch. 480, L. 1997.

Cross-References

Taking acknowledgments and affidavits, 3-1-404.

42-4-404. Jurisdiction and venue. (1) The court has jurisdiction over a proceeding for the adoption of an adult or emancipated minor if the petitioner has lived in Montana for at least 90 days immediately preceding the filing of a petition for adoption.

(2) A petition for adoption must be filed in the court in the county in which a petitioner lives.

History: En. Sec. 124, Ch. 480, L. 1997.

42-4-405. Procedure. Except as otherwise provided in this part, the procedure and law for adoption of a child set forth in this title is applicable in proceedings for the adoption of an adult. The provisions concerning the counseling requirement, preplacement evaluation, postplacement supervision period, and postplacement evaluation are not applicable to the adoption of an adult.

History: En. Sec. 125, Ch. 480, L. 1997.

CHAPTER 5

LEGAL PROCEEDINGS

Part 1 — Dispositional Hearing and Adoption Decree

42-5-101. Petition for adoption.
42-5-102. Time for action on petition for adoption — waiver.
42-5-103. Notice of hearing.
42-5-104. Content of notice.
42-5-105. Hearing on petition for adoption.
42-5-106. Granting petition for adoption — denial of petition.
42-5-107. Best interests of child.
42-5-108. Removal of child from state.
42-5-109. Decree of adoption.

Part 2 — Legal Effect

42-5-201. Communication of decree to department.
42-5-202. Effect of decree.
42-5-203. Finality of decree — expediency.
42-5-204. Rights of adoptee.
42-5-205. Foreign adoption decrees.

Part 3 — Visitation and Enforceability of Other Agreements
42-5-301. Visitation and communication agreements.

Part 1
Dispositional Hearing and Adoption Decree

Part Cross-References

Parent and child, Title 40, ch. 6.

Substitute birth certificate for persons adopted, 50-15-304.

Certificate of adoption, 50-15-311.

42-5-101. Petition for adoption. (1) A petition for adoption must be notarized by the petitioners and must specify:

(a) the full names, ages, and place and duration of residence of the petitioners;

(b) the current marital status of petitioners and, if married, the place and date of the marriage;

(c) the circumstances under which the petitioners obtained physical custody of the child and the name of the individual or agency that placed the child;

(d) the date and place of birth of the child, if known;

(e) the name used for the child in the proceeding and, if a change in name is desired, the full name by which the child is to be known;

(f) that it is the desire of the petitioners that the relationship of parent and child be established between the petitioners and the child and to have all the rights and be subject to all the duties of that relationship;

(g) a full description and statement of value of all property owned or possessed by the child;

(h) the facts, if any, that excuse consent on the part of a person whose consent is required for the adoption;

(i) that any applicable law governing interstate or intercountry placement was complied with;

(j) that, if applicable, the Indian Child Welfare Act, 25 U.S.C. 1901, et seq., was complied with;

(k) whether a previous petition has been filed by the petitioners to adopt the child at issue or any other child in any court and the disposition of the petitions; and

(l) the name and address, if known, of any person who is entitled to receive notice of the petition for adoption.

(2) There must be attached to or accompanying the petition:

(a) any written consent required by 42-2-301;

(b) a certified copy of any court order terminating the rights of the child's parents;

(c) a certified copy of any existing court order in any pending proceeding concerning custody of or visitation with the child;

(d) a copy of any agreement with a public agency to provide a subsidy for the benefit of the child with a special need;

(e) the postplacement evaluation prepared pursuant to 42-4-113 or 42-4-209;

(f) a disclosure of any disbursements made in connection with the adoption proceeding.

(3) One copy of the petition must be retained by the court. A copy must be sent to:

(a) the department or to the agency participating in the adoption proceeding; or

(b) the parent placing the child for adoption in a direct parental placement adoption.

History: En. Sec. 126, Ch. 480, L. 1997; amd. Sec. 17, Ch. 257, L. 1999.

Compiler's Comments

1999 Amendment: Chapter 257 in (1) after "adoption" deleted "must be filed in triplicate"; in (2)(a) substituted "42-2-301" for "42-4-405 and 42-5-101 through 42-5-109"; and made minor changes in style. Amendment effective April 5, 1999.

Cross-References

Change of name, Title 27, ch. 31.

42-5-102. Time for action on petition for adoption — waiver. Not less than 6 months from the date the child has been placed with the prospective adoptive parent, the prospective adoptive parent may apply to the court for a decree of adoption. If the best interests of the adoptee are served, then pursuant to 42-4-205 and 42-4-309, the court may waive the 6-month postplacement evaluation period and summarily consider an adoption petition.

History: En. Sec. 127, Ch. 480, L. 1997.

42-5-103. Notice of hearing. (1) Upon the filing of a petition for adoption, notice of hearing must be served on:

(a) a person whose consent to adoption is required under 42-2-301;

(b) the department or agency whose consent to adoption is required;

(c) the spouse of the petitioner if the spouse has not joined in the petition;

(d) a person who has revoked a consent or relinquishment or is attempting to have a consent or relinquishment set aside; and

(e) any other person named by the court to receive notice.

(2) The notice must direct the person to appear in court at the time specified and to show cause why the petition should not be granted.

(3) The notice of hearing must be served in a manner appropriate under the Montana Rules of Civil Procedure.

(4) A notice of hearing is not required to be served on any party:

(a) whose parental rights have been terminated in prior proceedings;

(b) who waives notice in a relinquishment, consent, or other document signed by the party;

(c) who has consented in writing to an adoption; or

(d) whose consent to adoption is not required under 42-2-302.

History: En. Sec. 128, Ch. 480, L. 1997.

Cross-References

Service of process, Rule 4, M.R.Civ.P. (see Title 25, ch. 20).

Service of pleadings and other papers, Rule 5, M.R.Civ.P. (see Title 25, ch. 20).

42-5-104. Content of notice. The notice required by 42-5-103 must contain:

(1) the caption of the petition;

(2) the address and telephone number of the court in which the petition is pending;

(3) a concise summary of the relief requested in the petition;

(4) the name, mailing address, and telephone number of the petitioner or the petitioner's attorney; and

(5) a statement of the method of responding to the notice and the consequences of failure to respond.

History: En. Sec. 129, Ch. 480, L. 1997.

42-5-105. Hearing on petition for adoption. (1) The petitioners and the child shall appear at the hearing unless the presence of the child is waived by the court.

(2) The court shall examine the petition, the documents accompanying the petition, and the petitioners and shall receive evidence in support of the petition.

History: En. Sec. 130, Ch. 480, L. 1997.

42-5-106. Granting petition for adoption — denial of petition. (1) The court shall issue a decree of adoption awarding custody of the child to the petitioners based on the evidence received if it determines that:

(a) the child has been in the physical custody of the petitioners for at least 6 months, unless the court for good cause shown waives this requirement pursuant to 42-4-205 or 42-4-309;

(b) notice of hearing on the petition for adoption was properly served or dispensed with;

(c) every necessary consent, relinquishment, waiver, disclaimer, or judicial order terminating parental rights has been obtained and filed with the court;

(d) any evaluation required by this title has been filed with and considered by the court; and

(e) the adoption is in the best interests of the child.

(2) If the petition for adoption is denied, the court shall dismiss the petition and enter an appropriate order as to the future custody of the child according to the best interests of the child.

History: En. Sec. 131, Ch. 480, L. 1997.

42-5-107. Best interests of child. (1) In determining whether to grant a petition to adopt, the court shall consider all relevant factors in determining the best interests of the child. The court shall consider factors relevant to the determination of a prospective adoptive parent's parenting ability, the future security for a child, and familial stability.

(2) In a contested adoption proceeding involving a child, the court shall consider the factors set out in subsection (1) and shall also consider:

(a) the nature and length of any relationship already established between a child and any person seeking to adopt the child;

(b) the nature of any family relationship between the child and any person seeking to adopt the child and whether that person has established a positive emotional relationship with the child;

(c) the harm that could result to the child from a change in placement;

(d) whether any person seeking to adopt the child has adopted a sibling or half-sibling of the child;

(e) which, if any, of the persons seeking to adopt the child were selected by the placing parent or the department or agency whose consent to the adoption is required.

(3) In an Indian child placement, the court shall determine if the requirements of the Indian Child Welfare Act, 25 U.S.C. 1901, et seq., have been met.

History: **En. Sec. 132, Ch. 480, L. 1997.**

42-5-108. Removal of child from state. Before a decree of adoption is issued, a petitioner may not remove the child from the state for more than 30 consecutive days without the permission of:

(1) the court if the child was placed directly for adoption; or

(2) the department or the agency that placed the child for adoption.

History: **En. Sec. 133, Ch. 480, L. 1997.**

42-5-109. Decree of adoption. A decree of adoption must state:

(1) the original name of the child;

(2) the name of the petitioner for adoption;

(3) whether the petitioner is married or unmarried;

(4) whether the petitioner is a stepparent of the child;

(5) the name by which the child is to be known;

(6) for a child born in Montana, a direction to the vital statistics bureau to issue a new birth certificate unless the adoptee is 12 years of age or older and requests that a new certificate not be issued;

(7) the child's date and place of birth, if known;

(8) the effect of the decree of adoption as stated in 42-5-202;

(9) that the adoption is in the best interests of the child; and

(10) if known, whether either birth parent objects to the release of the original birth certificate information upon the adoptee reaching 18 years of age.

History: **En. Sec. 134, Ch. 480, L. 1997; amd. Sec. 18, Ch. 257, L. 1999.**

Compiler's Comments

1999 Amendment: Chapter 257 at beginning of (10) substituted "if known, whether either birth parent objects" for "whether the birth mother objects". Amendment effective April 5, 1999.

Part 2

Legal Effect

42-5-201. Communication of decree to department. (1) Within 30 days after a decree of adoption becomes final, the clerk of court shall send a report of the adoption to the department.

(2) If petitioners have requested it, the court shall order the vital statistics bureau to issue a new birth certificate to the child.

History: **En. Sec. 135, Ch. 480, L. 1997.**

Cross-References

Birth certificates, Title 50, ch. 15, part 2.

42-5-202. Effect of decree. (1) After the decree of adoption is entered:

(a) the relationship of parent and child and all the rights, duties, and other legal consequences of the relation of parent and child exist between the adoptee and the adoptive parent and the kindred of the adoptive parent;

(b) the former parents and the kindred of the former parents of the adoptee, unless they are the adoptive parents or the spouse of an adoptive parent, are relieved of all parental responsibilities for the adoptee and have no rights over the adoptee except for a former parent's duty to pay arrearages for child support.

(2) A decree of adoption must include notice to the vital statistics bureau if it is known that either birth parent objects to release of the information on the original birth certificate upon the adoptee reaching 18 years of age.

(3) The relationship of parent and child for the purposes of intestate succession is governed by Title 72.

History: En. Sec. 136, Ch. 480, L. 1997; amd. Sec. 19, Ch. 257, L. 1999.

Compiler's Comments

1999 Amendment: Chapter 257 near middle of (2) substituted "if it is known that either birth parent objects" for "as to the birth mother's consent"; and made minor changes in style. Amendment effective April 5, 1999.

Cross-References

Birth certificates, Title 50, ch. 15, part 2.

42-5-203. Finality of decree — expediency. (1) For purposes of appeal, the decree of adoption is a final order when it is issued.

(2) A person may appeal from the order in the manner and form provided for appeals from a judgment in civil actions.

(3) An appeal from a decree of adoption must be heard expeditiously pursuant to the provisions of 42-2-618.

History: En. Sec. 137, Ch. 480, L. 1997.

42-5-204. Rights of adoptee. A decree of adoption does not affect any right or benefit vested in the adoptee before the decree became final.

History: En. Sec. 138, Ch. 480, L. 1997.

42-5-205. Foreign adoption decrees. When the relationship of parent and child has been created by a decree of adoption of a court of any other state or country, the rights and obligations of the parties as to matters within the jurisdiction of this state must be determined pursuant to this title.

History: En. Sec. 139, Ch. 480, L. 1997.

Cross-References

Recognition of adoption in another jurisdiction, 42-2-101.

Interstate placement, 42-2-103.

International placement, 42-2-104.

Part 3

Visitation and Enforceability of Other Agreements

42-5-301. Visitation and communication agreements. (1) Except as otherwise provided in this title, a decree of adoption terminates any existing order or written or oral agreement for contact or communication between the adoptee and the birth parents or family.

(2) Any express written agreement entered into between the placing parent and the prospective adoptive parent after the execution of a relinquishment and consent to adoption is independent of the adoption proceedings, and any relinquishment and consent to adopt remains valid whether or not the agreement for contact or communication is later performed. Failure to perform an agreement is not grounds for setting aside an adoption decree.

(3) A court may order that an agreement for contact or communication entered into under this section may not be enforced upon a finding that:

(a) enforcement is detrimental to the child;

(b) enforcement undermines the adoptive parent's parental authority; or

(c) due to a change in circumstances, compliance with the agreement would be unduly burdensome to one or more of the parties.

History: **En. Sec. 140, Ch. 480, L. 1997.**

CHAPTER 6

RECORDS

Part 1 — Confidential Intermediaries

42-6-101. Confidentiality of records and proceedings.
42-6-102. Disclosure of records — nonidentifying information — consensual release.
42-6-103. Petition for appointment of confidential intermediary.
42-6-104. Appointment of confidential intermediary — duties — payment.
42-6-105. Disclosure authorized in course of employment.
42-6-106 through 42-6-108 reserved.
42-6-109. Release of original birth certificate — certificate of adoption.

Chapter Cross-References

Right to know, Art. II, sec. 9, Mont. Const.

Right of privacy, Art. II, sec. 10, Mont. Const.

Public records, Title 2, ch. 6.

Part 1

Confidential Intermediaries

42-6-101. Confidentiality of records and proceedings. (1) Unless the court orders otherwise, all hearings held in proceedings under this title are confidential and must be held in closed court without admittance of any person other than interested parties and their counsel.

(2) All papers and records pertaining to the adoption must be kept as a permanent record of the court and must be withheld from inspection. A person may not have access to the records, except:

(a) for good cause shown on order of the judge of the court in which the decree of adoption was entered;

(b) as provided in this part;

(c) as provided in 50-15-121 and 50-15-122; or

(d) the department's child support enforcement division providing services under 42 U.S.C. 651, et seq.

(3) All files and records pertaining to adoption proceedings retained by the department, a licensed child-placing agency, a lawyer, or any authorized agency are confidential and must be withheld from inspection, except as provided in 50-15-121, 50-15-122, and this part.

History: **En. Sec. 141, Ch. 480, L. 1997.**

42-6-102. Disclosure of records — nonidentifying information — consensual release. (1) The department or authorized person or agency may disclose:

(a) nonidentifying information to an adoptee, an adoptive or birth parent, or an extended family member of an adoptee or birth parent; and

(b) identifying information to a court-appointed confidential intermediary upon order of the court or as provided in 50-15-121 and 50-15-122.

(2) Information may be disclosed to any person who consents in writing to the release of confidential information to other interested persons who have also consented. Identifying information pertaining to an adoption involving an adoptee who is still a child may not be disclosed based upon a consensual exchange of information unless the adoptee's adoptive parent consents in writing.

History: En. Sec. 142, Ch. 480, L. 1997.

42-6-103. Petition for appointment of confidential intermediary. (1) An adult adoptee, an adoptive or birth parent, or an adult extended family member of the adoptee or birth parent may petition the court for disclosure of identifying information regarding the adoptee, a birth child, a birth parent, or an extended family member.

(2) A petition for disclosure must contain:

(a) as much of the following information as is known by the petitioner:

(i) the name, address, and identification of the petitioner;

(ii) the date of the adoptee's birth;

(iii) the county and state where the adoption occurred;

(iv) the date of the adoption; and

(v) any other information known to the petitioner concerning the birth parents, the adoptive parent, and the adoptee that could assist in locating the person being sought;

(b) written documentation from a certified confidential intermediary agreeing to conduct the search; and

(c) if the petitioner is not the adoptee or birth parent, the reason the petitioner is requesting the appointment of a confidential intermediary.

History: En. Sec. 143, Ch. 480, L. 1997.

42-6-104. Appointment of confidential intermediary — duties — payment. (1) After a petition for disclosure has been filed under 42-6-103, the court shall appoint a confidential intermediary who shall:

(a) conduct a confidential search for the person sought as requested in the petition for disclosure;

(b) refrain from disclosing directly or indirectly any identifying information to the petitioner, unless ordered to do so by the court; and

(c) make a written report of the results of the search to the court not later than 6 months after appointment.

(2) Upon appointment, a confidential intermediary is entitled to be paid a reasonable fee plus actual expenses incurred in conducting the search. The fee and expenses must be paid by the petitioner.

(3) A confidential intermediary may inspect otherwise confidential records of the court, the department, or an authorized agency for use in the search. The confidential intermediary may not disclose identifying information from the records or any results of a search unless authorized by the court or unless the parties have executed written consent to the confidential intermediary. Nonidentifying information from any source may be disclosed without further order from the court.

(4) If a confidential intermediary locates the person being sought, a confidential inquiry must be made as to whether the located person consents to having that person's present identity disclosed to the petitioner. The court may request that the confidential intermediary assist in arranging contact between the petitioner and the located person.

(5) If a confidential intermediary locates the person being sought and the located person does not consent to having that person's identity disclosed, identifying information regarding that person may be disclosed only upon order of the court for good cause shown.

(6) If the person being sought is found to be deceased, the court may order disclosure of identifying information regarding the deceased to the petitioner.

History: En. Sec. 144, Ch. 480, L. 1997.

42-6-105. Disclosure authorized in course of employment. This title does not preclude an employee or agent of a court, department, or agency from:

(1) inspecting permanent, confidential, or sealed records for the purpose of discharging any obligation under this title;

(2) disclosing the name of the court in which a proceeding for adoption occurred or the name of an agency that placed an adoptee to an individual described in 42-6-103(1) who can verify the individual's identity; or

(3) disclosing nonidentifying information contained in confidential or sealed records in accordance with any other applicable state or federal law.

History: En. Sec. 145, Ch. 480, L. 1997.

42-6-106 through 42-6-108 reserved.

42-6-109. Release of original birth certificate — certificate of adoption. (1) For a person adopted on or before July 1, 1967, in addition to any copy of an adoptee's original birth certificate authorized for release by a court order issued pursuant to 50-15-121 or 50-15-122, the department shall furnish a copy of the original birth certificate upon the written request of an adoptee.

(2) For a person adopted between July 1, 1967, and September 30, 1997, in addition to any copy of an adoptee's original birth certificate authorized for release by a court order issued pursuant to 50-15-121 or 50-15-122, the department shall furnish a copy of the original birth certificate upon a court order.

(3) For a person adopted on or after October 1, 1997, in addition to any copy of an adoptee's original birth certificate authorized for release by a court order issued pursuant to 50-15-121 or 50-15-122, the department shall furnish a copy of the original birth certificate upon:

(a) the written request of an adoptee who has attained 18 years of age unless the birth parent has requested in writing that the original birth certificate not be automatically released; or

(b) a court order.

(4) For a person adopted on or after October 1, 1997, and subject to subsection (5), upon the request of an adoptive parent or an adoptee who has attained 18 years of age, the department shall issue a certificate of adoption that states the date and place of adoption, the date of birth of the adoptee, the

name of each adoptive parent, and the name of the adoptee as provided in the decree.

(5) A birth parent may request in writing to the vital statistics bureau that the birth certificate for an adoptee not be released without a court order.

History: En. Sec. 146, Ch. 480, L. 1997.

Cross-References

Birth certificates, Title 50, ch. 15, part 2.

CHAPTER 7

FEES AND PROHIBITED ACTIVITIES RELATED TO ADOPTION

Part 1 — General Fees and Activities

42-7-101. Fees related to placement for adoption by parent.
42-7-102. Limitations on payment of counseling and legal fees.
42-7-103 and 42-7-104 reserved.
42-7-105. Prohibited activities — violations — penalties.
42-7-106. Action by department.

Part 1

General Fees and Activities

42-7-101. Fees related to placement for adoption by parent. (1) Reasonable adoption fees may be paid by the adoptive parent for the actual cost of services. The cost of services must relate to:

(a) a petition for adoption;

(b) placement of a child;

(c) medical care or services;

(d) prenatal care;

(e) foster care;

(f) a preplacement evaluation;

(g) counseling related to providing information necessary to make an informed decision to voluntarily relinquish a child;

(h) travel or temporary living costs for the birth mother;

(i) legal fees incurred for services on behalf of the placing parent;

(j) the reasonable costs incurred by a placing parent in a direct parental placement adoption to document the disclosures of medical and social history required by 42-3-101; and

(k) other reasonable costs related to adoption that do not include education, vehicles, salary or wages, vacations, or permanent housing for the birth parent.

(2) A birth parent or a provider of a service listed in subsection (1) may receive or accept a payment authorized by subsection (1). The payment may not be made contingent on the placement of a child for adoption or upon relinquishment of and consent to adoption of the child. If the adoption is not completed, a person who is authorized by subsection (1) to make a specific payment is not liable for that payment unless the person has agreed in a signed

writing with a birth parent or a provider of a service to make the payment regardless of the outcome of the proceeding for adoption.

History: **En. Sec. 147, Ch. 480, L. 1997.**

42-7-102. Limitations on payment of counseling and legal fees. (1) A prospective adoptive parent may pay counseling expenses for a maximum of 10 hours of counseling.

(2) A prospective adoptive parent may pay for legal costs entailed for providing legal counsel for one birth parent unless the birth parents elect joint representation. The right of a relinquishing parent to legal counsel paid by the prospective adoptive parent continues only until the relinquishment becomes irrevocable. An attorney may not represent both a birth parent and a prospective adoptive parent.

History: **En. Sec. 148, Ch. 480, L. 1997.**

42-7-103 and 42-7-104 reserved.

42-7-105. Prohibited activities — violations — penalties. (1) A person, other than the department or a licensed child-placing agency, may not:

(a) advertise in any public medium that the person:

(i) knows of a child who is available for adoption; or

(ii) is willing to accept a child for adoption or knows of prospective adoptive parents for a child; or

(b) engage in placement activities as defined in 42-8-101.

(2) An individual other than an extended family member or stepparent of a child may not obtain legal or physical custody of a child for purposes of adoption unless the individual has a favorable preplacement evaluation or a court-ordered waiver of the evaluation.

(3) A person who, as a condition for placement, relinquishment, or consent to the adoption of a child, knowingly offers, gives, agrees to give, solicits, accepts, or agrees to accept from another person, either directly or indirectly, anything other than the fees allowed under 42-7-101 commits the offense of paying or charging excessive adoption process fees.

(4) It is illegal to require repayment or reimbursement of anything provided to a birth parent under 42-7-101. All payments by the adoptive parent made on behalf of a birth parent pursuant to this section are considered a gift to the birth parent.

(5) A person convicted of the offense of paying or charging excessive adoption process fees, attempting to recover expenses incurred from an adoption process, or otherwise violating this title may be fined an amount not to exceed $10,000 in an action brought by the appropriate city or county attorney. The court may also enjoin from further violations any person who violates this title.

History: **En. Sec. 149, Ch. 480, L. 1997.**

Cross-References

Injunctions, Title 27, ch. 19.

42-7-106. Action by department. The department may review and investigate compliance with this title and may maintain an action in court to compel compliance.

History: **En. Sec. 150, Ch. 480, L. 1997.**

CHAPTER 8

LICENSING OF CHILD PLACEMENT AGENCY

Part 1 — Licensing

42-8-101. Definitions.
42-8-102. General duties of department.
42-8-103. License required — term of license — no fee charged.
42-8-104. Requirements for licensure.
42-8-105 and 42-8-106 reserved.
42-8-107. Investigation of agencies — cancellation of licenses.
42-8-108. Violation a misdemeanor — penalty.

Part 1
Licensing

42-8-101. Definitions. As used in this part, the following definitions apply:

(1) "Person" includes any individual, partnership, voluntary association, or corporation.

(2) "Placement activities" means any of the following:

(a) placement of a child for adoption;

(b) arranging or providing short-term foster care for a child pending an adoptive placement; or

(c) facilitating placement of a child by maintaining a list in any form of birth parents or prospective adoptive parents.

(3) "Soliciting" means to request, offer, promote, refer, or entice, either directly or indirectly through correspondence, advertising, or other method, a potential adoptive parent or couple, birth parent or parents, or placement of a child by a birth parent.

History: En. Sec. 151, Ch. 480, L. 1997.

42-8-102. General duties of department. The department shall:

(1) issue licenses to entities engaged in child placement activities on October 1, 1997, if the licensed applicant has met the requirements established by the department by rule;

(2) prescribe the conditions upon which child-placing licenses are issued and revoked; and

(3) adopt rules for the conduct of the affairs of child-placing agencies that are consistent with the welfare of children.

History: En. Sec. 152, Ch. 480, L. 1997.

Cross-References

Adoption and publication of rules, Title 2, ch. 4, part 3.

42-8-103. License required — term of license — no fee charged. (1) Only an entity holding a current child-placing agency license issued by the department may act as an agency for the purpose of:

(a) procuring or selecting proposed adoptive homes;

(b) placing children in proposed adoptive homes;

(c) soliciting persons to adopt children or arranging for persons to adopt children;

(d) soliciting persons to relinquish children or place children in potential adoptive homes; or

(e) engaging in placement activities.

(2) Licenses are valid for 1 year after issuance. A fee may not be charged for a license.

History: **En. Sec. 153, Ch. 480, L. 1997.**

42-8-104. Requirements for licensure. The department may issue licenses to agencies meeting the following minimum requirements:

(1) The chief function of the agency or a specific program within the agency must be the care and placement of children.

(2) The agency operates on a nonprofit basis and is financially responsible in and for its operation.

(3) The agency meets the requirements as designated by the department by rule.

(4) The directing or managing personnel of the agency must be qualified both on the basis of professional educational experience and character.

(5) Complete records must be kept of both the children and adopting parents with which the agency deals, and the records must be maintained in accordance with 42-6-101.

(6) The agency shall maintain and use an in-state office for making a social study of the child and proposed adoptive parent before placement of the child, particularly with regard to:

(a) the physical and mental health, emotional stability, and personal integrity of the adoptive parent and the parent's ability to promote the child's welfare; and

(b) the physical and mental condition of the child and the child's family background.

(7) The agency must have the ability to provide education for adoptive parents and counseling for placing parents as required in 42-2-409 and department rules.

(8) The agency shall agree to cooperate with courts having jurisdiction in adoptive matters and with other public agencies having to deal with the welfare of children.

(9) The agency shall, annually, submit a full, complete, and true financial statement to the department, and the statement must contain a full accounting of the operations of the agency during the preceding year.

History: **En. Sec. 154, Ch. 480, L. 1997.**

42-8-105 and 42-8-106 reserved.

42-8-107. Investigation of agencies — cancellation of licenses. (1) The department may, through its authorized representative, investigate the operations of licensed agencies and may cancel licenses for failure to observe prescribed rules or to maintain minimum requirements. An agency shall give to representatives of the department all information requested and allow them to observe the operation of the agency.

(2) When the department finds, upon the basis of the statement required by 42-8-104(9) or upon its own investigation, that an agency has not conducted

or is financially incapable of conducting its operations according to the established standards, the department may suspend, revoke, or deny a license for the agency.

History: **En. Sec. 155, Ch. 480, L. 1997.**

42-8-108. Violation a misdemeanor — penalty. (1) Any person who maintains or conducts an agency for procuring the adoption of children or assists in the maintaining or conducting of an agency without first obtaining a child-placing license is guilty of a misdemeanor and upon conviction of a first offense shall be punished by a fine not exceeding $1,000 or imprisonment for up to 1 year in jail and shall be enjoined from further engaging in agency activities.

(2) Upon the second conviction of a person for violation of 42-8-103, 42-8-104, and 42-8-107, the person is guilty of a felony and may be punished by a fine not exceeding $10,000 or imprisonment for up to 5 years in prison and shall be enjoined from further engaging in agency activities.

History: **En. Sec. 156, Ch. 480, L. 1997.**

CHAPTER 9

RESERVED

CHAPTER 10

SUBSIDIZED ADOPTIONS

Part 1 — Procedures

42-10-101. Short title.
42-10-102. Purpose.
42-10-103. Definitions.
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Part 1
Procedures

42-10-101. Short title. This part may be cited as "The Subsidized Adoption Act of 1977".

History: En. 71-1806 by Sec. 1, Ch. 434, L. 1977; R.C.M. 1947, 71-1806; Sec. 53-4-301, MCA 1989; redes. 52-2-501 by Code Commissioner, 1991; Sec. 52-2-501, MCA 1995; redes. 42-10-101 by Sec. 174, Ch. 480, L. 1997.

42-10-102. Purpose. The purpose of this part is to encourage and promote the adoption of children with special needs by providing information and assistance in completing the adoption process and financial assistance when necessary to ensure the health and welfare of the child with special needs.

History: En. 71-1807 by Sec. 2, Ch. 434, L. 1977; R.C.M. 1947, 71-1807; Sec. 53-4-302, MCA 1989; redes. 52-2-502 by Code Commissioner, 1991; Sec. 52-2-502, MCA 1995; redes. 42-10-102 by Sec. 174, Ch. 480, L. 1997; amd. Sec. 1, Ch. 21, L. 1999.

Compiler's Comments

1999 Amendment: Chapter 21 in two places substituted "with special needs" for references to children who are hard to place. Amendment effective October 1, 1999.

42-10-103. Definitions. As used in this part, the following definitions apply:

(1) "Child with special needs" means a child who is a dependent of a public or voluntary licensed child placement agency and meets at least one of the following criteria as a child who is:

(a) diagnosed as having a physical, mental, or emotional disability;

(b) recognized to be at high risk of developing a physical, mental, or emotional disability;

(c) a member of a minority group;

(d) six years of age or older; or

(e) a member of a sibling group to be placed together for adoption.

(2) "Department" means the department of public health and human services provided for in 2-15-2201.

History: En. 71-1808 by Sec. 3, Ch. 434, L. 1977; R.C.M. 1947, 71-1808; amd. Sec. 11, Ch. 609, L. 1987; Sec. 53-4-303, MCA 1989; redes. 52-2-503 by Code Commissioner, 1991; amd. Sec. 344, Ch. 546, L. 1995; Sec. 52-2-503, MCA 1995; redes. 42-10-103 by Sec. 174, Ch. 480, L. 1997; amd. Sec. 2, Ch. 21, L. 1999.

Compiler's Comments

1999 Amendment: Chapter 21 inserted definition of child with special needs and deleted definition of hard-to-place child that read: ""Hard-to-place child" means a minor, as defined by 41-1-101, who is a dependent of a public or voluntary licensed child placing agency, legally free for adoption, and is not likely to be adopted because of:

(a) physical or mental disease or disability;

(b) recognized high risk of physical or mental disease or disability; or

(c) sibling relationship to another child who is eligible for adoption"; and made minor changes in style. Amendment effective October 1, 1999.

42-10-104. Power and duties of department. (1) The department shall establish, administer, and regulate a continuing program of subsidized adoption.

(2) The department shall keep such records as are necessary to evaluate the program in terms of the number of children adopted under the program, the cost of the program, and any other pertinent information.

(3) The department may adopt rules necessary for the proper administration of this part.

History: En. 71-1809 by Sec. 4, Ch. 434, L. 1977; R.C.M. 1947, 71-1809; Sec. 53-4-304, MCA 1989; redes. 52-2-504 by Code Commissioner, 1991; Sec. 52-2-504, MCA 1995; redes. 42-10-104 by Sec. 174, Ch. 480, L. 1997.

Cross-References

Adoption and publication of rules, Title 2, ch. 4, part 3.

42-10-105. Records to be confidential. All records regarding subsidized adoption are confidential and may be disclosed only in accordance with the provisions of 42-6-101.

History: En. 71-1811 by Sec. 6, Ch. 434, L. 1977; R.C.M. 1947, 71-1811(5); Sec. 53-4-306, MCA 1989; redes. 52-2-505 by Code Commissioner, 1991; amd. Sec. 57, Ch. 18, L. 1995; amd. Sec. 170, Ch. 480, L. 1997; Sec. 52-2-505, MCA 1995; redes. 42-10-105 by Sec. 174, Ch. 480, L. 1997.

Cross-References

Right to know, Art. II, sec. 9, Mont. Const.

Right of privacy, Art. II, sec. 10, Mont. Const.

Public records, Title 2, ch. 6.

42-10-106. Certification as child with special needs. (1) Whenever the conditions of 42-10-103 are found to exist and the foster parents seek to adopt the child, the child must be certified as a child with special needs.

(2) In all other cases in which the conditions of 42-10-103 are found to exist and after reasonable efforts have been made and without subsidy no appropriate adoptive family has been found for a child, the department shall certify the child as a child with special needs.

(3) If the child is the dependent of a licensed child-placing agency, that agency shall present to the department evidence of inability to place the child for adoption due to any of the conditions specified in 42-10-103. The agency shall present evidence that reasonable efforts have been made to place the child without subsidy. Upon such a showing, the department shall certify the child as a child with special needs.

History: En. 71-1810 by Sec. 5, Ch. 434, L. 1977; R.C.M. 1947, 71-1810(1) thru (3); Sec. 53-4-307, MCA 1989; redes. 52-2-506 by Code Commissioner, 1991; Sec. 52-2-506, MCA 1995; redes. 42-10-106 by Sec. 174, Ch. 480, L. 1997; amd. Sec. 3, Ch. 21, L. 1999.

Compiler's Comments

1999 Amendment: Chapter 21 throughout section substituted reference to child with special needs for reference to child who is "hard to place"; in first sentence of (3) after "dependent of a" deleted "voluntary" and in second sentence after "subsidy" deleted "such as recruitment of potential parents, use of adoption resource exchanges, and referral to appropriate specialized adoption agencies"; and made minor changes in style. Amendment effective October 1, 1999.

42-10-107. Eligibility for subsidy. Any family that applies for an adoption subsidy, is approved by the department or a licensed child placement agency as a suitable adoptive family, and adopts a child with special needs is eligible for subsidy regardless of the domicile or residence of the family at the time of application for adoption, placement, legal decree of adoption, or thereafter.

History: En. 71-1810 by Sec. 5, Ch. 434, L. 1977; R.C.M. 1947, 71-1810(4); Sec. 53-4-308, MCA 1989; redes. 52-2-507 by Code Commissioner, 1991; Sec. 52-2-507, MCA 1995; redes. 42-10-107 by Sec. 174, Ch. 480, L. 1997; amd. Sec. 4, Ch. 21, L. 1999.

Compiler's Comments

1999 Amendment: Chapter 21 after "department" inserted "or a licensed child placement agency", after "adoptive family" deleted "is or may be financially unable to meet the special needs of a hard-to-place child as determined by the department", and after "adopts a" substituted "child with special needs" for "hard-to-place child"; and made minor changes in style. Amendment effective October 1, 1999.

42-10-108. Subsidy agreement. (1) When parents are approved for adoption of a child certified as a child with special needs and before the final decree of adoption is issued, there must be a written agreement between the family and the department. The terms of the adoption subsidy agreement may commence with the adoption placement or at an appropriate time after the adoption decree.

(2) The subsidy agreement must continue in accordance with its terms until the child reaches majority or, in the case of a child with a mental or physical handicap, until 21 years of age. Termination or modification of the subsidy agreement may be requested by the adoptive parents or the department at any time.

History: En. 71-1811 by Sec. 6, Ch. 434, L. 1977; R.C.M. 1947, 71-1811(1), (3); Sec. 53-4-309, MCA 1989; redes. 52-2-508 by Code Commissioner, 1991; Sec. 52-2-508, MCA 1995; redes. 42-10-108 by Sec. 174, Ch. 480, L. 1997; amd. Sec. 5, Ch. 21, L. 1999.

Compiler's Comments

1999 Amendment: Chapter 21 in (1) substituted "a child with special needs" for "hard to place" and after "between the family" deleted "entering into the subsidized adoption"; in (2) at end of first sentence substituted "in the case of a child with a mental or physical handicap, until 21 years of age" for "for as long as the adopted child is the legal dependent of the adoptive parents and the child's condition continues"; and made minor changes in style. Amendment effective October 1, 1999.

Cross-References

Public contracts, Title 18, ch. 1.

42-10-109. Amount, duration, and scope of subsidy. The amount, duration, and scope of the subsidy may vary with the special needs of the child as well as the availability of other resources to meet these needs. The subsidy may be for services only or for the money payments, but in no case may the amount of the subsidy exceed:

(1) that which would be allowable for maintenance costs such as payments to cover the cost of food, clothing, shelter, daily supervision, school supplies, and a child's personal incidentals, not to exceed the foster care rate established by the department for a child under foster care; or

(2) in the case of a state medical subsidy, the reasonable fee for the services rendered, not to exceed the amount of $2,600 annually.

History: En. 71-1811 by Sec. 6, Ch. 434, L. 1977; R.C.M. 1947, 71-1811(2); Sec. 53-4-310, MCA 1989; redes. 52-2-509 by Code Commissioner, 1991; Sec. 52-2-509, MCA 1995; redes. 42-10-109 by Sec. 174, Ch. 480, L. 1997; amd. Sec. 6, Ch. 21, L. 1999.

Compiler's Comments

1999 Amendment: Chapter 21 in first sentence of introduction after "other resources" deleted "including those of the adoptive parents"; in (1) at beginning deleted "in the case of a sibling relationship" and after "allowable for" inserted language concerning maintenance costs, child's personal incidentals, and maximum foster care rate; in (2) near beginning inserted "state"; and made minor changes in style. Amendment effective October 1, 1999.

42-10-110. Repealed. Sec. 8, Ch. 21, L. 1999.

History: En. 71-1811 by Sec. 6, Ch. 434, L. 1977; R.C.M. 1947, 71-1811(4); Sec. 53-4-311, MCA 1989; redes. 52-2-510 by Code Commissioner, 1991; Sec. 52-2-510, MCA 1995; redes. 42-10-110 by Sec. 174, Ch. 480, L. 1997.

42-10-111 through 42-10-120 reserved.

42-10-121. Definitions. As used in 42-10-121 through 42-10-128, the following definitions apply:

(1) "Adoption assistance agreement" means an agreement for adoption assistance between adoptive parents and the state child welfare agency of the state that undertakes to provide the adoption assistance, including a subsidy agreement as provided in 42-10-108.

(2) "Adoption assistance state" means the signatory state to an adoption assistance agreement in a particular case.

(3) "Residence state" means the state of which the child is a resident by virtue of the residence of the adoptive parents.

(4) "State" means a state of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, the Commonwealth of the Northern Mariana Islands, or a territory or possession of or administered by the United States.

History: En. Sec. 2, Ch. 274, L. 1991; Sec. 52-2-521, MCA 1995; redes. 42-10-121 by Sec. 174, Ch. 480, L. 1997.

Cross-References

Rules for determining residency, 1-1-215.

42-10-122. Authorization. The department of public health and human services is authorized to develop, participate in the development of, negotiate, and enter into one or more interstate compacts on behalf of this state with other states for:

(1) the protection of children on behalf of whom adoption assistance is being provided; and

(2) the provision of procedures for interstate children's adoption assistance payments, including medical payments.

History: En. Sec. 1, Ch. 274, L. 1991; amd. Sec. 345, Ch. 546, L. 1995; Sec. 52-2-522, MCA 1995; redes. 42-10-122 by Sec. 174, Ch. 480, L. 1997.

Cross-References

Interstate Compact on the Placement of Children, Title 41, ch. 4.

42-10-123. Federal participation. Consistent with federal law, the department of public health and human services, in connection with the administration of services provided and compacts entered into under authority of 42-10-121 through 42-10-128, shall apply for and administer all federal aid for adoption assistance and medical assistance costs in any state plan made pursuant to the Adoption Assistance and Child Welfare Act of 1980 (Public Law 96-272), Titles IV (e) and XIX of the Social Security Act, or any other applicable federal laws.

History: En. Sec. 3, Ch. 274, L. 1991; amd. Sec. 346, Ch. 546, L. 1995; amd. Sec. 230, Ch. 42, L. 1997; Sec. 52-2-523, MCA 1995; redes. 42-10-123 by Sec. 174, Ch. 480, L. 1997.

42-10-124. Effect of compacts. A compact entered into under 42-10-121 through 42-10-128 has the force and effect of law.

History: En. Sec. 4, Ch. 274, L. 1991; Sec. 52-2-524, MCA 1995; redes. 42-10-124 by Sec. 174, Ch. 480, L. 1997.

42-10-125. Compacts — required contents. A compact under 42-10-121 through 42-10-128 must contain:

(1) a provision making it available for joinder by all states;

(2) a provision or provisions for withdrawal from the compact upon written notice to the parties, but with a period of 1 year between the date of the notice and the effective date of the withdrawal;

(3) a provision requiring that the protections afforded by or pursuant to the compact continue in force for the duration of the adoption assistance and be applicable to all children and their adoptive parents who on the effective date of the withdrawal are receiving adoption assistance from a party state other than the one in which they are resident and have their principal place of abode;

(4) a provision requiring that each:

(a) instance of adoption assistance to which the compact applies be covered by an adoption assistance agreement in writing between the adoptive parents and the state child welfare agency of the state that undertakes to provide the adoption assistance; and

(b) agreement be expressly for the benefit of the adopted child and enforceable by the adoptive parents and the state agency providing the adoption assistance; and

(5) other provisions as may be appropriate to implement the proper administration of the compact.

History: En. Sec. 5, Ch. 274, L. 1991; Sec. 52-2-525, MCA 1995; redes. 42-10-125 by Sec. 174, Ch. 480, L. 1997.

42-10-126. Compacts — optional contents. A compact under 42-10-121 through 42-10-128 may contain:

(1) provisions establishing procedures and entitlement to medical, developmental, or other social services for the adopted child in accordance with applicable laws, even though the child and the adoptive parents are in a state other than the one responsible for or providing the services or the funds to defray part or all of the costs of the services; and

(2) other provisions as may be appropriate or incidental to the proper administration of the compact.

History: En. Sec. 6, Ch. 274, L. 1991; Sec. 52-2-526, MCA 1995; redes. 42-10-126 by Sec. 174, Ch. 480, L. 1997.

Cross-References

Health care services, Title 53, ch. 6.

42-10-127. Medical benefits — rules. (1) The provisions of this section apply only when the compact entered by this state and the other state under 42-10-121 through 42-10-128 provides that the adoption assistance state, whether it be this state or the other state, shall continue medical assistance to children in accordance with the adoption assistance agreements made by the adoption assistance state after the children have changed their residence to this state or to the other state. All other children entitled to medical assistance in this state are eligible to receive it in accordance with the applicable laws and procedures.

(2) A child with special needs residing in this state who is the subject of an adoption assistance agreement with another state is entitled to receive medical assistance identification from this state upon the filing in the office of the department of public health and human services located in the county of the child's residence a copy of the adoption assistance agreement. Medical assistance identification gained pursuant to this section entitles the holder to

processing and payment on claims of the holder in the same manner and pursuant to the same conditions and procedures as other recipients of medical assistance.

(3) The department of public health and human services shall provide coverage and benefits for a child who is in another state who is covered by an adoption assistance agreement entered into in this state for coverage or benefits, if any, provided for under the adoption assistance agreement made in this state but not provided by the residence state. The adoptive parents acting for the child may submit evidence of payment for services or benefit amounts not payable in the residence state and must be reimbursed for the services. However, there may not be reimbursement for services or benefit amounts covered under any insurance or other third-party medical contract or arrangement held by the child or the adoptive parents. The department of public health and human services shall adopt rules implementing this subsection. The additional coverage and benefit amounts provided by this subsection are for services for which there is no federal contribution or for which, if federally aided, contributions are not provided by the residence state. Rules adopted pursuant to this subsection must include procedures to be followed for obtaining prior approval for services covered by this subsection when prior approval is required.

History: En. Sec. 7, Ch. 274, L. 1991; amd. Sec. 347, Ch. 546, L. 1995; Sec. 52-2-527, MCA 1995; redes. 42-10-127 by Sec. 174, Ch. 480, L. 1997.

Cross-References

Health care services, Title 53, ch. 6.

42-10-128. Fraudulent obtaining of public assistance. The provisions of 53-2-107 on fraudulently obtaining public assistance apply to coverage and benefits that may be obtained under 42-10-121 through 42-10-128.

History: En. Sec. 8, Ch. 274, L. 1991; Sec. 52-2-528, MCA 1995; redes. 42-10-128 by Sec. 174, Ch. 480, L. 1997.

Cross-References

Theft, 45-6-301.

TITLE 43

RESERVED

TITLE 44

LAW ENFORCEMENT

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2. Investigation, Communication, and Identification.
3. Montana Forensic Science System Act.
4. Miscellaneous Functions of Department of Justice.
5. Criminal Justice Information.
6. DNA Records.
Chapters 7 through 9 reserved.
10. Law Enforcement Academy.
11. Mutual Assistance — Rights of Assisting Officers.
12. Seizures Related to Controlled Substances.
13. Special Law Enforcement Assistance Funding.

CHAPTER 1

HIGHWAY PATROL

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Chapter Cross-References

Code of ethics, Title 2, ch. 2, part 1.

Local government law enforcement, Title 7, ch. 32.

Definition of peace officer, 45-2-101.

Obstructing peace officer, 45-7-302.

Highway safety, Title 61, ch. 2.

Part 1
General Provisions

Part Cross-References

Department of Justice to administer mandatory motor vehicle insurance laws and make rules, 61-6-105.

44-1-101. Creation of highway patrol. There is hereby created a "Montana highway patrol" under the control and supervision of the department of justice.

History: En. Sec. 1, Ch. 199, L. 1943; R.C.M. 1947, 31-101; amd. Sec. 1, Ch. 503, L. 1985.

44-1-102. General duties of department of justice. The department of justice shall provide for clerical help, for the maintenance of the patrol, and for the employment and supervision of the patrol in conformity with the provisions of this chapter.

History: En. Sec. 3, Ch. 199, L. 1943; amd. Sec. 1, Ch. 55, L. 1945; amd. Sec. 1, Ch. 245, L. 1971; R.C.M. 1947, 31-103(part); amd. Sec. 1, Ch. 503, L. 1985.

Cross-References

Department of Justice to administer mandatory motor vehicle insurance laws and make rules, 61-6-105.

44-1-103. Authority to make rules. The department of justice may make, promulgate, and amend rules which prescribe procedures and practice requirements of the Montana highway patrol.

History: En. Sec. 3, Ch. 199, L. 1943; amd. Sec. 1, Ch. 55, L. 1945; amd. Sec. 1, Ch. 245, L. 1971; R.C.M. 1947, 31-103(part); amd. Sec. 1, Ch. 503, L. 1985.

Cross-References

Department of Justice to administer mandatory motor vehicle insurance laws and make rules, 61-6-105.

44-1-104. Duty to furnish governor with transportation. The department of justice shall furnish the governor with automobile transportation upon his request, provided that such transportation shall be limited to travel and transportation of the governor while on official business of the state.

History: En. Sec. 3, Ch. 199, L. 1943; amd. Sec. 1, Ch. 55, L. 1945; amd. Sec. 1, Ch. 245, L. 1971; R.C.M. 1947, 31-103(part); amd. Sec. 1, Ch. 503, L. 1985.

44-1-105. Department of justice to furnish equipment. The department of justice shall furnish patrol officers with automobiles equipped and fitted with a distinctive siren and a particularly designated light for use at night. The department shall furnish all patrol officers with uniforms and equipment necessary for the performance of their respective duties, with the approval of the captain of their respective districts. Any such equipment and uniforms shall remain the property of the state of Montana.

History: En. Sec. 6, Ch. 199, L. 1943; amd. Sec. 1, Ch. 31, L. 1955; R.C.M. 1947, 31-106(part); amd. Sec. 1, Ch. 503, L. 1985; amd. Sec. 1, Ch. 217, L. 1989.

Cross-References

State employee motor pool provisions — applicability, 2-17-411.

44-1-106. Authority of department of justice to dispose of equipment. The department of justice shall have authority to destroy, sell, or dispose of any and all obsolete equipment, uniforms, or parts of obsolete equipment or uniforms. Any money received from the sale of these items must be deposited into the state treasury in the fund and to the credit of the accounting entity from which it was originally purchased.

History: En. Sec. 6, Ch. 199, L. 1943; amd. Sec. 1, Ch. 31, L. 1955; R.C.M. 1947, 31-106(part); amd. Sec. 1, Ch. 503, L. 1985; amd. Sec. 1, Ch. 529, L. 1991.

Cross-References

Disposal of surplus property, 18-4-221 through 18-4-224, 18-4-226; Title 18, ch. 6.

Part 2
Highway Patrol Chief

Part Cross-References

Chief of patrol defined, 61-1-302.

44-1-201. Appointment and tenure. The attorney general shall select a highway patrol chief who shall have the rank of colonel and shall hold his office until his appointment has terminated for cause, as hereinafter set forth.

History: En. Sec. 4, Ch. 199, L. 1943; amd. Sec. 1, Ch. 102, L. 1957; amd. Sec. 1, Ch. 173, L. 1967; amd. Sec. 15, Ch. 439, L. 1975; amd. Sec. 3, Ch. 343, L. 1977; R.C.M. 1947, 31-104(part).

Cross-References

State Commissioner on Vehicle Equipment Safety Commission, 61-2-204.

44-1-202. Qualifications. The person named as chief shall have been a continuous resident of Montana for at least 5 years.

History: En. Sec. 4, Ch. 199, L. 1943; amd. Sec. 1, Ch. 102, L. 1957; amd. Sec. 1, Ch. 173, L. 1967; amd. Sec. 15, Ch. 439, L. 1975; amd. Sec. 3, Ch. 343, L. 1977; R.C.M. 1947, 31-104(part).

44-1-203. Salary and expenses. The chief shall receive a salary fixed by the attorney general within the limits of the legislative appropriation for such purpose and travel expenses, as provided for in 2-18-501 through 2-18-503.

History: En. Sec. 4, Ch. 199, L. 1943; amd. Sec. 1, Ch. 102, L. 1957; amd. Sec. 1, Ch. 173, L. 1967; amd. Sec. 15, Ch. 439, L. 1975; amd. Sec. 3, Ch. 343, L. 1977; R.C.M. 1947, 31-104(part).

Part 3
Powers and Duties of Chief Relating to Patrol Officers

44-1-301. General supervisory powers. The chief shall have direct control and supervision of all patrol officers, subject to the approval of the attorney general.

History: En. Sec. 4, Ch. 199, L. 1943; amd. Sec. 1, Ch. 102, L. 1957; amd. Sec. 1, Ch. 173, L. 1967; amd. Sec. 15, Ch. 439, L. 1975; amd. Sec. 3, Ch. 343, L. 1977; R.C.M. 1947, 31-104(part); amd. Sec. 1, Ch. 146, L. 1979; amd. Sec. 1, Ch. 217, L. 1989.

44-1-302. Powers relating to supervisory personnel. The duties and jurisdiction of the supervisory personnel shall be outlined and defined by and under the control of the chief.

History: En. Sec. 5, Ch. 199, L. 1943; amd. Sec. 1, Ch. 187, L. 1951; amd. Sec. 1, Ch. 219, L. 1953; amd. Sec. 1, Ch. 268, L. 1955; amd. Sec. 1, Ch. 225, L. 1957; amd. Sec. 1, Ch. 109, L. 1959; amd. Sec. 1, Ch. 55, L. 1967; amd. Sec. 5, Ch. 188, L. 1975; amd. Sec. 1, Ch. 483, L. 1975; amd. Sec. 4, Ch. 343, L. 1977; R.C.M. 1947, 31-105(part); amd. Sec. 2, Ch. 146, L. 1979.

44-1-303. Duties. The chief, with the approval of the attorney general and within the limits of any appropriation made available for such purposes, shall:

(1) designate the authority and responsibility in each rank, grade, and position;

(2) formulate standards, policies, and qualifications in the selection of recruit patrol officers;

(3) prescribe the official uniform of the Montana highway patrol;

(4) station employees in such localities as he shall deem advisable for the enforcement of the traffic laws of this state;

(5) charge against each employee the value of property of the state lost or destroyed through the carelessness or neglect of such employee;

(6) discharge, demote, or temporarily suspend after hearing, as provided in parts 7 and 8 of this chapter, any patrol officer of the department;

(7) have purchased or otherwise acquired by the purchasing department of the state motor equipment and all other equipment and commodities deemed by him essential to the efficient operation of the Montana highway patrol.

History: En. Sec. 4, Ch. 199, L. 1943; amd. Sec. 1, Ch. 102, L. 1957; amd. Sec. 1, Ch. 173, L. 1967; amd. Sec. 15, Ch. 439, L. 1975; amd. Sec. 3, Ch. 343, L. 1977; R.C.M. 1947, 31-104(part); amd. Sec. 3, Ch. 146, L. 1979; amd. Sec. 1, Ch. 217, L. 1989.

Cross-References

State property purchases, Title 18, ch. 1, 4, 5.

Authority of Department of Justice to suspend, demote, or reprimand, 44-1-701.

Chief as Commissioner on Vehicle Equipment Safety Commission, 61-2-204.

Part 4

Appointment of Patrol Officers

44-1-401. Qualifications of patrol officers. Patrol officers shall possess the following qualifications:

(1) sound and active physical and mental condition;

(2) good moral character;

(3) residency in Montana;

(4) having passed a satisfactory test in the operation of automobiles; and

(5) citizenship in the United States.

History: En. Sec. 5, Ch. 199, L. 1943; amd. Sec. 1, Ch. 187, L. 1951; amd. Sec. 1, Ch. 219, L. 1953; amd. Sec. 1, Ch. 268, L. 1955; amd. Sec. 1, Ch. 225, L. 1957; amd. Sec. 1, Ch. 109, L. 1959; amd. Sec. 1, Ch. 55, L. 1967; amd. Sec. 5, Ch. 188, L. 1975; amd. Sec. 1, Ch. 483, L. 1975; amd. Sec. 4, Ch. 343, L. 1977; R.C.M. 1947, 31-105(3); amd. Sec. 1, Ch. 217, L. 1989; amd. Sec. 1, Ch. 414, L. 1991.

Cross-References

Definition of highway patrol officer, 61-1-305.

44-1-402. Appointment of supervisory personnel. Supervisory personnel shall be selected from the patrol officers by the chief. The chief shall designate supervisory personnel, including but not limited to captains, lieutenants, sergeants, and patrol officers, in such numbers as necessary but within the limits of the legislative appropriation made available for such purposes.

History: En. Sec. 5, Ch. 199, L. 1943; amd. Sec. 1, Ch. 187, L. 1951; amd. Sec. 1, Ch. 219, L. 1953; amd. Sec. 1, Ch. 268, L. 1955; amd. Sec. 1, Ch. 225, L. 1957; amd. Sec. 1, Ch. 109, L. 1959; amd. Sec. 1, Ch. 55, L. 1967; amd. Sec. 5, Ch. 188, L. 1975; amd. Sec. 1, Ch. 483, L. 1975; amd. Sec. 4, Ch. 343, L. 1977; R.C.M. 1947, 31-105(part); amd. Sec. 4, Ch. 146, L. 1979; amd. Sec. 1, Ch. 217, L. 1989.

44-1-403. Repealed. Sec. 2, Ch. 414, L. 1991.

History: En. Sec. 5, Ch. 199, L. 1943; amd. Sec. 1, Ch. 187, L. 1951; amd. Sec. 1, Ch. 219, L. 1953; amd. Sec. 1, Ch. 268, L. 1955; amd. Sec. 1, Ch. 225, L. 1957; amd. Sec. 1, Ch. 109, L. 1959; amd. Sec. 1, Ch. 55, L. 1967; amd. Sec. 5, Ch. 188, L. 1975; amd. Sec. 1, Ch. 483, L. 1975; amd. Sec. 4, Ch. 343, L. 1977; R.C.M. 1947, 31-105(1)(b); amd. Sec. 1, Ch. 503, L. 1985; amd. Sec. 102, Ch. 370, L. 1987.

44-1-404. Status of replacements for patrol officers who enter the armed forces. Patrol officers filling vacancies caused by the incumbents' entrance into the armed forces of the United States shall, on the return of the incumbents, be placed in the patrol reserve without pay, except that they shall hold their probationary or permanent appointments while there are sufficient operating funds. Reserve patrol officers shall be used for future replacements in the permanent patrol.

History: En. Sec. 5, Ch. 199, L. 1943; amd. Sec. 1, Ch. 187, L. 1951; amd. Sec. 1, Ch. 219, L. 1953; amd. Sec. 1, Ch. 268, L. 1955; amd. Sec. 1, Ch. 225, L. 1957; amd. Sec. 1, Ch. 109, L. 1959; amd. Sec. 1, Ch. 55, L. 1967; amd. Sec. 5, Ch. 188, L. 1975; amd. Sec. 1, Ch. 483, L. 1975; amd. Sec. 4, Ch. 343, L. 1977; R.C.M. 1947, 31-105(1)(c); amd. Sec. 1, Ch. 7, L. 1979; amd. Sec. 1, Ch. 217, L. 1989.

Cross-References

Leave of absence of public employee attending military training, 10-1-604.

Reemployment of public employee upon completion of military service, 10-2-221.

Part 5
Salaries and Expenses

Part Cross-References

Highway patrol officers' retirement system, Title 19, ch. 6.

44-1-501. Payment of expenses. All expenses of the highway patrol shall be paid out of the transportation department's account in the state special revenue fund.

History: En. Sec. 1, Ch. 285, L. 1971; R.C.M. 1947, 31-105.1; amd. Sec. 2, Ch. 7, L. 1979; amd. Sec. 1, Ch. 277, L. 1983; amd. Sec. 4, Ch. 20, Sp. L. June 1986; amd. Sec. 3, Ch. 512, L. 1991.

Cross-References

Distribution of state highway funds, Title 60, ch. 3, part 2.

44-1-502. Repealed. Sec. 2, Ch. 363, L. 1987.

History: En. 31-105.2 by Sec. 1, Ch. 221, L. 1977; R.C.M. 1947, 31-105.2.

44-1-503. Salary upon permanent appointment. In the event that a probationary patrol officer is appointed permanently, he shall, at the time of such appointment, receive the base salary of a patrol officer.

History: En. Sec. 5, Ch. 199, L. 1943; amd. Sec. 1, Ch. 187, L. 1951; amd. Sec. 1, Ch. 219, L. 1953; amd. Sec. 1, Ch. 268, L. 1955; amd. Sec. 1, Ch. 225, L. 1957; amd. Sec. 1, Ch.

109, L. 1959; amd. Sec. 1, Ch. 55, L. 1967; amd. Sec. 5, Ch. 188, L. 1975; amd. Sec. 1, Ch. 483, L. 1975; amd. Sec. 4, Ch. 343, L. 1977; R.C.M. 1947, 31-105(2); amd. Sec. 1, Ch. 217, L. 1989.

Cross-References

Probationary status and tenure, Title 44, ch. 1, part 6.

44-1-504 through 44-1-510 reserved.

44-1-511. Payment of salary benefit to officers injured in performance of duty. (1) A member of the highway patrol who, in the performance of his duties, suffers an injury which necessitates medical or other remedial treatment and which renders him unable to perform his duties shall be paid the full amount of his regular salary as a salary benefit until one of the following occurs:

(a) He ceases to be disabled.

(b) A period of 1 year elapses after the date of the injury.

(c) Although disabled, he is ordered returned to light duty by the chief of the highway patrol.

(d) Although disabled, he accepts a transfer position within the department of justice.

(e) He waives his benefit.

(2) The department of justice shall set off the amount of any workers' compensation award actually received against the salary benefit payable under this section.

History: **En Sec. 1, Ch. 317, L. 1979.**

Cross-References

Workers' compensation, Title 39, ch. 71.

Reimbursement for costs of law enforcement assistance, 44-11-202.

Crime victims' reparations, Title 53, ch. 9, part 1.

44-1-512. Determination of eligibility for salary benefit. (1) The highway patrol chief shall determine whether an injury incurred by an officer was incurred in the performance of his duties and whether an injury so incurred resulted in a disability.

(2) In determining the nature and extent of an officer's injuries and the extent of any recovery, the chief shall seek and consider the medical opinion of a qualified physician who has examined the injured officer. The chief may seek a second medical opinion in his discretion.

History: **En Sec. 2, Ch. 317, L. 1979.**

44-1-513. Periodic medical examinations — waiver of right to salary benefit. (1) The chief may appoint a physician to examine the officer from time to time. If, in the physician's opinion, the injured officer has sufficiently recovered to perform light duties or his regular duties, the physician shall certify that fact.

(2) An injured officer who unreasonably refuses to accept medical treatment or hospital care or to permit a medical examination under subsection (1) or 44-1-512(2) waives any salary benefit to which he might otherwise be entitled under 44-1-511.

History: **En Sec. 3, Ch. 317, L. 1979.**

44-1-514. Discontinuation of salary benefit when retirement allowance granted. Payment of a salary benefit under 44-1-511 shall be discontinued if the injured officer is disabled for an indefinite period and is granted a disability retirement allowance under Title 19, chapter 6. If an officer is indefinitely disabled and does not apply for a disability retirement allowance, application therefor may be made by the chief.

History: **En Sec. 4, Ch. 317, L. 1979.**

44-1-515. Assignment to light duty or another position within department of justice. (1) The chief, taking into consideration the medical opinions he has received, may determine at any time that an injured officer is able to perform light police duty consistent with his status as a law enforcement officer and may order the officer assigned to such light duty. If the officer refuses to perform the light duty, payment of the salary benefit under 44-1-511 shall be discontinued.

(2) The chief may order an injured officer transferred from the highway patrol to another position within the department of justice. An officer may decline to accept a transfer under this subsection with no loss of salary benefit.

History: **En Sec. 5, Ch. 317, L. 1979.**

44-1-516. Effect on probationary status. If the injured officer is on probationary status at the time he becomes injured, the balance of his probationary time shall be suspended until he returns to regular duty or is discharged for cause.

History: **En Sec. 6, Ch. 317, L. 1979.**

Cross-References

Probationary status and tenure, Title 44, ch. 1, part 6.

44-1-517. Subrogation. The state has a cause of action for reimbursement of sums it has paid to an officer as a salary benefit and for medical treatment and examinations against any third party against whom the officer has a cause of action for the injury which necessitated the payments by the state.

History: **En Sec. 7, Ch. 317, L. 1979.**

Cross-References

Recovery against governmental entity, 2-9-305.

44-1-518. Contribution for retirement — length of service credit — transfer of retirement contributions and length of service credit. (1) When an officer receives compensation under 44-1-511, the officer's contribution for retirement under 19-6-402 must be paid on the compensation received under 44-1-511 and the state's contribution for retirement under 19-6-404 must be paid on the compensation received under 44-1-511.

(2) The time for which contributions are paid under 44-1-511 shall be credited to the length of service computed for retirement purposes under 19-2-701.

(3) When a disabled officer who qualifies for benefits under 44-1-511 accepts a transfer under 44-1-515 to a nonhighway patrol position within the department of justice that is covered under the Public Employees' Retirement System Act, all of the officer's length of service credited with the Montana patrol officers' retirement system must be transferred to the public employees' retirement system in the officer's credit and the officer's accumulated

contributions and the state's adjusted contributions, with accrued interest, credited to the officer in the Montana highway patrol officers' retirement account must be transferred to the public employees' retirement account in the officer's credit. The state's "adjusted contributions" means an amount equal to the amount that would have been contributed by the state had the transferred service been employment covered under the public employees' retirement system.

History: **En Sec. 8, Ch. 317, L. 1979; amd. Sec. 1, Ch. 217, L. 1989; amd. Sec. 235, Ch. 265, L. 1993.**

Cross-References

Public employees' retirement system, Title 19, ch. 3.

Part 6
Probationary Status and Tenure

Part Cross-References

Duties of Chief of Highway Patrol Bureau, 44-1-303.

44-1-601. Probationary training and service — patrol officers. A new patrol officer shall be placed under probationary training and service for a period of 6 months to 1 year. If the chief fails to recommend a permanent appointment by the end of the probationary period, the probationary patrol officer will automatically be discharged.

History: **En. Sec. 5, Ch. 199, L. 1943; amd. Sec. 1, Ch. 187, L. 1951; amd. Sec. 1, Ch. 219, L. 1953; amd. Sec. 1, Ch. 268, L. 1955; amd. Sec. 1, Ch. 225, L. 1957; amd. Sec. 1, Ch. 109, L. 1959; amd. Sec. 1, Ch. 55, L. 1967; amd. Sec. 5, Ch. 188, L. 1975; amd. Sec. 1, Ch. 483, L. 1975; amd. Sec. 4, Ch. 343, L. 1977; R.C.M. 1947, 31-105(4)(a); amd. Sec. 3, Ch. 7, L. 1979; amd. Sec. 5, Ch. 146, L. 1979; amd. Sec. 1, Ch. 217, L. 1989.**

44-1-602. Probationary training and service — supervisory personnel. All newly appointed supervisory personnel shall be placed under probationary training and service for a period of 6 months to 1 year. If the chief fails to recommend a permanent appointment by the end of the probationary period, the probationary supervisory personnel will automatically revert to their previous ranks without prejudice.

History: **En. Sec. 5, Ch. 199, L. 1943; amd. Sec. 1, Ch. 187, L. 1951; amd. Sec. 1, Ch. 219, L. 1953; amd. Sec. 1, Ch. 268, L. 1955; amd. Sec. 1, Ch. 225, L. 1957; amd. Sec. 1, Ch. 109, L. 1959; amd. Sec. 1, Ch. 55, L. 1967; amd. Sec. 5, Ch. 188, L. 1975; amd. Sec. 1, Ch. 483, L. 1975; amd. Sec. 4, Ch. 343, L. 1977; R.C.M. 1947, 31-105(4)(b); amd. Sec. 4, Ch. 7, L. 1979; amd. Sec. 6, Ch. 146, L. 1979.**

44-1-603 through 44-1-610 reserved.

44-1-611. Tenure. Every person employed or appointed and designated as a chief, captain, lieutenant, sergeant, patrol officer, or any other rank under and pursuant to the provisions of this chapter, except as provided in 44-1-601 and 44-1-602, shall continue in service and hold his position without demotion until suspended, demoted, or discharged in the manner hereinafter provided for one or more of the causes specified in 44-1-612.

History: **En. Sec. 5, Ch. 199, L. 1943; amd. Sec. 1, Ch. 187, L. 1951; amd. Sec. 1, Ch. 219, L. 1953; amd. Sec. 1, Ch. 268, L. 1955; amd. Sec. 1, Ch. 225, L. 1957; amd. Sec. 1, Ch. 109, L. 1959; amd. Sec. 1, Ch. 55, L. 1967; amd. Sec. 5, Ch. 188, L. 1975; amd. Sec. 1, Ch.**

483, L. 1975; amd. Sec. 4, Ch. 343, L. 1977; R.C.M. 1947, 31-105(5); amd. Sec. 1, Ch. 217, L. 1989.

Cross-References

Duties of Department of Justice, 44-1-102.

44-1-612. Cause for suspension, demotion, or discharge. Cause for suspension, demotion, or discharge is:

(1) conviction of any crime involving moral turpitude in any court of competent jurisdiction subsequent to the commencement of such employment;

(2) gross neglect of duty or willful violation or disobedience of orders or regulations;

(3) loitering about or entering places of ill fame or ill repute or in which illegal gambling is known to be conducted or to be in progress, except in the immediate discharge of duty;

(4) conduct unbecoming an officer;

(5) drinking intoxicating liquor while using state-owned cars or in uniform or being intoxicated in a public place;

(6) sleeping while on duty;

(7) incapacity or partial incapacity materially affecting ability to perform official duties;

(8) gross inefficiency in performing duties; or

(9) willful disobedience of rules adopted by the department of justice governing the conduct and discipline of members of the patrol.

History: En. Sec. 5, Ch. 199, L. 1943; amd. Sec. 1, Ch. 187, L. 1951; amd. Sec. 1, Ch. 219, L. 1953; amd. Sec. 1, Ch. 268, L. 1955; amd. Sec. 1, Ch. 225, L. 1957; amd. Sec. 1, Ch. 109, L. 1959; amd. Sec. 1, Ch. 55, L. 1967; amd. Sec. 5, Ch. 188, L. 1975; amd. Sec. 1, Ch. 483, L. 1975; amd. Sec. 4, Ch. 343, L. 1977; R.C.M. 1947, 31-105(6); amd. Sec. 5, Ch. 7, L. 1979; amd. Sec. 1, Ch. 503, L. 1985.

Cross-References

Code of ethics, Title 2, ch. 2, part 1.

Part 7

Disciplinary Action — Preliminary Procedure

Part Cross-References

Code of ethics, Title 2, ch. 2, part 1.

Duties of Department of Justice, 44-1-102.

Cause for suspension, demotion, or discharge, 44-1-612.

Withholding officer's salary for failure to provide information, 44-2-205.

44-1-701. Authority of department of justice to suspend or demote. When the department of justice has cause to believe that any member of the highway patrol has violated any of the grounds for suspension, demotion, or discharge, it may impose a suspension without pay for up to 10 days without filing charges and conducting a hearing under part 8.

History: En. Sec. 5, Ch. 199, L. 1943; amd. Sec. 1, Ch. 187, L. 1951; amd. Sec. 1, Ch. 219, L. 1953; amd. Sec. 1, Ch. 268, L. 1955; amd. Sec. 1, Ch. 225, L. 1957; amd. Sec. 1, Ch. 109, L. 1959; amd. Sec. 1, Ch. 55, L. 1967; amd. Sec. 5, Ch. 188, L. 1975; amd. Sec. 1, Ch. 483, L. 1975; amd. Sec. 4, Ch. 343, L. 1977; R.C.M. 1947, 31-105(8)(a); amd. Sec. 1, Ch. 503, L. 1985; amd. Sec. 2, Ch. 713, L. 1991.

Cross-References

Duties of Chief of Highway Patrol generally, 44-1-303.

44-1-702. Preferring charges. (1) The charge or charges against any member of the highway patrol shall be made in writing and signed and sworn to by the person making the charge or charges.

(2) The written charge or charges shall be filed with the department of justice.

History: En. Sec. 5, Ch. 199, L. 1943; amd. Sec. 1, Ch. 187, L. 1951; amd. Sec. 1, Ch. 219, L. 1953; amd. Sec. 1, Ch. 268, L. 1955; amd. Sec. 1, Ch. 225, L. 1957; amd. Sec. 1, Ch. 109, L. 1959; amd. Sec. 1, Ch. 55, L. 1967; amd. Sec. 5, Ch. 188, L. 1975; amd. Sec. 1, Ch. 483, L. 1975; amd. Sec. 4, Ch. 343, L. 1977; R.C.M. 1947, 31-105(7)(a) thru (c); amd. Sec. 1, Ch. 503, L. 1985.

44-1-703. When charges dismissed. When charges are filed and the department of justice believes such charge or charges do not constitute grounds for suspension, demotion, or discharge, it shall dismiss such charges.

History: En. Sec. 5, Ch. 199, L. 1943; amd. Sec. 1, Ch. 187, L. 1951; amd. Sec. 1, Ch. 219, L. 1953; amd. Sec. 1, Ch. 268, L. 1955; amd. Sec. 1, Ch. 225, L. 1957; amd. Sec. 1, Ch. 109, L. 1959; amd. Sec. 1, Ch. 55, L. 1967; amd. Sec. 5, Ch. 188, L. 1975; amd. Sec. 1, Ch. 483, L. 1975; amd. Sec. 4, Ch. 343, L. 1977; R.C.M. 1947, 31-105(7)(e); amd. Sec. 1, Ch. 503, L. 1985.

44-1-704. When department of justice to order hearing. When charges are filed and the department of justice believes that such charge or charges constitute grounds for suspension, demotion, or discharge, it shall order a hearing to be had thereon before it and fix a time for such hearing.

History: En. Sec. 5, Ch. 199, L. 1943; amd. Sec. 1, Ch. 187, L. 1951; amd. Sec. 1, Ch. 219, L. 1953; amd. Sec. 1, Ch. 268, L. 1955; amd. Sec. 1, Ch. 225, L. 1957; amd. Sec. 1, Ch. 109, L. 1959; amd. Sec. 1, Ch. 55, L. 1967; amd. Sec. 5, Ch. 188, L. 1975; amd. Sec. 1, Ch. 483, L. 1975; amd. Sec. 4, Ch. 343, L. 1977; R.C.M. 1947, 31-105(7)(d); amd. Sec. 1, Ch. 503, L. 1985.

44-1-705. Suspension pending hearing and decision. If the department of justice orders a hearing, the chief may suspend such patrol officer pending the rendition of the decision made in such case.

History: En. Sec. 5, Ch. 199, L. 1943; amd. Sec. 1, Ch. 187, L. 1951; amd. Sec. 1, Ch. 219, L. 1953; amd. Sec. 1, Ch. 268, L. 1955; amd. Sec. 1, Ch. 225, L. 1957; amd. Sec. 1, Ch. 109, L. 1959; amd. Sec. 1, Ch. 55, L. 1967; amd. Sec. 5, Ch. 188, L. 1975; amd. Sec. 1, Ch. 483, L. 1975; amd. Sec. 4, Ch. 343, L. 1977; R.C.M. 1947, 31-105(8)(b); amd. Sec. 7, Ch. 146, L. 1979; amd. Sec. 1, Ch. 503, L. 1985; amd. Sec. 1, Ch. 217, L. 1989.

Part 8

Disciplinary Action Hearing and Decision

Part Cross-References

Duties of Department of Justice, 44-1-102.

Cause for suspension, demotion, or discharge, 44-1-612.

44-1-801. Notice of hearing. (1) The department of justice shall, at least 10 days before the time appointed for a hearing, serve written notice on the accused patrol officer, specifying the charge or charges filed and stating the name of the person or persons making the charge or charges.

(2) If the accused patrol officer is located within the state and his whereabouts is known, the service required by subsection (1) shall be made personally. If the accused patrol officer is located outside the state and his whereabouts is known, service may be made by mailing the written notice to

his place of residence. If, at the time, the whereabouts of the accused patrol officer is unknown, service may be made upon him by mailing the written notice to him at his last-known place of residence in Montana.

History: En. Sec. 5, Ch. 199, L. 1943; amd. Sec. 1, Ch. 187, L. 1951; amd. Sec. 1, Ch. 219, L. 1953; amd. Sec. 1, Ch. 268, L. 1955; amd. Sec. 1, Ch. 225, L. 1957; amd. Sec. 1, Ch. 109, L. 1959; amd. Sec. 1, Ch. 55, L. 1967; amd. Sec. 5, Ch. 188, L. 1975; amd. Sec. 1, Ch. 483, L. 1975; amd. Sec. 4, Ch. 343, L. 1977; R.C.M. 1947, 31-105(10); amd. Sec. 6, Ch. 7, L. 1979; amd. Sec. 1, Ch. 503, L. 1985; amd. Sec. 1, Ch. 217, L. 1989.

44-1-802. Authority of department of justice — conduct of hearing. (1) The department of justice shall be the authority to hear such charge or charges and render a decision and appropriate order.

(2) The department shall have the power to compel the attendance of witnesses at any such hearing and to examine them under oath and to require the production of books, papers, and other evidence at such hearing and, for those purposes, to issue subpoenas and cause the same to be served and executed in any part of the state.

History: En. Sec. 5, Ch. 199, L. 1943; amd. Sec. 1, Ch. 187, L. 1951; amd. Sec. 1, Ch. 219, L. 1953; amd. Sec. 1, Ch. 268, L. 1955; amd. Sec. 1, Ch. 225, L. 1957; amd. Sec. 1, Ch. 109, L. 1959; amd. Sec. 1, Ch. 55, L. 1967; amd. Sec. 5, Ch. 188, L. 1975; amd. Sec. 1, Ch. 483, L. 1975; amd. Sec. 4, Ch. 343, L. 1977; R.C.M. 1947, 31-105(11)(a), (11)(b); amd. Sec. 1, Ch. 503, L. 1985.

44-1-803. Rights of accused. The accused patrol officer shall be entitled to be confronted with the witnesses against him and have an opportunity to cross-examine the same and to introduce at such hearing testimony in his own behalf. He shall be entitled to be represented by counsel, at his own expense, at such hearing.

History: En. Sec. 5, Ch. 199, L. 1943; amd. Sec. 1, Ch. 187, L. 1951; amd. Sec. 1, Ch. 219, L. 1953; amd. Sec. 1, Ch. 268, L. 1955; amd. Sec. 1, Ch. 225, L. 1957; amd. Sec. 1, Ch. 109, L. 1959; amd. Sec. 1, Ch. 55, L. 1967; amd. Sec. 5, Ch. 188, L. 1975; amd. Sec. 1, Ch. 483, L. 1975; amd. Sec. 4, Ch. 343, L. 1977; R.C.M. 1947, 31-105(11)(c); amd. Sec. 1, Ch. 217, L. 1989; amd. Sec. 3, Ch. 713, L. 1991.

44-1-804. Rendering and filing of decision. The department of justice shall, within 30 days after such hearing or within the additional time to which the accused patrol officer consents, render its decision in writing and file same in its office, with the chief, and with the patrol officer accused.

History: En. Sec. 5, Ch. 199, L. 1943; amd. Sec. 1, Ch. 187, L. 1951; amd. Sec. 1, Ch. 219, L. 1953; amd. Sec. 1, Ch. 268, L. 1955; amd. Sec. 1, Ch. 225, L. 1957; amd. Sec. 1, Ch. 109, L. 1959; amd. Sec. 1, Ch. 55, L. 1967; amd. Sec. 5, Ch. 188, L. 1975; amd. Sec. 1, Ch. 483, L. 1975; amd. Sec. 4, Ch. 343, L. 1977; R.C.M. 1947, 31-105(11)(d); amd. Sec. 1, Ch. 503, L. 1985; amd. Sec. 1, Ch. 217, L. 1989; amd. Sec. 4, Ch. 713, L. 1991.

44-1-805. Reinstatement and backpay upon exoneration. If after the hearing the department of justice finds that the charge or charges made against the patrol officer are not true, the department shall reinstate the accused patrol officer to his position and rank and shall order the payment of any salary withheld pending the determination of the charge or charges.

History: En. Sec. 5, Ch. 199, L. 1943; amd. Sec. 1, Ch. 187, L. 1951; amd. Sec. 1, Ch. 219, L. 1953; amd. Sec. 1, Ch. 268, L. 1955; amd. Sec. 1, Ch. 225, L. 1957; amd. Sec. 1, Ch. 109, L. 1959; amd. Sec. 1, Ch. 55, L. 1967; amd. Sec. 5, Ch. 188, L. 1975; amd. Sec. 1, Ch. 483, L. 1975; amd. Sec. 4, Ch. 343, L. 1977; R.C.M. 1947, 31-105(12)(b); amd. Sec. 7, Ch. 7, L. 1979; amd. Sec. 1, Ch. 503, L. 1985; amd. Sec. 1, Ch. 217, L. 1989.

Cross-References

Reinstatement and backpay upon reversal or modification, 44-1-903.

44-1-806. Disciplinary action. If after a hearing the department of justice finds that any charge or charges made against the patrol officer are true, it may punish the offending party by suspension without pay, demotion, or discharge.

History: En. Sec. 5, Ch. 199, L. 1943; amd. Sec. 1, Ch. 187, L. 1951; amd. Sec. 1, Ch. 219, L. 1953; amd. Sec. 1, Ch. 268, L. 1955; amd. Sec. 1, Ch. 225, L. 1957; amd. Sec. 1, Ch. 109, L. 1959; amd. Sec. 1, Ch. 55, L. 1967; amd. Sec. 5, Ch. 188, L. 1975; amd. Sec. 1, Ch. 483, L. 1975; amd. Sec. 4, Ch. 343, L. 1977; R.C.M. 1947, 31-105(12)(a); amd. Sec. 8, Ch. 7, L. 1979; amd. Sec. 1, Ch. 503, L. 1985; amd. Sec. 1, Ch. 217, L. 1989; amd. Sec. 5, Ch. 713, L. 1991.

44-1-807. Length of suspension. A member under suspension shall be on leave without pay for a period not to exceed 30 days.

History: En. Sec. 5, Ch. 199, L. 1943; amd. Sec. 1, Ch. 187, L. 1951; amd. Sec. 1, Ch. 219, L. 1953; amd. Sec. 1, Ch. 268, L. 1955; amd. Sec. 1, Ch. 225, L. 1957; amd. Sec. 1, Ch. 109, L. 1959; amd. Sec. 1, Ch. 55, L. 1967; amd. Sec. 5, Ch. 188, L. 1975; amd. Sec. 1, Ch. 483, L. 1975; amd. Sec. 4, Ch. 343, L. 1977; R.C.M. 1947, 31-105(9)(a); amd. Sec. 9, Ch. 7, L. 1979.

44-1-808. Demotion pay status. In cases of disciplinary action resulting in demotion, the member shall receive the pay of the rank to which he is demoted.

History: En. Sec. 5, Ch. 199, L. 1943; amd. Sec. 1, Ch. 187, L. 1951; amd. Sec. 1, Ch. 219, L. 1953; amd. Sec. 1, Ch. 268, L. 1955; amd. Sec. 1, Ch. 225, L. 1957; amd. Sec. 1, Ch. 109, L. 1959; amd. Sec. 1, Ch. 55, L. 1967; amd. Sec. 5, Ch. 188, L. 1975; amd. Sec. 1, Ch. 483, L. 1975; amd. Sec. 4, Ch. 343, L. 1977; R.C.M. 1947, 31-105(9)(b).

Cross-References

Reinstatement and backpay upon reversal or modification, 44-1-903.

Part 9

Disciplinary Action — Appeal to Court

44-1-901. Right to appeal. (1) A patrol officer who is suspended, demoted, or discharged has a right of appeal:

(a) to the district court in the county in which the claim arose or to the district court of Lewis and Clark County; or

(b) pursuant to the terms of a grievance procedure contained in a collective bargaining agreement if the officer is covered by a collective bargaining agreement.

(2) The appeal to the district court must be made within 10 days after the decision or determination of the department of justice.

History: En. Sec. 5, Ch. 199, L. 1943; amd. Sec. 1, Ch. 187, L. 1951; amd. Sec. 1, Ch. 219, L. 1953; amd. Sec. 1, Ch. 268, L. 1955; amd. Sec. 1, Ch. 225, L. 1957; amd. Sec. 1, Ch. 109, L. 1959; amd. Sec. 1, Ch. 55, L. 1967; amd. Sec. 5, Ch. 188, L. 1975; amd. Sec. 1, Ch. 483, L. 1975; amd. Sec. 4, Ch. 343, L. 1977; R.C.M. 1947, 31-105(13)(a), (13)(b); amd. Sec. 10, Ch. 7, L. 1979; amd. Sec. 1, Ch. 503, L. 1985; amd. Sec. 1, Ch. 217, L. 1989; amd. Sec. 1, Ch. 225, L. 1991.

Cross-References

Judicial review of contested cases, Title 2, ch. 4, part 7.

44-1-902. Action by court. The district court shall review a decision or determination appealed pursuant to 44-1-901(1)(a) in a summary manner and render its decision within 90 days from the filing of the appeal.

History: En. Sec. 5, Ch. 199, L. 1943; amd. Sec. 1, Ch. 187, L. 1951; amd. Sec. 1, Ch. 219, L. 1953; amd. Sec. 1, Ch. 268, L. 1955; amd. Sec. 1, Ch. 225, L. 1957; amd. Sec. 1, Ch. 109, L. 1959; amd. Sec. 1, Ch. 55, L. 1967; amd. Sec. 5, Ch. 188, L. 1975; amd. Sec. 1, Ch. 483, L. 1975; amd. Sec. 4, Ch. 343, L. 1977; R.C.M. 1947, 31-105(13)(c); amd. Sec. 2, Ch. 225, L. 1991.

44-1-903. Reinstatement and backpay upon reversal or modification. If the decision or determination of the department of justice is finally reversed or modified, the accused patrol officer must be reinstated in his position. Upon reinstatement, the department shall pay to the patrol officer any salary or wages withheld from him pending the determination of the charge or charges or take such action as may be directed by resolution of the grievance procedure or the court.

History: En. Sec. 5, Ch. 199, L. 1943; amd. Sec. 1, Ch. 187, L. 1951; amd. Sec. 1, Ch. 219, L. 1953; amd. Sec. 1, Ch. 268, L. 1955; amd. Sec. 1, Ch. 225, L. 1957; amd. Sec. 1, Ch. 109, L. 1959; amd. Sec. 1, Ch. 55, L. 1967; amd. Sec. 5, Ch. 188, L. 1975; amd. Sec. 1, Ch. 483, L. 1975; amd. Sec. 4, Ch. 343, L. 1977; R.C.M. 1947, 31-105(13)(d); amd. Sec. 11, Ch. 7, L. 1979; amd. Sec. 1, Ch. 503, L. 1985; amd. Sec. 1, Ch. 217, L. 1989; amd. Sec. 3, Ch. 225, L. 1991.

Cross-References

Reinstatement and backpay upon exoneration, 44-1-805.

44-1-904 through 44-1-909 reserved.

44-1-910. Waiver. A patrol officer may waive in writing his rights under Title 44, chapter 1, parts 7 and 8, and accept discipline considered appropriate by the department of justice.

History: En. Sec. 1, Ch. 713, L. 1991.

Part 10

Jurisdiction of Patrol Officers

Part Cross-References

Enforcement of provisions respecting use of snowmobiles, 23-2-641.

Enforcement of motor vehicle ownership, registration, and taxation statutes, 61-3-602.

Motor vehicle accidents and accident reports, Title 61, ch. 7.

Traffic regulation, Title 61, ch. 8.

Obedience to highway patrol officer, 61-9-105.

Records kept by Department of Justice, 61-11-102.

Highway patrol officer acting as firewarden, 77-5-104.

44-1-1001. Offenses for which patrol officers may make arrests. (1) The highway patrol chief and all patrol officers may make arrests for the offenses listed in subsection (2) under the following circumstances:

(a) the offense is committed in the presence of the chief or any patrol officer;

(b) the offense is committed in a rural district and a request for assistance is made by a peace officer; or

(c) the offense is committed in a city or town with a population of less than 2,500 and a request for assistance is made by a peace officer or the mayor of the city or town.

(2) Offenses for which arrests may be made under subsection (1) are:
(a) deliberate homicide;
(b) assault with a deadly weapon;
(c) arson;
(d) criminal mischief;
(e) burglary;
(f) theft;
(g) kidnapping;
(h) illegal transportation of narcotics; or
(i) violation of the Dyer Act regarding the transportation of stolen automobiles.

History: En. Sec. 10, Ch. 199, L. 1943; amd. Sec. 1, Ch. 63, L. 1965; amd. Sec. 2, Ch. 280, L. 1977; amd. Sec. 46, Ch. 359, L. 1977; R.C.M. 1947, 31-110(part); amd. Sec. 12, Ch. 7, L. 1979; amd. Sec. 1, Ch. 217, L. 1989.

Cross-References

Deliberate homicide, 45-5-102.
Assault, 45-5-201.
Aggravated assault, 45-5-202.
Kidnapping, 45-5-302.
Aggravated kidnapping, 45-5-303.
Criminal mischief, 45-6-101.
Negligent arson, 45-6-102.
Arson, 45-6-103.
Burglary, 45-6-204.
Theft, 45-6-301.
Criminal sale of dangerous drugs, 45-9-101.
Written reports of highway accidents, 61-7-109.

44-1-1002. No authority in labor disputes. Such highway patrol officers have no authority and are expressly forbidden to make arrests in labor disputes or to prevent violence in connection with strikes and may not perform any duties whatsoever in connection with labor disputes, strikes, or boycotts.

History: En. Sec. 10, Ch. 199, L. 1943; amd. Sec. 1, Ch. 63, L. 1965; amd. Sec. 2, Ch. 280, L. 1977; amd. Sec. 46, Ch. 359, L. 1977; R.C.M. 1947, 31-110(part); amd. Sec. 1, Ch. 217, L. 1989.

44-1-1003. Offenses on highways, rest areas, and state highway properties adjacent to the highway or involving motor vehicles. Patrol officers are considered police officers for the purpose of making arrests for all offenses occurring on the highways, highway rest areas, state highway properties adjacent to the highway, or involving the use of motor vehicles or the registration thereof and for the purpose of serving warrants of arrest in connection with such violations.

History: En. Sec. 10, Ch. 199, L. 1943; amd. Sec. 1, Ch. 63, L. 1965; amd. Sec. 2, Ch. 280, L. 1977; amd. Sec. 46, Ch. 359, L. 1977; R.C.M. 1947, 31-110(2); amd. Sec. 1, Ch. 645, L. 1979; amd. Sec. 1, Ch. 217, L. 1989.

Cross-References

Regulations governing arrest authorized, 7-32-4301.

Arrest warrants generally, Title 46, ch. 6, part 2.

Arrest without warrant — generally, Title 46, ch. 6, part 3; Title 46, ch. 30, part 3.

Motor vehicle defined, 61-1-102.

Highways defined, 61-1-201, 61-1-202, 61-1-210, 61-1-211.

Authority of Department of Justice to cancel licenses, 61-5-201.

Reports of accidents, 61-7-109.

Definition of ways of this state open to the public, 61-8-101.

44-1-1004. Authority concerning livestock or livestock products in transit. Patrol officers may stop any truck or motor vehicle in which livestock or livestock products are being transported and ascertain whether the driver of such truck or vehicle is rightfully in possession of such livestock or livestock products. If the patrol officers have good reason to believe that livestock or livestock products have been stolen, they may take possession of the same until the livestock or livestock products can be delivered into the custody of the sheriff or until such time as the facts as to the actual ownership can be ascertained.

History: En. Sec. 10, Ch. 199, L. 1943; amd. Sec. 1, Ch. 63, L. 1965; amd. Sec. 2, Ch. 280, L. 1977; amd. Sec. 46, Ch. 359, L. 1977; R.C.M. 1947, 31-110(3); amd. Sec. 1, Ch. 217, L. 1989.

Cross-References

Theft, 45-6-301.

Duties of stock inspectors and detectives concerning livestock or livestock products in transit, 81-1-202.

44-1-1005. Motor carriers safety — enforcement — violations. (1) The department of justice shall:

(a) adopt, by rule, standards for safety of operations of motor carriers, each of whom is considered to consent impliedly to reasonable safety inspections of its motor vehicles used in furtherance of its business as a motor carrier;

(b) provide standards for the safe operation of all motor vehicles used in commerce that exceed 26,000 pounds gross vehicle weight, except farm vehicles; and

(c) provide for the safe operation of vehicles of less than 26,000 pounds gross vehicle weight that are designed to transport more than 15 passengers, including the driver, or that are used to transport hazardous materials of a type or quantity that requires the vehicle to be marked or placarded in accordance with rules adopted by the department.

(2) Standards of safety adopted pursuant to subsections (1)(b) and (1)(c) must be the same as prescribed for motor carriers, and the same inspection standards and procedures apply.

(3) The highway patrol has responsibility for enforcement of standards adopted pursuant to subsection (1)(a). Inspection of a vehicle based in Montana may, at the request of the carrier, be made at the place of business or domicile of the vehicle owner or, if that is not a practicable inspection site, at a designated location and at a mutually agreeable time. After inspection, a vehicle found to conform to the standards adopted pursuant to subsection (1)(a) is entitled to certification and identification to exempt it from further safety inspection until the next required periodic inspection or until a nonconformity with standards is apparent. Nothing in this section prohibits the inspection of a motor vehicle as provided for by subsection (1)(a) at a safe location on a public road.

(4) The department shall cooperate with the department of transportation to ensure minimum duplication and maximum coordination of enforcement effort.

(5) The department may designate and train civilian employees as inspectors within the motor carrier safety assistance program. Each civilian inspector is a peace officer whose jurisdiction is limited to enforcement of violations of Title 61, chapters 5 and 9, and any standards adopted pursuant to subsections (1) and (2) of this section. Each employee designated as a peace officer may:

(a) issue citations and make arrests;

(b) issue summonses;

(c) accept bail;

(d) serve warrants of arrest;

(e) make reasonable inspections of cargo carried by commercial motor vehicles;

(f) make reasonable safety inspections of commercial motor vehicles; and

(g) require production of documents relating to the cargo, driver, routing, maintenance, or ownership of commercial motor vehicles.

(6) Violations of the standards adopted pursuant to subsection (1) are punishable as provided in 61-9-512.

History: En. Sec. 10, Ch. 199, L. 1943; amd. Sec. 1, Ch. 63, L. 1965; amd. Sec. 2, Ch. 280, L. 1977; amd. Sec. 46, Ch. 359, L. 1977; R.C.M. 1947, 31-110(4); amd. Sec. 13, Ch. 7, L. 1979; amd. Sec. 1, Ch. 226, L. 1981; amd. Sec. 1, Ch. 394, L. 1983; amd. Sec. 1, Ch. 503, L. 1985; amd. Sec. 4, Ch. 686, L. 1985; amd. Sec. 103, Ch. 370, L. 1987; amd. Sec. 1, Ch. 386, L. 1987; amd. Sec. 1, Ch. 226, L. 1991; amd. Sec. 3, Ch. 512, L. 1991; amd. Sec. 1, Ch. 80, L. 1995.

Cross-References

Vehicle equipment, Title 61, ch. 9.

Applicability of Title 61, chapter 9, 61-9-109.

Performance ability of brakes, 61-9-312.

Inspections by officers of Department of Justice, 61-9-501.

Owners and drivers to comply with inspection laws, 61-9-503.

Joint enforcement of motor carrier safety standards by highway patrol and Department of Transportation, 61-10-141.

Officers authorized to weigh vehicles and require removal of excessive loads, 61-10-141.

Display of permit, 61-10-142.

Confiscation — action by Commission, 61-10-143.

Motor carriers, Title 69, ch. 12.

Part 11
Procedure for Arrests

Part Cross-References

Arrest, Title 46, ch. 6.

Circumstances in which peace officer may arrest, 46-6-201, 46-6-210, 46-6-311, 46-6-412.

Bail, Title 46, ch. 9.

Obedience to highway patrol officer, 61-9-105.

44-1-1101. Duty of patrol officer upon making an arrest. Upon making an arrest, a patrol officer shall:

(1) deliver the offender to the nearest justice of the peace during office hours or to the county jail;

(2) give the offender a summons describing the nature of the offense with instructions thereon for the offender to report to the nearest justice of the peace; or

(3) accept bail determined pursuant to Title 46, chapter 9, part 3.

History: En. Sec. 12, Ch. 199, L. 1943; R.C.M. 1947, 31-112(part); amd. Sec. 14, Ch. 7, L. 1979; amd. Sec. 1, Ch. 217, L. 1989.

Cross-References

Regulations governing arrest authorized, 7-32-4301.

Initial appearance of arrested person, Title 46, ch. 7.

44-1-1102. Procedure when patrol officer accepts bail. If the patrol officer accepts bail, he shall give a signed receipt to the offender, setting forth the amount received. The patrol officer shall then deliver the bail money to the justice of the peace before whom the offender is to appear, and the justice of the peace shall give a receipt to the patrol officer for the amount of bail money delivered. After the filing of the complaint and the appearance of the defendant, the justice of the peace shall assume jurisdiction and may set and accept further bail bond.

History: **En. Sec. 12, Ch. 199, L. 1943; R.C.M. 1947, 31-112(part); amd. Sec. 15, Ch. 7, L. 1979; amd. Sec. 1, Ch. 217, L. 1989.**

Cross-References

Bail schedule for minor offenses — acceptance of bail by peace officer, 46-9-302.

44-1-1103. Check in lieu of cash. (1) In the case of traffic violations, bond may be made by personal check in lieu of cash. Highway patrol officers or other authorized agents receiving bonds on behalf of the court may accept a personal check in lieu of cash provided that:

(a) the check is drawn on a bank domiciled in the state of Montana; and

(b) the person who writes the check in lieu of cash bond has two documents identifying him.

(2) If a check is offered in lieu of cash, the highway patrol officer or other authorized agent who accepts the check is not liable in the case of nonpayment.

(3) A person who writes a check in lieu of cash bond which is returned for insufficient funds is subject to prosecution under 45-6-316, and obtaining bond constitutes securing services for the purposes of that section.

History: **En. 31-112.1 by Sec. 1, Ch. 295, L. 1977; R.C.M. 1947, 31-112.1; amd. Sec. 1, Ch. 217, L. 1989.**

Cross-References

Issuing bad checks, 45-6-316.

Furnishing bail, Title 46, ch. 9, part 4.

CHAPTER 2

INVESTIGATION, COMMUNICATION, AND IDENTIFICATION

Part 1 — Criminal Investigation

44-2-101. Repealed.
44-2-102. Repealed.
44-2-103. Repealed.
44-2-104 through 44-2-110 reserved.
44-2-111. Definition of "agent".
44-2-112. Repealed.
44-2-113. Qualifications of agents.
44-2-114. Personnel covered by PERS.
44-2-115. Powers and duties of agents.
44-2-116. Cooperation of state agencies.

Part 2 — State System of Criminal Identification

44-2-201. Establishment of state system.
44-2-202. Assistance to and instruction of local officers.
44-2-203. Repealed.
44-2-204. Repealed.
44-2-205. Withholding of salary of officer who fails to provide information.
44-2-206. Cooperation with FBI and other states.

Part 3 — Teletypewriter Communications System

44-2-301. Establishment — inclusion of other state agencies.
44-2-302. Powers of attorney general.
44-2-303. Federal cost sharing.
44-2-304. Report by attorney general.
44-2-305 through 44-2-310 reserved.
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44-2-312. Authorization of monthly operational charge.
44-2-313. Payment of charge.
44-2-314. Use of money — records.
44-2-315. Removal from network upon nonpayment.
44-2-316. Assessment for personnel.

Part 4 — Dental Records
Missing Persons and Unidentified Bodies

44-2-401. Missing persons — dental records.
44-2-402. Dental examination — records — report.

Part 5 — Missing Children

44-2-501. Short title.
44-2-502. Definitions.
44-2-503. Missing children information program.
44-2-504. Reports to missing children information program.
44-2-505. Duties of law enforcement authority.
44-2-506. List of missing Montana school children.
44-2-507. Notice to parents of children absent from school.
44-2-508 through 44-2-510 reserved.
44-2-511. School enrollment procedures to aid identification of missing children.

Part 6 — Escape or Release From Confinement—Notification

44-2-601. Notification of escape or release from confinement.

Part 7 — Drug Abuse Resistance Education (D.A.R.E.)

44-2-701. Montana drug abuse resistance education trust fund account — administration by board of crime control.
44-2-702. Montana drug abuse resistance education program.
44-2-703. Gifts and grants to program.
44-2-704. Program costs.
44-2-705. Restriction on use of funds.

Chapter Cross-References

Statewide emergency telephone 9-1-1 system, Title 10, ch. 4.

Private investigators, guards, carriers, and street patrols, Title 37, ch. 60.

Automatic telephone alarm systems, 37-60-408.

Part 1
Criminal Investigation

Part Cross-References

Investigative procedures, Title 46, ch. 4.

44-2-101. Repealed. Sec. 14, Ch. 503, L. 1985.

History: En. Sec. 1, Ch. 176, L. 1967; amd. Sec. 1, Ch. 219, L. 1971; R.C.M. 1947, 82-414(1).

44-2-102. Repealed. Sec. 14, Ch. 503, L. 1985.

History: En. Sec. 7, Ch. 176, L. 1967; amd. Sec. 7, Ch. 219, L. 1971; R.C.M. 1947, 82-420.

44-2-103. Repealed. Sec. 27, Ch. 525, L. 1979.

History: En. Sec. 4, Ch. 176, L. 1967; amd. Sec. 4, Ch. 219, L. 1971; R.C.M. 1947, 82-417.

44-2-104 through 44-2-110 reserved.

44-2-111. Definition of "agent". As used in this part, "agent" means a person appointed by the attorney general to conduct criminal investigations and perform related duties within the department of justice.

History: En. Sec. 2, Ch. 176, L. 1967; amd. Sec. 2, Ch. 219, L. 1971; R.C.M. 1947, 82-415; amd. Sec. 5, Ch. 503, L. 1985; amd. Sec. 1, Ch. 280, L. 1991.

Cross-References

Definition of agent, 28-10-101 through 28-10-103.

44-2-112. Repealed. Sec. 4, Ch. 280, L. 1991.

History: En. Sec. 1, Ch. 176, L. 1967; amd. Sec. 1, Ch. 219, L. 1971; R.C.M. 1947, 82-414(2).

44-2-113. Qualifications of agents. Each agent must be a person qualified by experience, training, and high professional competence in criminal investigation. Each agent shall meet all the requirements of 7-32-303.

History: En. Sec. 1, Ch. 176, L. 1967; amd. Sec. 1, Ch. 219, L. 1971; R.C.M. 1947, 82-414(3); amd. Sec. 2, Ch. 280, L. 1991.

44-2-114. Personnel covered by PERS. All agents and assisting personnel shall be covered by the public employees' retirement system.

History: En. Sec. 5, Ch. 176, L. 1967; amd. Sec. 5, Ch. 219, L. 1971; R.C.M. 1947, 82-418.

Cross-References

Public employees' retirement system, Title 19, ch. 3.

44-2-115. Powers and duties of agents. An agent appointed by the attorney general pursuant to this part is a peace officer and:

(1) shall provide investigative assistance to city, county, state, and federal law enforcement agencies at their request in accordance with rules adopted by the department of justice;

(2) shall have concurrent jurisdiction with local law enforcement agencies to investigate offenses involving dangerous drugs, as provided in Title 45, chapter 9, and violations that constitute organized criminal activity;

(3) shall investigate gambling activities in this state as provided in 23-5-113;

(4) shall investigate any apparent violations of penal statutes disclosed by an audit of a state agency by the legislative auditor;

(5) shall investigate apparent violations of penal statutes referred by the state workers' compensation insurance fund; and

(6) shall assist whenever possible any law enforcement school held in the state for law enforcement officers when requested.

History: En. Sec. 3, Ch. 176, L. 1967; amd. Sec. 3, Ch. 219, L. 1971; R.C.M. 1947, 82-416; amd. Sec. 16, Ch. 7, L. 1979; amd. Sec. 3, Ch. 280, L. 1991; amd. Sec. 14, Ch. 630, L. 1993.

Cross-References

Peace officer defined, 1-1-207, 45-2-101, 46-1-202.

Montana Law Enforcement Academy, Title 44, ch. 10.

44-2-116. Cooperation of state agencies. All state departments and agencies shall cooperate with such agents and assisting personnel in providing transportation and educational and laboratory facilities for their use when so requested.

History: En. Sec. 6, Ch. 176, L. 1967; amd. Sec. 6, Ch. 219, L. 1971; R.C.M. 1947, 82-419.

Part 2

State System of Criminal Identification

44-2-201. Establishment of state system. The department of justice shall cooperate with and assist sheriffs, chiefs of police, and other law enforcement officers in the establishment of a complete state system of criminal identification.

History: En. Sec. 33, Ch. 199, L. 1965; R.C.M. 1947, 80-2002(part); amd. Sec. 17, Ch. 7, L. 1979.

44-2-202. Assistance to and instruction of local officers. The department shall assist and, when practicable, instruct sheriffs, chiefs of police, and other law enforcement officers in establishing efficient local bureaus of identification in their districts and in making them proficient in procuring and maintaining fingerprint records.

History: En. Sec. 37, Ch. 199, L. 1965; R.C.M. 1947, 80-2006; amd. Sec. 18, Ch. 7, L. 1979.

44-2-203. Repealed. Sec. 27, Ch. 525, L. 1979.

History: En. Sec. 33, Ch. 199, L. 1965; R.C.M. 1947, 80-2002(part).

44-2-204. Repealed. Sec. 27, Ch. 525, L. 1979.

History: En. Sec. 34, Ch. 199, L. 1965; R.C.M. 1947, 80-2003.

44-2-205. Withholding of salary of officer who fails to provide information. The department shall report to the attorney general the failure of any officer to provide information as required by law. After an investigation of the report, the attorney general may order the proper disbursing officer to withhold payment of the salary of the officer who failed to provide the information until the information is given to the department.

History: En. Sec. 35, Ch. 199, L. 1965; R.C.M. 1947, 80-2004.

Cross-References

Discipline of highway patrol members, Title 44, ch. 1, parts 7 through 9.

44-2-206. Cooperation with FBI and other states. The department shall cooperate with identification bureaus in other states and with the federal bureau of investigation to develop and carry on a complete interstate and international system of criminal identification and investigation.

History: En. Sec. 36, Ch. 199, L. 1965; R.C.M. 1947, 80-2005.

Part 3

Teletypewriter Communications System

Part Cross-References

Criminal justice information, Title 44, ch. 5, 6.

44-2-301. Establishment — inclusion of other state agencies. The attorney general is hereby authorized to establish a permanent law enforcement teletypewriter communications system for the purpose of connecting federal, state, county, and city law enforcement agencies by teletype. He is further authorized to bring into the network, should he and they so desire, any department of Montana state government or its subdivisions outside of law enforcement activities when, in the opinion of the attorney general and the state department or subdivision, such inclusion will materially aid the law enforcement agencies of the state of Montana or its subdivisions in the fight against crime.

History: En. Sec. 1, Ch. 1, Ex. L. 1967; amd. Sec. 1, Ch. 145, L. 1969; R.C.M. 1947, 82-3901.

44-2-302. Powers of attorney general. To carry out the provisions of this part, the attorney general is authorized to:

(1) purchase, lease, or otherwise acquire facilities and equipment necessary to accomplish the purposes of this part;

(2) employ such personnel as may be necessary to operate such facilities within the framework of any funds budgeted or prorated on a charge basis against participating agencies as herein identified.

History: En. Sec. 3, Ch. 1, Ex. L. 1967; amd. Sec. 3, Ch. 145, L. 1969; R.C.M. 1947, 82-3903(a), (b).

Cross-References

Duties of Attorney General, 2-15-501.

44-2-303. Federal cost sharing. The attorney general shall contact federal law enforcement agencies or officials relative to federal cost sharing in the teletypewriter communications system, and if such funds are available from federal sources, the attorney general may sign agreements with the federal agencies. Any federal funds received in any biennium for which Montana funds have been appropriated shall be deposited in the system's account and shall be used, if at all possible, to reduce the spending of money appropriated from the general fund.

History: En. Sec. 5, Ch. 1, Ex. L. 1967; amd. Sec. 5, Ch. 145, L. 1969; R.C.M. 1947, 82-3905; amd. Sec. 19, Ch. 7, L. 1979.

44-2-304. Report by attorney general. The attorney general shall submit, as a part of the information required by 17-7-111, a report in detail covering the operations of the communications network, the accounting of all money received and expended, and the need to expand or improve the system.

History: En. Sec. 6, Ch. 1, Ex. L. 1967; amd. Sec. 6, Ch. 145, L. 1969; R.C.M. 1947, 82-3906; amd. Sec. 35, Ch. 112, L. 1991; amd. Sec. 31, Ch. 349, L. 1993.

44-2-305 through 44-2-310 reserved.

44-2-311. Participation by local and other agencies. Any county, city, or other law enforcement agency may, with the approval of the attorney general, connect to the system and participate in it upon payment of or agreement to pay those costs established by the department of justice.

History: En. Sec. 4, Ch. 1, Ex. L. 1967; amd. Sec. 4, Ch. 145, L. 1969; R.C.M. 1947, 82-3904.

44-2-312. Authorization of monthly operational charge. The attorney general is hereby authorized to establish a monthly operational charge for the teletypewriter communications network, exclusive of personnel services, and such charge shall be prorated among all the various agencies using the system.

History: En. Sec. 3, Ch. 1, Ex. L. 1967; amd. Sec. 3, Ch. 145, L. 1969; R.C.M. 1947, 82-3903(part).

44-2-313. Payment of charge. Such charge shall be billed monthly to the agencies. Payments made as a result of the billing shall be remitted to the attorney general and deposited by him in a special account in the state treasury.

History: En. Sec. 3, Ch. 1, Ex. L. 1967; amd. Sec. 3, Ch. 145, L. 1969; R.C.M. 1947, 82-3903(part); amd. Sec. 20, Ch. 7, L. 1979.

44-2-314. Use of money — records. The state treasurer is authorized to draw warrants on this account upon request of the attorney general when money is needed to pay any of the costs of keeping the system operative. A strict accounting must be kept of all receipts and disbursements and must be available as a matter of record to members of the appropriations committee of the house of representatives as they may require in the performance of their duties.

History: En. Sec. 3, Ch. 1, Ex. L. 1967; amd. Sec. 3, Ch. 145, L. 1969; R.C.M. 1947, 82-3903(part); amd. Sec. 30, Ch. 325, L. 1995.

44-2-315. Removal from network upon nonpayment. Law enforcement agencies, other than the state of Montana or any of its subdivisions, that become 90 days delinquent in payment of any fees approved and assessed hereunder shall be notified that they will be removed from the network, and the department of justice shall take the necessary steps to carry out this provision.

History: En. Sec. 3, Ch. 1, Ex. L. 1967; amd. Sec. 3, Ch. 145, L. 1969; R.C.M. 1947, 82-3903(part).

44-2-316. Assessment for personnel. A special prorated assessment shall be made against all participating agencies for personnel necessary to assist in the operation at one central location or key point at which there is a federal intertie. This assessment shall be made monthly the same as the operational charge. It shall be transmitted, deposited, and drawn by warrant as are other warrants as provided in 44-2-312 through 44-2-315, except that the assessment may not be levied against the one central station for which the assessment is made.

History: En. Sec. 3, Ch. 1, Ex. L. 1967; amd. Sec. 3, Ch. 145, L. 1969; R.C.M. 1947, 82-3903(d); amd. Sec. 21, Ch. 7, L. 1979.

Part 4

Dental Records Missing Persons and Unidentified Bodies

44-2-401. Missing persons — dental records. (1) Any person who reports a missing person to a police or sheriff's department or other law enforcement authority must be given a form, supplied by the department of justice, that authorizes the release of the dental records of the missing person. The form must state that if the person is still missing 30 days after the report was made, the form should be signed by a relative of the missing person and taken to the dentist of the missing person, who must release the dental records or copies thereof to the relative. The records must be submitted by the relative within the next 10 days to the law enforcement authority to which the missing person report was made.

(2) If the missing person has not been found within 30 days after the report was made and no relative exists or can be located, the law enforcement

authority may execute a signed written declaration stating that an investigation into the location of the missing person is being conducted and that the dental records may be necessary to the investigation. A dentist shall release the missing person's dental records upon presentation of the declaration.

(3) If a person reported missing has not been found within 45 days after the report was made, the law enforcement authority conducting the investigation shall confer with the county coroner or state medical examiner and write a missing person report on a form supplied by the department of justice. The report and any dental records or copies thereof obtained under this section must be submitted to the department of justice.

(4) The department of justice shall maintain an information file concerning each person reported to it as missing. The file must include information received under this section and any other information the department considers relevant to locating the missing person.

(5) The department files must be made available to any law enforcement agency attempting to locate missing persons.

(6) A law enforcement authority that finds a missing person or is notified that he has been found shall notify the department of justice, which shall return all dental records to the dentist and destroy the file prepared under subsection (4) concerning the person.

History: En. Sec. 1, Ch. 389, L. 1983.

44-2-402. Dental examination — records — report. (1) If the coroner cannot identify a body, he or the state medical examiner shall have a dentist examine the body, and if the body cannot be identified from the dental examination, the coroner or state medical examiner must send the dental examination results to the department of justice on a form supplied by the department.

(2) The department is a repository for dental examination records filed with it under this section. The department shall compare such records with dental records filed with it pursuant to 44-2-401 in an attempt to identify the body and must submit any findings to the coroner or state medical examiner.

History: En. Sec. 2, Ch. 389, L. 1983.

Part 5
Missing Children

44-2-501. Short title. This part may be cited as the "Missing Children Act of 1985".

History: En. Sec. 1, Ch. 559, L. 1985.

44-2-502. Definitions. As used in this part, the following definitions apply:

(1) "Missing child" means any person who has been reported as missing to a law enforcement authority and:

(a) who is under 18 years of age;

(b) whose temporary or permanent residence is in Montana or is believed to be in Montana; and

(c) whose location has not been determined.

(2) "Missing child report" is a report prepared on a form designed by the department of justice for use by private citizens and law enforcement authorities to report information about missing children to the missing children information program provided for in 44-2-503.

History: En. Sec. 2, Ch. 559, L. 1985.

44-2-503. Missing children information program. (1) The department of justice shall establish a missing children information program to create a central repository to aid in the location of missing children in Montana.

(2) The missing children information program shall:

(a) establish a system of intrastate communication of information relating to any child determined to be missing by the parent, guardian, or legal custodian of the child or by a law enforcement authority;

(b) provide a centralized file for the exchange of information on missing children within the state, including information obtained under the provisions of 44-2-401;

(c) interface with the national crime information center computer system for exchange of information on children suspected of interstate travel; and

(d) provide the superintendent of public instruction each month with a list of missing Montana school children for the purposes of 44-2-506.

History: En. Sec. 3, Ch. 559, L. 1985.

44-2-504. Reports to missing children information program. (1) All state, county, and municipal law enforcement authorities shall submit to the missing children information program provided for in 44-2-503 any missing child report and other information required by 44-2-401.

(2) Any parent, guardian, or legal custodian may submit a missing child report to the missing children information program on any child whose whereabouts are unknown, regardless of the circumstances, subsequent to making a report to the appropriate law enforcement authority within the county in which the child became missing.

(3) The parent, guardian, or legal custodian responsible for notifying the missing children information program or a law enforcement authority of a missing child shall immediately notify the authority and the program of any child whose location has been determined.

History: En. Sec. 4, Ch. 559, L. 1985.

44-2-505. Duties of law enforcement authority. Whenever a parent, guardian, or legal custodian of a child files a report with a law enforcement authority that the child is missing, the law enforcement authority shall:

(1) immediately inform all on-duty law enforcement officers of the existence of the missing child report;

(2) communicate the report to all other law enforcement authorities having jurisdiction in the county; and

(3) immediately enter the missing child report into the national crime information center computer system.

History: En. Sec. 5, Ch. 559, L. 1985.

44-2-506. List of missing Montana school children. (1) The superintendent of public instruction shall assist the missing children information program provided for in 44-2-503 in identifying and locating missing children who are enrolled in Montana public school districts in kindergarten through grade 12 by:

(a) collecting each month a list of missing Montana school children as provided by the missing children information program provided for in 44-2-503;

(b) distributing the list of missing school children on a monthly basis, unless the list has no change from the previous month's information, to all school districts admitting children to kindergarten through grade 12;

(c) designing the list to include pertinent available information for identification of the missing school child, including if possible a recent photograph of the child; and

(d) notifying the appropriate law enforcement agency and the missing children information program as soon as any additional information is obtained or contact is made with respect to a missing school child.

(2) Each school district in Montana shall:

(a) distribute to each school building within the district the list of missing school children provided for in subsection (1); and

(b) notify the appropriate law enforcement agency at the earliest known contact with any child whose name appears on the list of missing school children.

History: En. Sec. 6, Ch. 559, L. 1985.

44-2-507. Notice to parents of children absent from school. The trustees of any elementary or high school district shall establish procedures to be followed by school personnel for attempting to contact by the end of a school day any parent, guardian, or legal custodian whose child is absent from school but who has not reported the child as absent for the school day to determine whether the parent, guardian, or legal custodian is aware of the child's absence from school.

History: En. Sec. 7, Ch. 559, L. 1985.

Cross-References

School attendance, Title 20, ch. 5, part 1.

44-2-508 through 44-2-510 reserved.

44-2-511. School enrollment procedures to aid identification of missing children. (1) When a child enrolls in a school district for the first time, the school district shall:

(a) require that the child's parent, guardian, or legal custodian present to the school, within 40 days of enrollment, proof of identity of the child; and

(b) request the appropriate school records of the child from the previous school attended by the child. The school enrolling the child shall make the request within 40 days of enrollment of the child.

(2) If a child's parent, guardian, or legal custodian does not present the proof of identity required in subsection (1) within 40 days of enrollment or if the school district does not receive the school records of the child within 60 days of enrollment, the school shall notify the missing children information program provided in 44-2-503 and a local law enforcement authority of the fact that no proof of identity has been presented for the child.

(3) A school district that receives a request for the school records of a child shall transfer the records to the requesting school as soon as possible.

(4) When a school district receives a notice from a law enforcement authority, parent, guardian, or legal custodian that a child who is or has been enrolled in that school has been reported as a missing child, the school district shall:

(a) flag in some manner the student records of the child; and

(b) notify the missing children information program and a local law enforcement authority if a request for the school records is received from another school district.

(5) If it is necessary for a local law enforcement authority to conduct an investigation on a missing child, school personnel may not inform the person claiming custody of the child of the investigation while it is being conducted.

(6) For the purposes of this section:

(a) "proof of identity" means a certified copy of a birth certificate, a certified transcript or similar student records from the previous school, or any documentary evidence that a school district considers to be satisfactory proof of identity; and

(b) "school district" means a school district as defined in 20-6-101 or a nonpublic elementary school or high school in the state.

History: En. Sec. 1, Ch. 407, L. 1987.

Cross-References

Compulsory enrollment and excuses, 20-5-102.

Part 6

Escape or Release From Confinement — Notification

44-2-601. Notification of escape or release from confinement. (1) The notice required by subsection (2) must be given if:

(a) a person committed to a hospital or mental health facility under Title 46, chapter 14, escapes or is released from confinement;

(b) a person confined in an institution other than a jail pending or during trial for a criminal offense involving the use or threat of physical force or violence or confined in a prison or other state institution after conviction of a criminal offense involving the use or threat of physical force or violence escapes or is released from confinement; or

(c) a person confined in a jail pending or during trial for a criminal offense involving the use or threat of physical force or violence or confined in a jail after conviction of a criminal offense involving the use or threat of physical force or violence escapes from confinement.

(2) If a person referred to in subsection (1) escapes or is released from confinement, the institution in which the person was confined shall notify:

(a) the sheriff or other law enforcement officials in the county in which the offense occurred;

(b) the sheriff or other law enforcement officials in the county or counties, if known, in which a victim or the victims of the offense reside at the time of the escape or release;

(c) the sheriff or other law enforcement officials in the county, if known, in which the person intends to reside upon leaving confinement;

(d) the sheriff or other law enforcement officials in the county in which the jail, prison, hospital, mental health facility, or other institution from which the person escaped or was released is located;

(e) a victim of the offense who has requested notification in the event of an escape or a release of the person; and

(f) a court that has requested that it be notified in the event of an escape or a release of the person.

(3) The department shall adopt a methodology for notifying the individuals and entities listed in subsection (2). The methodology must take into account the public safety concerns related to escape. Notification concerning a pending release must be made prior to the release.

History: En. Sec. 1, Ch. 103, L. 1991; amd. Sec. 1, Ch. 374, L. 1993; amd. Sec. 1, Ch. 125, L. 1995; amd. Sec. 1, Ch. 372, L. 1995.

Part 7

Drug Abuse Resistance Education (D.A.R.E.)

44-2-701. Montana drug abuse resistance education trust fund account — administration by board of crime control. (1) There is a Montana drug abuse resistance education trust fund account in the state special revenue fund in the state treasury.

(2) Funds deposited in the account may be expended by the Montana board of crime control, as provided for in 2-15-2006, to fund services and activities under and payment of administrative costs of the Montana drug abuse resistance education program provided for in 44-2-702.

History: En. Sec. 1, Ch. 808, L. 1991.

Cross-References

Drug offense fines, penalties, and forfeitures in Justices' Courts used for local government drug education, 3-10-601.

Drug laws property forfeiture sale proceeds used for drug education, 44-12-206.

Seized money and proceeds of seized property sold at official sale used for drug education, 46-5-308.

Drug offense fines used for drug education, 46-18-235.

44-2-702. Montana drug abuse resistance education program. (1) The Montana board of crime control shall use the money in the Montana drug abuse resistance education trust fund account established by 44-2-701 to fund services and activities operated by nonprofit, private, community-based educational and service organizations, units of local government, or school districts if those services and activities relate solely to the development, enhancement, and expansion of drug abuse resistance education in Montana.

(2) In administering the Montana drug abuse resistance education program, the Montana board of crime control shall:

(a) identify priorities for funding services, activities, and criteria for the receipt of program funds;

(b) monitor the expenditure of funds by organizations receiving funds under this section;

(c) evaluate the effectiveness of services and activities under this section; and

(d) adopt rules necessary to implement 44-2-703, 44-2-704, and this section.

History: En. Sec. 2, Ch. 808, L. 1991.

Cross-References

Providing youth with intoxicating substance, 16-6-305, 45-5-622, 45-5-623.

Drug education for higher education students pursuing teaching degree, Title 20, ch. 25, part 6.

Possession by youth of intoxicating substance, 45-5-624.

Board of Pharmacy drug education programs, 50-32-105.

Department of Public Health and Human Services drug and alcohol treatment and prevention programs, Title 53, ch. 24.

44-2-703. Gifts and grants to program. The Montana board of crime control may accept contributions, gifts, and grants, in money or otherwise, to the Montana drug abuse resistance education program. Upon receipt, contributions, monetary gifts, and grants must be paid into the Montana drug abuse resistance education trust fund account established by 44-2-701.

History: En. Sec. 3, Ch. 808, L. 1991.

44-2-704. Program costs. The costs incurred by the Montana board of crime control in administering the Montana drug abuse resistance education program must be paid with money from the Montana drug abuse resistance education trust fund account established by 44-2-701. The board shall keep costs to a minimum and shall use the board's existing office space, personnel, equipment, and supplies to the extent possible.

History: En. Sec. 4, Ch. 808, L. 1991.

44-2-705. Restriction on use of funds. Funds deposited in the Montana drug abuse resistance education trust fund account may be used only for the program authorized in 44-2-702 and may not be used to pay the expenses of any other program or service administered in whole or in part by the Montana board of crime control or the department of justice.

History: En. Sec. 5, Ch. 808, L. 1991.

CHAPTER 3

MONTANA FORENSIC SCIENCE SYSTEM ACT

Part 1 — General Provisions

Forensic Science

44-3-101. Short title.
44-3-102. Purpose.
44-3-103. Repealed.
44-3-104. Functions of department.
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44-3-205 through 44-3-210 reserved.
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44-3-213. Report to county attorney.
44-3-214. Records.

Part 3 — Laboratory of Criminalistics

44-3-301. Laboratory of criminalistics.
44-3-302. Fees for laboratory services.
44-3-303. Duties of laboratory director.
44-3-304. Repealed.

Part 4 — Provisions Relating to Corpses

44-3-401. Exemption from liability for autopsy.
44-3-402. Repealed.
44-3-403. Repealed.
44-3-404. Criminal penalty.

Chapter Cross-References

Office of County Coroner generally, Title 7, ch. 4, part 29.

Investigative procedures, Title 46, ch. 4.

Part 1

General Provisions Forensic Science

44-3-101. Short title. This chapter shall be known as the "Montana Forensic Science System Act".

History: En. 82-427 by Sec. 1, Ch. 530, L. 1977; R.C.M. 1947, 82-427.

44-3-102. Purpose. The purpose of this chapter is to authorize the attorney general to provide the personnel, facilities, and procedures to:

(1) determine the cause of certain types of deaths by such investigation and examination as are in the public interest;

(2) analyze specimens for law enforcement officers; and

(3) provide reports, including oral testimony, concerning such investigation, examination, and analysis when in the public interest.

History: En. 82-428 by Sec. 2, Ch. 530, L. 1977; R.C.M. 1947, 82-428; amd. Sec. 1, Ch. 689, L. 1989.

44-3-103. Repealed. Sec. 14, Ch. 503, L. 1985.

History: En. 82-429 by Sec. 3, Ch. 530, L. 1977; R.C.M. 1947, 82-429(part).

44-3-104. Functions of department. The forensics functions of the department of justice include operation of a division of forensic sciences.

History: En. 82-430 by Sec. 4, Ch. 530, L. 1977; R.C.M. 1947, 82-430; amd. Sec. 6, Ch. 503, L. 1985; amd. Sec. 2, Ch. 689, L. 1989.

44-3-105. Authority to accept grants. The department of justice is authorized to accept federal and other moneys which may be made available to accomplish the purposes of this chapter.

History: En. 82-431 by Sec. 5, Ch. 530, L. 1977; R.C.M. 1947, 82-431; amd. Sec. 7, Ch. 503, L. 1985.

44-3-106. Power of attorney general to employ personnel. The attorney general is authorized to employ personnel necessary to perform the functions authorized under this chapter.

History: En. 82-435 by Sec. 9, Ch. 530, L. 1977; R.C.M. 1947, 82-435(part); amd. Sec. 8, Ch. 503, L. 1985; amd. Sec. 3, Ch. 689, L. 1989.

Part 2
Medical Examiners

Part Cross-References

Office of County Coroner, Title 7, ch. 4, part 29.

Presumption person is dead, alive, or missing, 26-1-602, 26-1-622, 26-1-623.

Investigative criminal procedures, Title 46, ch. 4.

Cadavers and autopsies, Title 50, ch. 21.

Duty of medical examiner to report violations of Montana Elder and Persons With Developmental Disabilities Abuse Prevention Act, 52-3-811.

44-3-201. State medical examiner. A state medical examiner must be appointed by the attorney general. The state medical examiner must be a physician licensed to practice medicine in Montana.

History: En. 82-429 by Sec. 3, Ch. 530, L. 1977; R.C.M. 1947, 82-429(part); amd. Sec. 9, Ch. 503, L. 1985; amd. Sec. 4, Ch. 689, L. 1989.

44-3-202. Repealed. Sec. 8, Ch. 689, L. 1989.

History: En. 82-440 by Sec. 14, Ch. 530, L. 1977; R.C.M. 1947, 82-440(part).

44-3-203. Associate medical examiners — qualifications. Associate medical examiners must be physicians licensed to practice in Montana and may continue their private practice during their appointment.

History: En. 82-437 by Sec. 11, Ch. 530, L. 1977; R.C.M. 1947, 82-437(1).

Cross-References

Licensing of physicians, Title 37, ch. 3, part 3.

44-3-204. Associate medical examiners — compensation. (1) Associate medical examiners may be paid for their services an amount which the state medical examiner considers to be reasonable compensation and may be reimbursed for expenses actually incurred in the performance of their duties.

(2) The costs of services performed by associate medical examiners are chargeable to the county for which the service is performed.

History: En. 82-437 by Sec. 11, Ch. 530, L. 1977; R.C.M. 1947, 82-437(2), (3).

44-3-205 through 44-3-210 reserved.

44-3-211. Duties of state medical examiner. The duties of the state medical examiner include but are not limited to the following:

(1) providing assistance and consultation to associate medical examiners, coroners, and law enforcement officers;

(2) providing court testimony when necessary to accomplish the purposes of this chapter;

(3) stimulating and directing research in the field of forensic pathology;

(4) maintaining an ongoing educational and training program for associate medical examiners, coroners, and law enforcement officers;

(5) appointing associate medical examiners; and

(6) performing autopsies as requested.

History: En. 82-436 by Sec. 10, Ch. 530, L. 1977; R.C.M. 1947, 82-436(1) thru (4); amd. Sec. 5, Ch. 689, L. 1989.

Cross-References

Duties of County Coroner, 7-4-2911.

Expert testimony, Rules 702 through 705, M.R.Ev. (see Title 26, ch. 10).

Coroner's report of traffic accident deaths, 61-7-112.

44-3-212. Repealed. Sec. 8, Ch. 689, L. 1989.

History: En. 82-436 by Sec. 10, Ch. 530, L. 1977; R.C.M. 1947, 82-436(5) thru (7).

44-3-213. Report to county attorney. When the cause of death has been established within reasonable medical certainty by the state medical examiner or his associate, whether by review of a coroner's report or by personal examination, the state medical examiner shall make available in writing to the county attorney his determination as to the cause of death.

History: En. 82-446 by Sec. 20, Ch. 530, L. 1977; R.C.M. 1947, 82-446; amd. Sec. 22, Ch. 7, L. 1979.

Cross-References

Coroner's report to County Attorney, 46-4-103.

44-3-214. Records. Copies of records and detailed findings of autopsy and laboratory investigations shall be maintained by the state medical examiner's office.

History: En. 82-447 by Sec. 21, Ch. 530, L. 1977; R.C.M. 1947, 82-447.

Cross-References

Autopsy — when conducted — scope, 46-4-103.

Part 3
Laboratory of Criminalistics

Part Cross-References

Driving under influence of alcohol or drugs, Title 61, ch. 8, part 4.

44-3-301. Laboratory of criminalistics. (1) There is a laboratory of criminalistics within the department of justice. The laboratory's purpose is to perform analysis of specimens submitted by all Montana state, county, or city law enforcement officers and all state agencies and referral specimens from other states if accepted by the laboratory director.

(2) The laboratory's functions include analysis of toxicologic and criminalistic specimens which the laboratory director considers within the performance capability of the laboratory.

History: En. 82-438 by Sec. 12, Ch. 530, L. 1977; R.C.M. 1947, 82-438(1), (2); amd. Sec. 6, Ch. 689, L. 1989.

44-3-302. Fees for laboratory services. The laboratory may charge reasonable fees for its services, except that it may not charge state, county, city, or municipal law enforcement officers or coroners of this state for services rendered. Fees collected under this section shall be deposited in an account in the state special revenue fund in the state treasury and used to pay operation expenses of the laboratory.

History: En. 82-438 by Sec. 12, Ch. 530, L. 1977; R.C.M. 1947, 82-438(3); amd. Sec. 1, Ch. 277, L. 1983.

44-3-303. Duties of laboratory director. There is a director of the laboratory of criminalistics. The laboratory director shall:

(1) be responsible for supervision and direction of the laboratory;

(2) assist the department in the appointment of laboratory personnel;

(3) render decisions as to the disposition of specimens; and

(4) perform all other duties required by the rules of the department.

History: En. 82-439 by Sec. 13, Ch. 530, L. 1977; R.C.M. 1947, 82-439; amd. Sec. 10, Ch. 503, L. 1985; amd. Sec. 7, Ch. 689, L. 1989.

44-3-304. Repealed. Sec. 8, Ch. 689, L. 1989.

History: En. 82-440 by Sec. 14, Ch. 530, L. 1977; R.C.M. 1947, 82-440(part).

Part 4

Provisions Relating to Corpses

Part Cross-References

Investigation of death — autopsy, Title 46, ch. 4, part 1.

Cadavers and autopsies, Title 50, ch. 21.

Determination of death, Title 50, ch. 22.

44-3-401. Exemption from liability for autopsy. No criminal or civil action may arise against a medical examiner for performing an autopsy under this chapter or for performing an autopsy on request of a federal officer investigating a death within a federal jurisdiction.

History: En. 82-441 by Sec. 15, Ch. 530, L. 1977; R.C.M. 1947, 82-441; amd. Sec. 1, Ch. 492, L. 1985.

Cross-References

Liability of mortuary or physician, 46-4-104.

44-3-402. Repealed. Sec. 2, Ch. 408, L. 1983.

History: En. 82-442 by Sec. 16, Ch. 530, L. 1977; R.C.M. 1947, 82-442.

44-3-403. Repealed. Sec. 21, Ch. 660, L. 1991.

History: En. 82-443 by Sec. 17, Ch. 530, L. 1977; R.C.M. 1947, 82-443.

44-3-404. Criminal penalty. A person is guilty of a misdemeanor and may be fined not more than $500 or imprisoned in the county jail for not more than 1 year, or both, if he:

(1) purposely fails to report or conceals a death, including a fetal death;

(2) refuses to make available prior medical or other information in a death investigation;

(3) without an order from the coroner or state medical examiner, purposely touches, removes, or disturbs a corpse, its clothing, or anything near the corpse; or

(4) knowingly or purposely disobeys a cessation order of a coroner.

History: En. 82-445 by Sec. 19, Ch. 530, L. 1977; R.C.M. 1947, 82-445; amd. Sec. 23, Ch. 7, L. 1979; amd. Sec. 12, Ch. 660, L. 1991.

CHAPTER 4

MISCELLANEOUS FUNCTIONS OF DEPARTMENT OF JUSTICE

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Chapter Cross-References

Duty of Attorney General with regard to crime victims, 46-24-103.

Part 1

Training Coordinator for County Attorneys

44-4-101. Position established — salary. There is created within the department of justice the position of training coordinator for county attorneys. The position of training coordinator for county attorneys is an exempt position as provided in 2-18-103. The salary for this position is the same as that provided in 7-4-2503 for a county attorney in a county with a population in excess of 30,000.

History: En. Sec. 1, Ch. 353, L. 1973; R.C.M. 1947, 82-421; amd. Sec. 24, Ch. 7, L. 1979; amd. Sec. 19, Ch. 455, L. 1995.

44-4-102. Appointment. The training coordinator shall be appointed by the attorney general from a list of three names proposed and submitted by the Montana county attorneys' association.

History: En. Sec. 2, Ch. 353, L. 1973; R.C.M. 1947, 82-422.

44-4-103. Functions. The training coordinator shall perform the functions assigned by the attorney general. The functions may include but are not limited to the following:

(1) providing local training in current aspects of the criminal law for county attorneys, city attorneys, and other law enforcement personnel. The training coordinator may require payment by city attorneys of a fee commensurate with the cost of the training.

(2) assisting in developing and disseminating standards, procedures, and policies which will insure that criminal laws are applied consistently and uniformly throughout Montana;

(3) consolidating present and past information on important aspects of the criminal law and providing a pool of official opinions, legal briefs, and other relevant criminal law information;

(4) providing assistance with research, briefs, or other technical services requested by a county attorney or law enforcement official;

(5) applying for and disbursing federal funds available to aid the prosecutorial function; and

(6) as provided in 44-4-111, acting as special counsel.

History: En. Sec. 3, Ch. 353, L. 1973; R.C.M. 1947, 82-423; amd. Sec. 25, Ch. 7, L. 1979; amd. Sec. 1, Ch. 7, L. 1983; amd. Sec. 1, Ch. 291, L. 1983.

44-4-104 through 44-4-110 reserved.

44-4-111. Request for special counsel services. (1) Except as provided in subsection (2), the training coordinator may act as special counsel upon request of the county attorney with the approval of the governing body of a county.

(2) If a case involves the prosecution of a member of the governing body of a county or a person related to him by consanguinity within the fourth degree or affinity within the second degree, the coordinator may, with the consent of the attorney general, act as special counsel upon request of the county attorney without approval of the governing body of the county.

History: En. Sec. 2, Ch. 7, L. 1983.

Cross-References

Affinity defined, 1-1-219.

Representation, 72-2-116.

44-4-112. County payment for special counsel services. Whenever the training coordinator acts as special counsel as provided in 44-4-111, the department of justice shall charge the county a reasonable hourly fee for the training coordinator's services. Upon receipt of payment for these services, the department shall deposit these funds into the state general fund.

History: En. Sec. 3, Ch. 7, L. 1983.

Part 2

Confidential License Plates and Registrations

Part Cross-References

Registration of motor vehicles, Title 61, ch. 3.

Records of Department of Justice open to public inspection, 61-3-101.

44-4-201. Authorization to issue confidential plates and registrations. (1) The attorney general may issue confidential license plates and certificates of registration to bona fide law enforcement agencies, except the highway patrol, within the state of Montana.

(2) The attorney general may issue confidential license plates and certificates of registration for purposes other than law enforcement.

(3) Confidential license plates and certificates of registration are exempt from all requirements for public disclosure.

(4) The issuance of confidential registrations is subject to the provisions of this part.

History: En. 82-424 by Sec. 1, Ch. 90, L. 1975; R.C.M. 1947, 82-424(part); amd. Sec. 1, Ch. 653, L. 1989.

44-4-202. Authority of attorney general to adopt rules. The attorney general may adopt rules necessary to implement the provisions of this part and to prevent the abuse or misuse of confidential registration plates.

History: En. 82-424 by Sec. 1, Ch. 90, L. 1975; R.C.M. 1947, 82-424(7).

Cross-References

Rulemaking under Montana Administrative Procedure Act, Title 2, ch. 4, parts 1 through 5.

44-4-203. Registration records. (1) The registration records of each vehicle registered must be maintained by the department of justice.

(2) The contents of confidential registration records may be disclosed only at the discretion of the attorney general when there is a legitimate law enforcement purpose for disclosure.

History: En. 82-424 by Sec. 1, Ch. 90, L. 1975; R.C.M. 1947, 82-424(4), (5); amd. Sec. 11, Ch. 416, L. 1999.

Compiler's Comments

1999 Amendment: Chapter 416 at end of (2) inserted "when there is a legitimate law enforcement purpose for disclosure"; and made minor changes in style. Amendment effective October 1, 1999.

44-4-204. Applications for confidential plates and registrations. Applications by law enforcement agencies operating within the state must be made to the attorney general on a form and in a manner prescribed by the attorney general.

History: En. 82-424 by Sec. 1, Ch. 90, L. 1975; R.C.M. 1947, 82-424(1).

44-4-205. Use of confidential plates and registrations. (1) Such license plates and registrations may be displayed and used only during and in the furtherance of official law enforcement investigations or for purposes as authorized in 44-4-201(2).

(2) Such confidential plates and certificates of registration may be used outside the state by federal agencies and state agencies upon application to the attorney general.

History: En. 82-424 by Sec. 1, Ch. 90, L. 1975; R.C.M. 1947, 82-424(2), (3); amd. Sec. 2, Ch. 653, L. 1989.

44-4-206. Revocation. Such registrations may be revoked at any time by the attorney general at his discretion. On delivery of notice of revocation, the registrant shall, within 24 hours, deliver such license plates and certificate of registration to the attorney general or his duly appointed agent.

History: En. 82-424 by Sec. 1, Ch. 90, L. 1975; R.C.M. 1947, 82-424(6).

Part 3

Board of Crime Control

Part Cross-References

Creation and composition, 2-15-2006.

Training program required for reserve officers, 7-32-214.

Employment standards of Board, 7-32-303.

Qualifications of police officers, 7-32-4112.

44-4-301. Functions. (1) As designated by the governor as the state planning agency under the Omnibus Crime Control and Safe Streets Act of 1968, as amended, the board of crime control shall perform the functions assigned to it under that act. The board shall also provide to criminal justice agencies technical assistance and supportive services that are approved by the board or assigned by the governor or legislature.

(2) The board may:

(a) establish minimum qualifying standards for employment of peace officers, as defined in 7-32-303, detention officers, detention center administrators, public safety communications officers, probation and parole officers, corrections officers, and commercial vehicle inspectors; and

(b) develop procedures for revoking or suspending the certification of peace officers, as defined in 7-32-303, detention officers, detention center administrators, public safety communications officers, probation and parole officers, corrections officers, and commercial vehicle inspectors.

(3) The board may require basic training for officers, establish minimum standards for equipment and procedures and for advanced inservice training for officers, establish minimum standards for the certification of public safety communications officers, establish minimum standards for the certification of motor carrier services division officers appointed under 61-12-201, and establish minimum standards for law enforcement and detention officer training schools administered by the state or any of its political subdivisions or agencies, to ensure the public health, welfare, and safety.

(4) The board may waive the minimum qualification standard provided in subsection (2) for good cause shown.

(5) The board shall establish minimum standards for training of probation and parole officers, pursuant to 46-23-1003.

(6) The board shall establish minimum standards for training corrections officers and commercial vehicle inspectors.

(7) It is the duty of the appointing authority to cause each probation and parole officer, corrections officer, and commercial vehicle inspector appointed under its authority whose term of employment commenced after September 30, 1999, to attend and successfully complete within 6 months of employment, an appropriate basic course certified by the board. The appointing authority may terminate a probation and parole officer's, corrections officer's, or commercial vehicle inspector's employment for failure to:

(a) meet the minimum standards established by the board; or

(b) satisfactorily complete the appropriate basic course.

History: En. 82A-1207 by Sec. 1, Ch. 272, L. 1971; amd. Sec. 1, Ch. 61, L. 1973; amd. Sec. 1, Ch. 202, L. 1977; R.C.M. 1947, 82A-1207(4); amd. Sec. 1, Ch. 345, L. 1989; amd. Sec. 4, Ch. 58, L. 1991; amd. Sec. 1, Ch. 809, L. 1991; amd. Sec. 1, Ch. 161, L. 1993; amd. Sec. 3, Ch. 437, L. 1993; amd. Sec. 1, Ch. 315, L. 1999.

Compiler's Comments

1999 Amendment: Chapter 315 at end of (2)(a) and (2)(b) inserted "probation and parole officers, corrections officers, and commercial vehicle inspectors"; inserted (6) requiring board to establish minimum standards for training corrections officers and commercial vehicle inspectors; inserted (7) describing duty of appointing authority and authorizing authority to terminate employment of probation and parole officer, corrections officer, or commercial vehicle inspector for failure to meet standards or to complete appropriate basic course; and made minor changes in style. Amendment effective October 1, 1999.

The amendment to this section made by Ch. 508, L. 1999, was rendered void by sec. 12, Ch. 508, L. 1999, a contingent voidness section.

Cross-References

Law Enforcement Academy, Title 44, ch. 10.

44-4-302. *(Temporary)* **Definitions.** As used in this part, the following definitions apply:

(1) "Commercial vehicle inspector" means a person authorized by the department of justice to conduct a motor carrier safety inspection pursuant to 44-1-1005.

(2) "Corrections officer" means a person who has full-time or part-time authority and responsibility for maintaining custody of inmates and who performs tasks related to the operation of a prison or juvenile correctional facility.

(3) "Detention center" means a facility established and maintained by an appropriate entity for the purpose of confining arrested persons or persons sentenced to a detention center.

(4) "Detention center administrator" means the sheriff, chief of police, administrator, superintendent, director, or other individual serving as the chief executive officer of a detention center or temporary detention center.

(5) "Detention officer" means a person or a peace officer who has full-time or part-time authority and responsibility for maintaining custody of inmates and who performs tasks related to the operation of a detention center or temporary detention center.

(6) "Juvenile detention center" means a detention facility as defined in 41-5-103.

(7) "Juvenile detention officer" means a person who has full-time or part-time authority and responsibility for maintaining custody of juveniles under the jurisdiction of the youth court and who performs tasks related to the operation of a juvenile detention center.

(8) "Public safety communications officer" means a person who receives requests for emergency services, as defined in 10-4-101, dispatches the appropriate emergency service units, and is certified under 7-31-203.

(9) "Temporary detention center" means a facility for the temporary detention of an arrested person for up to 72 hours, excluding holidays, Saturdays, and Sundays. The period of time a person is held in temporary detention may not exceed 96 hours. *(Terminates June 30, 2001—sec. 5, Ch. 469, L. 1999.)*

44-4-302. *(Effective July 1, 2001)* **Definitions.** As used in this part, the following definitions apply:

(1) "Commercial vehicle inspector" means a person authorized by the department of justice to conduct a motor carrier safety inspection pursuant to 44-1-1005.

(2) "Corrections officer" means a person who has full-time or part-time authority and responsibility for maintaining custody of inmates and who performs tasks related to the operation of a prison or juvenile correctional facility.

(3) "Detention center" means a facility established and maintained by an appropriate entity for the purpose of confining arrested persons or persons sentenced to a detention center.

(4) "Detention center administrator" means the sheriff, chief of police, administrator, superintendent, director, or other individual serving as the chief executive officer of a detention center or temporary detention center.

(5) "Detention officer" means a person or a peace officer who has full-time or part-time authority and responsibility for maintaining custody of inmates

and who performs tasks related to the operation of a detention center or temporary detention center.

(6) "Public safety communications officer" means a person who receives requests for emergency services, as defined in 10-4-101, dispatches the appropriate emergency service units, and is certified under 7-31-203.

(7) "Temporary detention center" means a facility for the temporary detention of an arrested person for up to 72 hours, excluding holidays, Saturdays, and Sundays. The period of time that a person is held in temporary detention may not exceed 96 hours.

History: En. Sec. 2, Ch. 345, L. 1989; amd. Sec. 5, Ch. 58, L. 1991; amd. Sec. 2, Ch. 315, L. 1999; amd. Sec. 2, Ch. 469, L. 1999.

Compiler's Comments

1999 Amendments — Composite Section: Chapter 315 inserted definitions of commercial vehicle inspector and corrections officer; and made minor changes in style. Amendment effective October 1, 1999.

Chapter 469 inserted definitions of juvenile detention center and juvenile detention officer; and made minor changes in style. Amendment effective April 26, 1999, and terminates June 30, 2001.

The amendment to this section made by Ch. 508, L. 1999, was rendered void by sec. 12, Ch. 508, L. 1999, a contingent voidness section.

44-4-303. *(Temporary)* **Temporary exemption for juvenile detention officers.** (1) A juvenile detention officer employed by a juvenile detention center is exempt from the requirements for certification and basic detention officer training provided for in 44-4-301 on the following conditions:

(a) The juvenile detention officer shall satisfactorily complete the training provided for in this section.

(b) The juvenile detention center that employs the juvenile detention officer shall develop and conduct a training program based on training approved by a nationally recognized professional association for juvenile detention officers. The training program must include goals, objectives, a curriculum outline, and a budget. If more than one juvenile detention center chooses to develop and conduct a training program, those centers shall work cooperatively to develop one curriculum for the purposes of this section.

(c) The jurisdiction that administers and operates the juvenile detention center shall assume the responsibility and cost for administering a training program for the juvenile detention officers employed in a juvenile detention facility and any associated liability related to the training.

(d) The juvenile detention center shall submit quarterly reports on the progress of the development and implementation of a training program provided for in subsection (1)(b) to the board of crime control, peace officer standards and training council, youth justice council, and Montana law enforcement academy.

(e) The juvenile detention center shall present a final report to the board of crime control, peace officer standards and training council, youth justice council, and Montana law enforcement academy by October 1, 2000, that includes the goals, objectives, curriculum, and budget and any findings, recommendations, and suggested legislation.

(f) The jurisdiction that operates and administers a juvenile detention center shall agree to allow the board of crime control, peace officer standards and training council, and youth justice council to contract, at the expense of the board of crime control, for an evaluation of the curriculum and training program by an outside party who has both adult and juvenile detention experience and to cooperate with the evaluation process.

(2) The board of crime control, peace officers standards and training council, and youth justice council shall present a report of its findings, recommendations, and suggested legislation regarding training for juvenile detention officers who are employed in juvenile detention centers to the 57th legislature.

(3) A county that complies with this section is eligible for reimbursement through the state grants for youth detention services provided for in Title 41, chapter 5, part 19, to the same extent that training received pursuant to 44-4-301 is reimbursable. *(Terminates June 30, 2001—sec. 5, Ch. 469, L. 1999.)*

History: En. Sec. 1, Ch. 469, L. 1999.

Compiler's Comments

Effective Date: Section 4, Ch. 469, L. 1999, provided that this section is effective on passage and approval. Approved April 26, 1999.

Termination: Section 5, Ch. 469, L. 1999, provided: "[This act] terminates June 30, 2001."

Parts 4 through 8 reserved

Part 9

Railroad Corporation Special Peace Officers

Part Cross-References

Attorney General — general duties, 2-15-501.

Railroad corporations, Title 69, ch. 14, part 5.

Railroad personnel, Title 69, ch. 14, part 10.

44-4-901. Attorney general — appointment of special peace officers. The attorney general may appoint special peace officers as provided in this part.

History: En. Sec. 1, Ch. 552, L. 1987.

44-4-902. Application for appointment. A class I railroad corporation, as defined by the interstate commerce commission in part 1201 of 49 CFR, desiring the appointment of an officer or employee as a special peace officer shall apply to the attorney general. The application must state the name, age, and place of residence of the person applying for appointment. The applicant must have at least 3 years of experience as a class I railroad peace officer or have completed a training course at an approved law enforcement academy, or meet the qualifications described in 7-32-303 and adopted under 44-4-301. The application must be signed by the applicant and a managing officer of the railroad corporation. The managing officer signing the application shall at the same time submit an affidavit to the effect that he is acquainted with the person seeking appointment, that he believes him to be of good moral character, and that he is of such character and experience that he can be safely entrusted with the powers and duties of a special peace officer.

History: En. Sec. 2, Ch. 552, L. 1987.

44-4-903. Limitations on special peace officer. A person appointed and sworn as a special peace officer shall when on duty have the power and authority of a peace officer but may exercise such power and authority only in the protection of the property of the class I railroad corporation employing him.

History: En. Sec. 3, Ch. 552, L. 1987.

44-4-904. Responsibility of corporation. The class I railroad corporation employing a special peace officer is solely responsible for the compensation of the special peace officer and is civilly liable for any action of the officer arising out of his actions as a special peace officer. The class I railroad corporation employing a special peace officer shall hold the state, its subdivisions, and the officers and employees thereof harmless and indemnify them from any claim or liability, including costs and attorney fees, arising out of any action of a special peace officer or the certification of the special peace officer by the state.

History: En. Sec. 4, Ch. 552, L. 1987.

CHAPTER 5

CRIMINAL JUSTICE INFORMATION

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Part 1
General Provisions

44-5-101. Short title. This chapter may be cited as the "Montana Criminal Justice Information Act of 1979".

History: En. Sec. 1, Ch. 525, L. 1979.

44-5-102. Purpose. The purpose of this chapter is to require the photographing and fingerprinting of persons under certain circumstances, to ensure the accuracy and completeness of criminal history information, and to establish effective protection of individual privacy in confidential and nonconfidential criminal justice information collection, storage, and dissemination.

History: En. Sec. 2, Ch. 525, L. 1979; amd. Sec. 9, Ch. 145, L. 1985.

44-5-103. Definitions. As used in this chapter, the following definitions apply:

(1) "Access" means the ability to read, change, copy, use, transfer, or disseminate criminal justice information maintained by criminal justice agencies.

(2) "Administration of criminal justice" means the performance of any of the following activities: detection, apprehension, detention, pretrial release, posttrial release, prosecution, adjudication, correctional supervision, or rehabilitation of accused persons or criminal offenders. It includes criminal identification activities and the collection, storage, and dissemination of criminal justice information.

(3) "Confidential criminal justice information" means:

(a) criminal investigative information;

(b) criminal intelligence information;

(c) fingerprints and photographs;

(d) criminal justice information or records made confidential by law; and

(e) any other criminal justice information not clearly defined as public criminal justice information.

(4) (a) "Criminal history record information" means information about individuals collected by criminal justice agencies consisting of identifiable descriptions and notations of arrests; detentions; the filing of complaints, indictments, or informations and dispositions arising therefrom; sentences; correctional status; and release. It includes identification information, such as

fingerprint records or photographs, unless the information is obtained for purposes other than the administration of criminal justice.

(b) Criminal history record information does not include:

(i) records of traffic offenses maintained by the department of justice; or

(ii) court records.

(5) (a) "Criminal intelligence information" means information associated with an identifiable individual, group, organization, or event compiled by a criminal justice agency:

(i) in the course of conducting an investigation relating to a major criminal conspiracy, projecting potential criminal operation, or producing an estimate of future major criminal activities; or

(ii) in relation to the reliability of information, including information derived from reports of informants or investigators or from any type of surveillance.

(b) Criminal intelligence information does not include information relating to political surveillance or criminal investigative information.

(6) "Criminal investigative information" means information associated with an individual, group, organization, or event compiled by a criminal justice agency in the course of conducting an investigation of a crime or crimes. It includes information about a crime or crimes derived from reports of informants or investigators or from any type of surveillance. It does not include criminal intelligence information.

(7) "Criminal justice agency" means:

(a) any court with criminal jurisdiction;

(b) any federal, state, or local government agency designated by statute or by a governor's executive order to perform as its principal function the administration of criminal justice;

(c) any local government agency not included under subsection (7)(b) that performs as its principal function the administration of criminal justice pursuant to an ordinance or local executive order; or

(d) any agency of a foreign nation that has been designated by that nation's law or chief executive officer to perform as its principal function the administration of criminal justice and that has been approved for the receipt of criminal justice information by the Montana attorney general, who may consult with the United States department of justice.

(8) "Criminal justice information" means information relating to criminal justice collected, processed, or preserved by a criminal justice agency. It does not include the administrative records of a criminal justice agency.

(9) "Criminal justice information system" means a system, automated or manual, operated by foreign, federal, regional, state, or local governments or governmental organizations for collecting, processing, preserving, or disseminating criminal justice information. It includes equipment, facilities, procedures, and agreements.

(10) (a) "Disposition" means information disclosing that criminal proceedings against an individual have terminated and describing the nature of the termination or information relating to sentencing, correctional supervision, release from correctional supervision, the outcome of appellate or collateral review of criminal proceedings, or executive clemency. Criminal proceedings have terminated if a decision has been made not to bring charges

or criminal proceedings have been concluded, abandoned, or indefinitely postponed.

(b) Particular dispositions include but are not limited to:

(i) conviction at trial or on a plea of guilty;

(ii) acquittal;

(iii) acquittal by reason of mental disease or defect;

(iv) acquittal by reason of mental incompetence;

(v) the sentence imposed, including all conditions attached to the sentence by the sentencing judge;

(vi) deferred imposition of sentence with any conditions of deferral;

(vii) nolle prosequi;

(viii) a nolo contendere plea;

(ix) deferred prosecution or diversion;

(x) bond forfeiture;

(xi) death;

(xii) release as a result of a successful collateral attack;

(xiii) dismissal of criminal proceedings by the court with or without the commencement of a civil action for determination of mental incompetence or mental illness;

(xiv) a finding of civil incompetence or mental illness;

(xv) exercise of executive clemency;

(xvi) correctional placement on probation or parole or release; or

(xvii) revocation of probation or parole.

(c) A single arrest of an individual may result in more than one disposition.

(11) "Dissemination" means the communication or transfer of criminal justice information to individuals or agencies other than the criminal justice agency that maintains the information. It includes confirmation of the existence or nonexistence of criminal justice information.

(12) "Fingerprints" means the recorded friction ridge skin of the fingers, palms, or soles of the feet.

(13) "Public criminal justice information" means:

(a) information made public by law;

(b) information of court records and proceedings;

(c) information of convictions, deferred sentences, and deferred prosecutions;

(d) information of postconviction proceedings and status;

(e) information originated by a criminal justice agency, including:

(i) initial offense reports;

(ii) initial arrest records;

(iii) bail records; and

(iv) daily jail occupancy rosters;

(f) information considered necessary by a criminal justice agency to secure public assistance in the apprehension of a suspect; or

(g) statistical information.

(14) "State repository" means the recordkeeping systems maintained by the department of justice pursuant to 44-2-201 in which criminal history record information is collected, processed, preserved, and disseminated.

(15) "Statistical information" means data derived from records in which individuals are not identified or identification is deleted and from which neither

individual identity nor any other unique characteristic that could identify an individual is ascertainable.

History: En. Sec. 3, Ch. 525, L. 1979; amd. Sec. 1, Ch. 804, L. 1991; amd. Sec. 1, Ch. 431, L. 1993; amd. Sec. 1, Ch. 147, L. 1999.

Compiler's Comments

1999 Amendment: Chapter 147 inserted definition of fingerprints; and made minor changes in style. Amendment effective March 23, 1999.

Cross-References

Registration of sexual and violent offenders, Title 46, ch. 23, part 5.

44-5-104. Relationship to other statutes. Laws requiring disclosure of public records, writings, or information are not superseded by this chapter unless clearly inconsistent with its specific language. Laws requiring confidentiality of information contained in records or writings are not superseded by this chapter, which applies only when information may be disclosed consistent with such laws.

History: En. Sec. 4, Ch. 525, L. 1979.

Cross-References

Right to know and right of privacy, Art. II, sec. 9 and 10, Mont. Const.

Public records, Title 2, ch. 6.

44-5-105. Department of justice — powers. The department of justice may:

(1) adopt rules necessary to carry out the purposes of this chapter;

(2) hear and decide contested cases or challenges that may arise under the provisions of the Montana Administrative Procedure Act;

(3) conduct audits of the criminal history record information systems of a representative sample of state and local criminal justice agencies chosen annually on a random basis to determine whether they are in compliance with the provisions of this chapter.

History: En. Sec. 23, Ch. 525, L. 1979; amd. Sec. 2, Ch. 603, L. 1993.

Cross-References

Montana Administrative Procedure Act, Title 2, ch. 4.

44-5-106 through 44-5-110 reserved.

44-5-111. Court order to enforce compliance. Any person may apply for an order from a district court to enforce compliance with any provision of this chapter.

History: En. Sec. 24, Ch. 525, L. 1979.

44-5-112. Sanctions. The sanctions provided in 44-2-205 apply to any knowing or purposeful violation of this chapter.

History: En. Sec. 22, Ch. 525, L. 1979.

Cross-References

Knowingly and purposely defined, 1-1-204, 45-2-101.

Part 2
Collection and Processing

Part Cross-References

Public records generally, Title 2, ch. 6, part 1.

44-5-201. Scope of authority to collect, process, and preserve criminal justice information. A criminal justice agency may collect, process, and preserve only that criminal justice information which is necessary for the performance of its authorized functions.

History: En. Sec. 5, Ch. 525, L. 1979.

44-5-202. Photographs and fingerprints. (1) The following agencies may, if authorized by subsections (2) through (5), collect, process, and preserve photographs and fingerprints:

(a) any criminal justice agency performing, under law, the functions of a police department or a sheriff's office, or both;

(b) the department of corrections; and

(c) the department of justice.

(2) The department of corrections may photograph and fingerprint anyone under the jurisdiction of the division of corrections or its successor.

(3) A criminal justice agency described in subsection (1)(a) shall photograph and fingerprint a person who has been arrested or noticed or summoned to appear to answer an information or indictment if:

(a) the charge is the commission of a felony;

(b) the identification of an accused is in issue; or

(c) it is required to do so by court order.

(4) Whenever a person charged with the commission of a felony is not arrested, the person shall appear before the sheriff, chief of police, or other concerned law enforcement officer for fingerprinting at the time of initial appearance in court to answer the information or indictment against the person.

(5) A criminal justice agency described in subsection (1)(a) may photograph and fingerprint an accused if the accused has been arrested for the commission of a misdemeanor, except that an individual arrested for a traffic, regulatory, or fish and game offense may not be photographed or fingerprinted unless the individual is incarcerated.

(6) Within 10 days the originating agency shall send the state repository a copy of each fingerprint taken on a completed form provided by the state repository.

(7) The state repository shall compare the fingerprints received with those already on file in the state repository. If it is determined that the individual is wanted or is a fugitive from justice, the state repository shall at once inform the originating agency. If it is determined that the individual has a criminal record, the state repository shall send the originating agency a copy of the individual's complete criminal history record.

(8) Photographs and fingerprints taken must be returned by the state repository to the originating agency, which shall return all copies to the individual from whom they were taken, in the following circumstances:

(a) upon order of the court that had jurisdiction; or

(b) upon the request of the individual when the individual was released without the filing of charges or when the charges did not result in a conviction.

History: En. Sec. 6, Ch. 525, L. 1979; amd. Sec. 1, Ch. 262, L. 1991; amd. Sec. 2, Ch. 804, L. 1991; amd. Sec. 197, Ch. 546, L. 1995.

Cross-References

Requiring fingerprints for alcoholic beverage license, 16-4-403.

Fingerprints and photographs of youth, 41-5-1206.

Right of the mentally ill and persons with developmental disabilities not to be fingerprinted, 53-20-143, 53-21-143.

Rights of the mentally ill and persons with developmental disabilities concerning photographs, 53-20-144, 53-21-144.

44-5-203 through 44-5-210 reserved.

44-5-211. Records — form, contents, limits on use. A criminal justice agency originating initial offense reports, initial arrest records, bail records, or daily jail occupancy rosters may maintain a chronological or numerical record of these items. These records may not contain any prior criminal history record information and may not be used to gain access to any other public criminal justice information.

History: En. Sec. 7, Ch. 525, L. 1979.

44-5-212. Record preservation. Unless required by federal law, expunging, purging, or destroying of criminal justice information is not required based on the length of time such records are held.

History: En. Sec. 8, Ch. 525, L. 1979.

44-5-213. Procedures to ensure accuracy of criminal history records. In order to ensure complete and accurate criminal history record information:

(1) the department of justice shall maintain a centralized state repository of criminal history record information to serve all criminal justice agencies in the state;

(2) dispositions resulting from formal proceedings in a court having jurisdiction in a criminal action against an individual who has been photographed and fingerprinted under 44-5-202 shall be reported to the originating agency and the state repository within 15 days. If the dispositions can readily be collected and reported through the court system, the dispositions may be submitted to the state repository by the administrative office of the courts.

(3) an originating agency shall advise the state repository within 30 days of all dispositions concerning the termination of criminal proceedings against an individual who has been photographed and fingerprinted under 44-5-202;

(4) the department of corrections shall advise the state repository within 30 days of all dispositions subsequent to conviction of an individual who has been photographed and fingerprinted under 44-5-202;

(5) each criminal justice agency shall query the state repository prior to dissemination of any criminal history record information to ensure the timeliness of the information. When no final disposition is shown by the state repository records, the state repository shall query the source of the document or other appropriate source for current status. Inquiries must be made prior to any dissemination except in those cases in which time is of the essence and the repository is technically incapable of responding within the necessary time period. If time is of the essence, the inquiry must still be made and the response must be forwarded as soon as it is received.

(6) each criminal justice agency shall ensure that all its criminal justice information is complete, accurate, and current; and

(7) the department of justice shall adopt rules for criminal justice agencies other than those that are part of the judicial branch of government to implement this section. The department of justice may adopt rules for the same purpose for the judicial branch of government if the supreme court consents to the rules.

History: En. Sec. 9, Ch. 525, L. 1979; amd. Sec. 1, Ch. 262, L. 1991; amd. Sec. 198, Ch. 546, L. 1995.

44-5-214. Inspection or transfer of criminal history records. (1) An individual or the individual's agent may inspect any criminal history record information maintained about the individual or transfer copies of that information to any other person upon the presentation of satisfactory identification to the criminal justice agency maintaining the criminal history record information. Fingerprints may be required for identification. An agent must also submit a notarized authorization from the agent's principal or an authorization order from a district court.

(2) If an individual's criminal history record information is maintained in the state repository, copies of the records shall be transferred to the local agency for inspection upon proper request of the individual or the individual's agent. A local agency shall honor a verified affidavit accompanying a request by an individual for a transfer of copies of criminal history record information concerning that individual to a criminal justice agency of another state for the purpose of complying with this chapter.

(3) (a) An individual may request inspection or transfer of copies, or both, of criminal history record information only during normal working hours.

(b) Copies of records may be made by or at the request of a properly identified individual or the individual's authorized agent. If a machine for making copies is not reasonably available, the individual or the individual's agent may make handwritten copies. A charge may be made by the agency for the cost of supplying the copies. Each copy must be clearly marked to indicate that it is for inspection only.

(c) An agency employee should be available to answer questions concerning record content. A record of each request to inspect records under this section must be maintained.

History: En. Sec. 19, Ch. 525, L. 1979; amd. Sec. 3, Ch. 603, L. 1993.

Cross-References

Dissemination of public criminal justice information, 44-5-301.

Dissemination of criminal history records, 44-5-302.

Dissemination of confidential criminal justice information, 44-5-303.

Dissemination of copied or inspected records, 44-5-305.

44-5-215. Challenge and correction. (1) After inspection of criminal history record information, an individual may contest the accuracy or completeness, or both, of the information about himself.

(2) If the agency maintaining the criminal history record information does not correct it to the individual's satisfaction, the individual may request review and correction by the executive head of the agency.

(3) If the requested correction is denied by the head of the agency, the individual may present a challenge to the department of justice.

(4) If the agency in charge of the record in question can verify the accuracy of its record by communication with the originating criminal justice agency, it

shall do so. If accuracy or completeness cannot be verified and the agency primarily originating the information containing the alleged error or omission is in the state, the individual shall address his challenge to that agency. If information necessary to verify the accuracy or completeness of the record cannot be obtained by the originating agency, it may rely on verified written documents or include the individual's allegation in its records in dissemination until there is a final disposition of the challenge.

(5) If the challenge is successful, the agency shall:

(a) supply to the individual, if requested, a list of those noncriminal justice agencies which have received copies of the criminal history record information about the individual; and

(b) immediately correct its records and notify all criminal justice agencies to which it has given erroneous or incomplete information of these changes.

History: En. Sec. 20, Ch. 525, L. 1979.

Cross-References

Torts by governmental entities generally, Title 2, ch. 9, parts 1 and 3.

Record preservation, 44-5-212.

Part 3
Dissemination

44-5-301. Dissemination of public criminal justice information. (1) There are no restrictions on the dissemination of public criminal justice information.

(2) All public criminal justice information is available from the department or the agency that is the source of the original documents and that is authorized to maintain the documents according to applicable law. These documents must be open, subject to the restrictions in this section, during the normal business hours of the agency. A reasonable charge may be made by a criminal justice agency for providing a copy of public criminal justice information.

History: En. Sec. 10, Ch. 525, L. 1979; amd. Sec. 12, Ch. 416, L. 1999.

Compiler's Comments

1999 Amendment: Chapter 416 deleted former (1)(a) and (1)(b) that read: "except for the following:

(a) Whenever a record or index is compiled by name or universal identifier from a manual or automated system, only information about convictions, deferred prosecutions, or deferred sentences is available to the public.

(b) Whenever the conviction record reflects only misdemeanors or deferred prosecutions and whenever there are no convictions except for traffic, regulatory, or fish and game offenses for a period of 5 years from the date of the last conviction, no record or index may be disseminated pursuant to subsection (1)(a). However, the original documents are available to the public from the originating criminal justice agency"; in first sentence in (2) inserted "the department or"; and made minor changes in style. Amendment effective October 1, 1999.

Cross-References

Registration of sexual and violent offenders, Title 46, ch. 23, part 5.

44-5-302. Dissemination of criminal history record information that is not public criminal justice information. (1) Criminal history record information may not be disseminated to agencies other than criminal justice agencies unless:

(a) the information is disseminated with the consent or at the request of the individual about whom it relates according to procedures specified in 44-5-214 and 44-5-215;

(b) a district court considers dissemination necessary;

(c) the information is disseminated in compliance with 44-5-304; or

(d) the agency receiving the information is authorized by law to receive it.

(2) The department of justice and other criminal justice agencies may accept fingerprints of applicants for admission to the state bar of Montana and shall, with respect to a bar admission applicant whose fingerprints are given to the department or agency by the state bar, exchange available state, multistate, local, federal (to the extent allowed by federal law), and other criminal history record information with the state bar for licensing purposes.

History: En. Sec. 11, Ch. 525, L. 1979; amd. Sec. 1, Ch. 15, L. 1989.

44-5-303. Dissemination of confidential criminal justice information. (1) Except as provided in subsections (2) through (4), dissemination of confidential criminal justice information is restricted to criminal justice agencies, to those authorized by law to receive it, and to those authorized to receive it by a district court upon a written finding that the demands of individual privacy do not clearly exceed the merits of public disclosure.

(2) If the prosecutor determines that dissemination of confidential criminal justice information would not jeopardize a pending investigation or other criminal proceeding, the information may be disseminated to a victim of the offense by the prosecutor or by the investigating law enforcement agency after consultation with the prosecutor.

(3) Unless otherwise ordered by a court, a person or criminal justice agency that accepts confidential criminal justice information assumes equal responsibility for the security of the information with the originating agency. Whenever confidential criminal justice information is disseminated, it must be designated as confidential.

(4) The county attorney or the county attorney's designee is authorized to receive confidential criminal justice information for the purpose of cooperating with local fetal, infant, and child mortality review teams. The county attorney or the county attorney's designee may, in that person's discretion, disclose information determined necessary to the goals of the review team. The review team and the county attorney or the designee shall maintain the confidentiality of the information.

History: En. Sec. 12, Ch. 525, L. 1979; amd. Sec. 3, Ch. 804, L. 1991; amd. Sec. 2, Ch. 125, L. 1995; amd. Sec. 7, Ch. 519, L. 1997.

Cross-References

Inspection or transfer of criminal history records, 44-5-214.

44-5-304. Development of statistical information — agreements as to access. (1) An individual or agency with the express purpose of developing statistical information may have access to criminal history record information pursuant to an agreement with a criminal justice agency. The agreement shall contain, but need not be limited to, the following provisions:

(a) specific authorization for access to specific information;

(b) a limitation on the use of the information to research, evaluative, or statistical purposes;

(c) assurance of the confidentiality and security of the information; and

(d) sanctions for violations of the agreement or this section.

(2) Proposed agreements and any completed research, statistical, or evaluative study or product developed from the use of statistical information is subject to review and approval by the department of justice to ensure compliance with this chapter.

History: En. Sec. 13, Ch. 525, L. 1979.

44-5-305. Dissemination of copied or inspected records. (1) Criminal justice agencies shall maintain a record of all agencies and individuals to which or whom copies of criminal history record information have been disseminated.

(2) A criminal justice agency supplying criminal history record information to an individual upon request is not responsible for the use or secondary dissemination of copied or inspected information and is not required to furnish updated information except upon a subsequent request by the individual.

History: En. Sec. 21, Ch. 525, L. 1979.

44-5-306 through 44-5-310 reserved.

44-5-311. Nondisclosure of information about victim. (1) If a victim of an offense requests confidentiality, a criminal justice agency may not disseminate, except to another criminal justice agency, the address, telephone number, or place of employment of the victim or a member of the victim's family unless disclosure is of the location of the crime scene, is required by law, is necessary for law enforcement purposes, or is authorized by a district court upon a showing of good cause.

(2) The court may not compel a victim or a member of the victim's family who testifies in a criminal justice proceeding to disclose on the record in open court a residence address or place of employment unless the court determines that disclosure of the information is necessary.

(3) A criminal justice agency may not disseminate to the public any information directly or indirectly identifying the victim of an offense committed under 45-5-502, 45-5-503, 45-5-504, or 45-5-507 unless disclosure is of the location of the crime scene, is required by law, is necessary for law enforcement purposes, or is authorized by a district court upon a showing of good cause.

History: En. Sec. 3, Ch. 125, L. 1995.

Part 4

System Security

Part Cross-References

Right to know and right of privacy, Art. II, sec. 9 and 10, Mont. Const.

Public records, Title 2, ch. 6.

44-5-401. Criminal justice information system security. Provisions for the recording, preservation, dissemination, and management of court records are made by statute and may be supplemented by supreme court rule. Any other criminal justice agency shall protect the security of any criminal justice information system, automated or manual, under its control by taking reasonable precautions and establishing procedures to protect the system and data stored in the system from damage and for the prevention of and recovery from hazards such as fire, flood, power failure, and entry into secure areas by unauthorized persons.

History: **En. Sec. 14, Ch. 525, L. 1979.**

44-5-402. Automated equipment. In an automated criminal justice information system, information shall be collected, processed, and preserved on a computer dedicated solely to criminal justice information, except that, if this is impractical, a central computer may be used if adequate safeguards are built into the criminal justice information system to prevent unauthorized inquiry, modification, or destruction of criminal justice information in conformity with the current federal regulations in 28 CFR section 20.21(f) or any amendment thereto.

History: **En. Sec. 15, Ch. 525, L. 1979.**

44-5-403. Computer programming. Procedures for each automated criminal justice information system shall assure that the information is secured by the following programming techniques and security procedures:

(1) the assignment of a terminal identification code to each terminal authorized to access the criminal justice information system;

(2) the assignment of a unique identification number to each authorized terminal operator, which number must be used to gain access to the files;

(3) the maintenance of a record of each inquiry to identify the inquiring agency, the program used to make the inquiry, the date of the inquiry, and the name of the file being queried;

(4) computer programming controls to ensure that each terminal user can obtain only that information which the user is authorized to use;

(5) creation and use of a safe place for storage of duplicate computer files;

(6) built-in program controls to ensure that each terminal is limited to the appropriate or authorized information that can be input, modified, or canceled from it;

(7) destruction or safeguarding of system documentation and data input forms; and

(8) creation of reports to provide for an audit trail and periodic review of file accessed, modifications, and deletions. All criminal justice intelligence information shall be identified as such.

History: **En. Sec. 16, Ch. 525, L. 1979.**

44-5-404. Manual equipment. In a manual criminal justice information system, information shall be protected as follows:

(1) provision of adequate physical security;

(2) marking of all criminal justice intelligence information and precautions against unauthorized copying; and

(3) establishment of a log of each external inquiry to reflect the identity of the inquirer, the date of inquiry, and the name of the files being queried.

History: **En. Sec. 17, Ch. 525, L. 1979.**

44-5-405. Personnel. Each automated or manual criminal justice information system, except those that are or may be maintained by courts of criminal jurisdiction, shall establish the following procedures to ensure that personnel security is achieved and maintained:

(1) Applicants for employment and persons presently employed to work with or in a computer center or manual system that processes criminal justice information are subject to investigation by the employing agency to establish their honesty and fitness to handle sensitive information. Consent to such an investigation may be a prerequisite to the processing of an employment application.

(2) The character and fitness of criminal justice information system personnel to handle sensitive information, including personnel working with manual criminal justice file systems and terminal operators as well as personnel working with the system at a central computer, shall be reviewed by the employing agency periodically. Serious violations or deficiencies under this section are grounds for dismissal.

(3) Each criminal justice agency shall develop and maintain an inservice training program and security manual to ensure that each employee who works with or has access to the criminal justice information system annually reviews and understands the nature and importance of the system's security provisions.

(4) With regard to automated systems, the criminal justice agency shall screen and may reject for employment and initiate or cause to be initiated administrative action relating to employees having direct access to criminal history record information as required by federal regulations in 28 CFR section 20.21(f) or any amendment thereto.

History: En. Sec. 18, Ch. 525, L. 1979.

Cross-References

Code of ethics, Title 2, ch. 2, part 1.

Official misconduct, 45-7-401.

Part 5

Criminal Intelligence Information Section

Part Cross-References

Right to know, Art. II, sec. 9, Mont. Const.

Right of privacy, Art. II, sec. 10, Mont. Const.

General duties of Attorney General, 2-15-501.

44-5-501. Creation of criminal intelligence information section — advisory council. (1) The department of justice may create a criminal intelligence information section.

(2) (a) If a section is created under subsection (1), the attorney general shall establish a criminal intelligence information advisory council in accordance with 2-15-122, consisting of one representative from the Montana chiefs of police association, one representative from the Montana sheriffs and peace officers association, one representative from the Montana county attorneys association, one member of the department of justice, a member of the judiciary committee of either the house of representatives or the senate, and a citizen at large.

(b) The representatives from the Montana chiefs of police association and the Montana sheriffs and peace officers association must be sworn officers of a participating agency.

(c) The department of justice member may not be an employee of the department involved in criminal intelligence or criminal investigation work.

(d) Members of the advisory council serve at the pleasure of the attorney general.

(e) The department shall provide staff and support services for the advisory council.

History: En. Sec. 1, Ch. 145, L. 1985; amd. Sec. 13, Ch. 503, L. 1985.

44-5-502. Definitions. In this part the following definitions apply:

(1) "Advisory council" means the criminal intelligence information advisory council provided for in 44-5-501.

(2) "Section" means the criminal intelligence information section provided for in 44-5-501.

History: En. Sec. 2, Ch. 145, L. 1985.

44-5-503. Duties of section. The section may not initiate investigations to gather criminal intelligence information, but subject to standards and procedures provided by this part and to other limitations imposed by law, the section shall:

(1) establish and maintain liaison with participating law enforcement agencies to foster a meaningful exchange of criminal intelligence information;

(2) develop and maintain a system for collecting, reviewing, storing, referencing, indexing, and disseminating criminal intelligence information;

(3) receive and collect information from participating law enforcement agencies;

(4) develop an analytical capability to provide useful strategic and tactical intelligence reports;

(5) maintain the integrity and security of all information collected by the section; and

(6) develop methods of evaluating the effectiveness of the section in accomplishing its goals and in safeguarding the privacy of all individuals about whom the section has information.

History: En. Sec. 3, Ch. 145, L. 1985.

Cross-References

Teletypewriter communications system, Title 44, ch. 2, part 3.

Criminal justice information — collection and processing, Title 44, ch. 5, part 2.

44-5-504. Section standards and procedures. The attorney general, in conjunction with the department of justice and after considering recommendations of the advisory council, shall adopt standards and procedures for the operation of the section. The standards and procedures must ensure compliance with this part by the section and must include safeguards of individual privacy rights as provided in this chapter.

History: En. Sec. 8, Ch. 145, L. 1985; amd. Sec. 13, Ch. 503, L. 1985.

Cross-References

Montana Administrative Procedure Act — adoption and publication of rules, Title 2, ch. 4, parts 1 through 5.

44-5-505. Section supervisor and personnel. (1) The attorney general shall designate a section supervisor.

(2) The department of justice may employ necessary personnel for the efficient and secure operation of the section, subject to approval of the personnel by the attorney general.

History: En. Sec. 4, Ch. 145, L. 1985; amd. Sec. 13, Ch. 503, L. 1985.

44-5-506. Participating agencies. (1) Agencies eligible for participation in the section are:

(a) municipal police departments;

(b) sheriff's departments; and

(c) sections of the department of justice engaged in criminal investigation.

(2) A participant in the section must be an eligible agency that has been authorized by the attorney general to receive criminal intelligence information from the section under this part.

History: En. Sec. 6, Ch. 145, L. 1985; amd. Sec. 13, Ch. 503, L. 1985.

Cross-References

Sheriff's Department, Title 7, ch. 32, part 21.

Municipal police force, Title 7, ch. 32, part 41.

Criminal investigation, Title 44, ch. 2, part 1.

44-5-507 through 44-5-510 reserved.

44-5-511. Functions of advisory council. The advisory council shall:

(1) recommend general policies for the operation of the section;

(2) recommend the approval or denial of an application from an eligible agency for participation in the section;

(3) recommend the suspension of a participant agency for due cause; and

(4) recommend, if appropriate, the reinstatement of a suspended participant agency.

History: En. Sec. 5, Ch. 145, L. 1985.

Cross-References

Creation of advisory councils, 2-15-122.

44-5-512 through 44-5-514 reserved.

44-5-515. Protection of individual privacy. The advisory council shall review and evaluate the implementation of the section's safeguards of individual privacy rights adopted pursuant to 44-5-504 and periodically inspect all records relating to dissemination of information to determine whether they are in compliance with this part and with the standards and procedures adopted by the section. The advisory council shall make an annual report to the attorney general.

History: En. Sec. 7, Ch. 145, L. 1985.

Cross-References

Right of privacy, Art. II, sec. 10, Mont. Const.

Part 6

National Crime Prevention and Privacy Compact

Part Compiler's Comments

Effective Date: This part is effective October 1, 1999.

44-5-601. Compact adopted — text. The National Crime Prevention and Privacy Compact is enacted into law and entered into with all jurisdictions legally joining in the compact in the form substantially as set forth in this section.

Article I. Definitions

As used in this compact, the following definitions apply:

(1) "Attorney general" means the attorney general of the United States.

(2) "Compact officer" means:

(a) with respect to the federal government, an official so designated by the director of the FBI; and

(b) with respect to a party state, the chief administrator of the state's criminal history record repository or a designee of the chief administrator who is a regular full-time employee of the repository.

(3) "Council" means the compact council established under Article VI.

(4) "Criminal history record repository" means the state agency designated by the governor or other appropriate executive official or the legislature of a state to perform centralized recordkeeping functions for criminal history records and services in the state.

(5) (a) "Criminal history records" means information collected by criminal justice agencies on individuals consisting of identifiable descriptions and notations of arrests, detentions, indictments, or other formal criminal charges and any disposition arising therefrom, including acquittal, sentencing, correctional supervision, or release.

(b) The term does not include identification information such as fingerprint records if the information does not indicate involvement of the individual with the criminal justice system.

(6) "Criminal justice" includes activities relating to the detection, apprehension, detention, pretrial release, posttrial release, prosecution, adjudication, correctional supervision, or rehabilitation of accused persons or criminal offenders. The administration of criminal justice includes criminal identification activities and the collection, storage, and dissemination of criminal history records.

(7) (a) "Criminal justice agency" means:

(i) courts; and

(ii) a governmental agency or any subunit of an agency that performs the administration of criminal justice pursuant to a statute or executive order and allocates a substantial part of its annual budget to the administration of criminal justice.

(b) The term includes federal and state inspector general offices.

(8) "Criminal justice services" means services provided by the FBI to criminal justice agencies in response to a request for information about a particular individual or as an update to information previously provided for criminal justice purposes.

(9) "Direct access" means access to the national identification index by computer terminal or other automated means not requiring the assistance of or intervention by any other party or agency.

(10) "Executive order" means an order of the president of the United States or the chief executive officer of a state that has the force of law and that is promulgated in accordance with applicable law.

(11) "FBI" means the federal bureau of investigation.

(12) (a) "III system" means the interstate identification index system, which is the cooperative federal-state system for the exchange of criminal history records.

(b) The term includes the national identification index, the national fingerprint file, and to the extent of their participation in the system, the criminal history record repositories of the states and the FBI.

(13) "National fingerprint file" means a database of fingerprints or of other uniquely personal identifying information that relates to an arrested or charged individual and that is maintained by the FBI to provide positive identification of record subjects indexed in the III system.

(14) "National identification index" means an index maintained by the FBI consisting of names, identifying numbers, and other descriptive information relating to record subjects about whom there are criminal history records in the III system.

(15) "National indices" means the national identification index and the national fingerprint file.

(16) "Noncriminal justice purposes" means uses of criminal history records for purposes authorized by federal or state law other than purposes relating to criminal justice activities, including employment suitability, licensing determinations, immigration and naturalization matters, and national security clearances.

(17) "Nonparty state" means a state that has not ratified this compact.

(18) "Party state" means a state that has ratified this compact.

(19) "Positive identification" means a determination, based upon a comparison of fingerprints or other equally reliable biometric identification techniques, that the subject of a record search is the same person as the subject of a criminal history record or records indexed in the III system. Identifications based solely upon a comparison of subjects' names or other nonunique identification characteristics or numbers, or combinations thereof, does not constitute positive identification.

(20) "Sealed record information" means:

(a) with respect to adults, that portion of a record that is:

(i) not available for criminal justice uses;

(ii) not supported by fingerprints or other accepted means of positive identification; or

(iii) subject to restrictions on dissemination for noncriminal justice purposes pursuant to a court order related to a particular subject or pursuant to a federal or state statute that requires action on a sealing petition filed by a particular record subject; and

(b) with respect to juveniles, whatever each state determines is a sealed record under its own law and procedure.

(21) "State" means any state, territory, or possession of the United States, the District of Columbia, and the Commonwealth of Puerto Rico.

Article II. Purposes

The purposes of this compact are to:

(1) provide a legal framework for the establishment of a cooperative federal-state system for the interstate and federal-state exchange of criminal history records for noncriminal justice uses;

(2) require the FBI to permit use of the national identification index and the national fingerprint file by each party state and to provide, in a timely fashion, federal and state criminal history records to requesting states, in accordance with the terms of this compact and with rules, procedures, and standards established by the council under Article VI;

(3) require party states to provide information and records for the national identification index and the national fingerprint file and to provide criminal history records, in a timely fashion, to criminal history record repositories of other states and the federal government for noncriminal justice purposes, in accordance with the terms of this compact and with rules, procedures, and standards established by the council under Article VI;

(4) provide for the establishment of a council to monitor III system operations and to prescribe system rules and procedures for the effective and proper operation of the III system for noncriminal justice purposes; and

(5) require the FBI and each party state to adhere to III system standards concerning record dissemination and use, response times, system security, data quality, and other duly established standards, including those that enhance the accuracy and privacy of such records.

Article III. Responsibilities of Compact Parties

(1) The director of the FBI shall:

(a) appoint an FBI compact officer who shall:

(i) administer this compact within the department of justice and among federal agencies and other agencies and organizations that submit search requests to the FBI pursuant to Article V(3);

(ii) ensure that compact provisions and rules, procedures, and standards prescribed by the council under Article VI are complied with by the department of justice and the federal agencies and other agencies and organizations referred to in subsection (1)(a)(i) of this Article III; and

(iii) regulate the use of records received by means of the III system from party states when such records are supplied by the FBI directly to other federal agencies;

(b) provide to federal agencies and to state criminal history record repositories criminal history records maintained in its database for the noncriminal justice purposes described in Article IV, including:

(i) information from nonparty states; and

(ii) information from party states that is available from the FBI through the III system, but is not available from the party state through the III system;

(c) provide a telecommunications network and maintain centralized facilities for the exchange of criminal history records for both criminal justice purposes and the noncriminal justice purposes described in Article IV and ensure that the exchange of the records for criminal justice purposes has priority over exchange for noncriminal justice purposes; and

(d) modify or enter into user agreements with nonparty state criminal history record repositories to require them to establish record request procedures conforming to those prescribed in Article V.

(2) Each party state shall:

(a) appoint a compact officer who shall:

(i) administer this compact within that state;

(ii) ensure that compact provisions and rules, procedures, and standards established by the council under Article VI are complied with in the state; and

(iii) regulate the in-state use of records received by means of the III system from the FBI or from other party states;

(b) establish and maintain a criminal history record repository, which shall provide:

(i) information and records for the national identification index and the national fingerprint file; and

(ii) the state's III system-indexed criminal history records for noncriminal justice purposes described in Article IV;

(c) participate in the national fingerprint file; and

(d) provide and maintain telecommunications links and related equipment necessary to support the criminal justice services set forth in this compact.

(3) In carrying out their responsibilities under this compact, the FBI and each party state shall comply with III system rules, procedures, and standards duly established by the council concerning record dissemination and use, response times, data quality, system security, accuracy, privacy protection, and other aspects of III system operation.

(4) (a) Use of the III system for noncriminal justice purposes authorized in this compact must be managed so as not to diminish the level of services provided in support of criminal justice purposes.

(b) Administration of compact provisions may not reduce the level of service available to authorized noncriminal justice users on the effective date of this compact.

Article IV. Authorized Record Disclosures

(1) To the extent authorized by section 552a of Title 5, United States Code (commonly known as the Privacy Act of 1974), the FBI shall provide on request criminal history records, excluding sealed record information, to state criminal history record repositories for noncriminal justice purposes allowed by federal statute, federal executive order, or a state statute that has been approved by the attorney general to ensure that the state statute explicitly authorizes national indices checks.

(2) The FBI, to the extent authorized by section 552a of Title 5, United States Code (commonly known as the Privacy Act of 1974), and state criminal history record repositories shall provide criminal history records, excluding sealed record information, to criminal justice agencies and other governmental or nongovernmental agencies for noncriminal justice purposes allowed by federal statute, federal executive order, or a state statute that has been approved by the attorney general to ensure that the state statute explicitly authorizes national indices checks.

(3) Any record obtained under this compact may be used only for the official purposes for which the record was requested. Each compact officer shall establish procedures, consistent with this compact and with rules, procedures, and standards established by the council under Article VI, which procedures shall protect the accuracy and privacy of the records and shall:

(a) ensure that records obtained under this compact are used only by authorized officials for authorized purposes;

(b) require that subsequent record checks are requested to obtain current information whenever a new need arises; and

(c) ensure that record entries that may not legally be used for a particular noncriminal justice purpose are deleted from the response and, if no information authorized for release remains, an appropriate "no record" response is communicated to the requesting official.

Article V. Record Request Procedures

(1) Subject fingerprints or other approved forms of positive identification must be submitted with all requests for criminal history record checks for noncriminal justice purposes.

(2) Each request for a criminal history record check utilizing the national indices made under any approved state statute must be submitted through that state's criminal history record repository. A state criminal history record repository shall process an interstate request for noncriminal justice purposes through the national indices only if the request is transmitted through another state criminal history record repository or the FBI.

(3) Each request for criminal history record checks utilizing the national indices made under federal authority must be submitted through the FBI or, if the state criminal history record repository consents to process fingerprint submissions, through the criminal history record repository in the state in which the request originated. Direct access to the national identification index by entities other than the FBI and state criminal history records repositories may not be permitted for noncriminal justice purposes.

(4) A state criminal history record repository or the FBI:

(a) may charge a fee, in accordance with applicable law, for handling a request involving fingerprint processing for noncriminal justice purposes; and

(b) may not charge a fee for providing criminal history records in response to an electronic request for a record that does not involve a request to process fingerprints.

(5) (a) If a state criminal history record repository cannot positively identify the subject of a record request made for noncriminal justice purposes, the request, together with fingerprints or other approved identifying information, must be forwarded to the FBI for a search of the national indices.

(b) If, with respect to a request forwarded by a state criminal history record repository under subsection (5)(a), the FBI positively identifies the subject as having a III system-indexed record or records:

(i) the FBI shall so advise the state criminal history record repository; and

(ii) the state criminal history record repository is entitled to obtain the additional criminal history record information from the FBI or other state criminal history record repositories.

Article VI. Establishment Of Compact Council

(1) (a) There is established a council to be known as the compact council, which has the authority to promulgate rules and procedures governing the use of the III system for noncriminal justice purposes, not to conflict with FBI administration of the III system for criminal justice purposes.

(b) The council shall:

(i) continue in existence as long as this compact remains in effect;

(ii) be located, for administrative purposes, within the FBI; and

(iii) be organized and hold its first meeting as soon as practicable after the effective date of this compact.

(2) The council must be composed of 15 members, each of whom must be appointed by the attorney general, as follows:

(a) nine members, each of whom shall serve a 2-year term, who must be selected from among the compact officers of party states based on the recommendation of the compact officers of all party states, except that in the absence of the requisite number of compact officers available to serve, the chief administrators of the criminal history record repositories of nonparty states must be eligible to serve on an interim basis;

(b) two at-large members, nominated by the director of the FBI, each of whom shall serve a 3-year term, of whom:

(i) one must be a representative of the criminal justice agencies of the federal government and may not be an employee of the FBI; and

(ii) one must be a representative of the noncriminal justice agencies of the federal government;

(c) two at-large members, nominated by the chairman of the council once the chairman is elected pursuant to subsection (3) of this Article VI, each of whom shall serve a 3-year term, of whom:

(i) one must be a representative of state or local criminal justice agencies; and

(ii) one must be a representative of state or local noncriminal justice agencies;

(d) one member who shall serve a 3-year term and who shall simultaneously be a member of the FBI's advisory policy board on criminal justice information services, nominated by the membership of that policy board;

(e) one member, nominated by the director of the FBI, who shall serve a 3-year term and who must be an employee of the FBI.

(3) (a) From its membership, the council shall elect a chairman and a vice chairman of the council. Both the chairman and vice chairman of the council:

(i) must be a compact officer, unless there is no compact officer on the council who is willing to serve, in which case the chairman may be an at-large member; and

(ii) shall serve 2-year terms and may be reelected to only one additional 2-year term.

(b) The vice chairman of the council shall serve as the chairman of the council in the absence of the chairman.

(4) (a) The council shall meet at least once each year at the call of the chairman. Each meeting of the council must be open to the public. The council shall provide prior public notice in the federal register of each meeting of the council, including the matters to be addressed at the meeting.

(b) A majority of the council or any committee of the council shall constitute a quorum of the council or of a committee, respectively, for the conduct of business. A lesser number may meet to hold hearings, take testimony, or conduct any business not requiring a vote.

(5) The council shall make available for public inspection and copying at the council office within the FBI and shall publish in the federal register any rules, procedures, or standards established by the council.

(6) The council may request from the FBI reports, studies, statistics, or other information or materials that the council determines to be necessary to enable the council to perform its duties under this compact. The FBI, to the extent authorized by law, may provide assistance or information upon a request.

(7) The chairman may establish committees as necessary to carry out this compact and may prescribe their membership, responsibilities, and duration.

Article VII. Ratification of Compact

This compact takes effect upon being entered into by two or more states as between those states and the federal government. When additional states subsequently enter into this compact, it becomes effective among those states and the federal government and each party state that has previously ratified it. When ratified, this compact has the full force and effect of law within the ratifying jurisdictions. The form of ratification must be in accordance with the laws of the executing state.

Article VIII. Miscellaneous Provisions

(1) Administration of this compact may not interfere with the management and control of the director of the FBI over the FBI's collection and dissemination of criminal history records and the advisory function of the FBI's advisory policy board chartered under the Federal Advisory Committee Act (5 U.S.C. App.) for all purposes other than noncriminal justice.

(2) Nothing in this compact may require the FBI to obligate or expend funds beyond those appropriated to the FBI.

(3) Nothing in this compact may diminish or lessen the obligations, responsibilities, and authorities of any state, whether a party state or a nonparty state, or of any criminal history record repository or other subdivision or component thereof, under the Departments of State, Justice, and Commerce, the Judiciary, and Related Agencies Appropriation Act, 1973 (Public Law 92-544), or regulations and guidelines promulgated thereunder, including the rules and procedures promulgated by the council under Article VI(1), regarding the use and dissemination of criminal history records and information.

Article IX. Renunciation

(1) This compact shall bind each party state until renounced by the party state.

(2) Any renunciation of this compact by a party state must:

(a) be effected in the same manner by which the party state ratified this compact; and

(b) become effective 180 days after written notice of renunciation is provided by the party state to each other party state and to the federal government.

Article X. Severability

The provisions of this compact must be severable. If any phrase, clause, sentence, or provision of this compact is declared to be contrary to the constitution of any participating state or to the Constitution of the United States or if the applicability of any phrase, clause, sentence, or provision of this compact to any government, agency, person, or circumstance is held invalid, the validity of the remainder of this compact and the applicability of the remainder of the compact to any government, agency, person, or circumstance may not be affected by the severability. If a portion of this compact is held contrary to the constitution of any party state, all other portions of this compact must remain in full force and effect as to the remaining party states and in full force and effect as to the party state affected, as to all other provisions.

Article XI. Adjudication of Disputes

(1) The council:

(a) has initial authority to make determinations with respect to any dispute regarding:

(i) interpretation of this compact;

(ii) any rule or standard established by the council pursuant to Article VI; and

(iii) any dispute or controversy between any parties to this compact; and

(b) shall hold a hearing concerning any dispute described in subsection (1)(a) at a regularly scheduled meeting of the council and only render a decision based upon a majority vote of the members of the council. The decision must be published pursuant to the requirements of Article VI(5).

(2) The FBI shall exercise immediate and necessary action to preserve the integrity of the III system, to maintain system policy and standards, to protect the accuracy and privacy of records, and to prevent abuses until the council holds a hearing on the matters.

(3) The FBI or a party state may appeal any decision of the council to the attorney general and after that appeal may file suit in the appropriate district court of the United States that has original jurisdiction of all cases or controversies arising under this compact. Any suit arising under this compact and initiated in a state court must be removed to the appropriate district court of the United States in the manner provided by section 1446 of Title 28, United States Code, or other statutory authority.

History: En. Sec. 1, Ch. 220, L. 1999.

44-5-602. Appointment of compact officer. The attorney general shall appoint a compact officer for the purpose of complying with Article III (2)(a) of the National Crime Prevention and Privacy Compact.

History: En. Sec. 2, Ch. 220, L. 1999.

CHAPTER 6

DNA RECORDS

Part 1 — DNA Index

44-6-101. Definitions.
44-6-102. Establishment of DNA identification index.
44-6-103. Collection of samples and maintenance of data.
44-6-104 and 44-6-105 reserved.
44-6-106. Release of DNA records.
44-6-107. Expungement of DNA records.
44-6-108. Confidentiality of records of DNA testing.

44-6-109 reserved.
44-6-110. Rulemaking authority.

Part 1
DNA Index

44-6-101. Definitions. As used in this part, the following definitions apply:

(1) "Biological sample" means cheek cells removed by using a buccal swab of a type authorized by the department or a vial or other container of blood.

(2) "Department" means the department of justice provided for in 2-15-2001.

(3) "DNA" means deoxyribonucleic acid.

(4) "DNA identification index" means the DNA identification record system established under 44-6-102.

(5) "DNA record" means DNA identification information stored in the DNA identification index for purposes of establishing identification in connection with law enforcement investigations or supporting statistical interpretation of the results of DNA analysis. The DNA record is considered the objective form of the results of a DNA analysis, such as the numerical representation of DNA fragment lengths, autoradiographs and the digital image of autoradiographs, and discrete allele assignment numbers.

(6) "DNA testing" means DNA analysis of materials derived from the human body for the purposes of identification consistent with this part.

(7) "Forensic DNA laboratory" means any laboratory operated by state government that performs DNA analysis on materials derived from the human body for use as evidence in a criminal proceeding or for purposes of identification.

(8) "Marker" means a method of describing individuals by genetic profile, such as blood or DNA type, and has the specific meaning given to the word by department rule, which must take into account the meaning generally given to the word for forensic typing by DNA technologists.

(9) "Sexual offense" means the offenses contained in the definition of that term in 46-23-502.

(10) "Violent offense" has the meaning contained in 46-23-502.

History: En. Sec. 1, Ch. 251, L. 1995; amd. Sec. 2, Ch. 375, L. 1997; amd. Sec. 2, Ch. 147, L. 1999.

Compiler's Comments

1999 Amendment: Chapter 147 inserted definition of biological sample; and made minor changes in style. Amendment effective March 23, 1999.

44-6-102. Establishment of DNA identification index. (1) The department shall establish a computerized DNA identification index for the receipt, storage, and exchange of DNA records. The DNA identification index is the central repository for DNA records in the state of Montana.

(2) The DNA identification index must include:

(a) DNA records for an individual convicted of, or a youth found under 41-5-1502 to have committed, a sexual offense or violent offense;

(b) DNA records for a person upon order of a sentencing judge under 46-18-202; and

(c) analyses of DNA samples recovered from crime scenes, medical examinations, and unidentified human remains. For purposes of identification of missing persons, the DNA identification index may include DNA records of close biological relatives of a missing person.

(3) The DNA identification index and the DNA testing done by a forensic DNA laboratory must be compatible with the systems of DNA identification used by other criminal justice agencies or private testing laboratories to the extent necessary to permit the exchange of DNA information.

(4) The DNA records collected and stored in the DNA identification index may contain only information relating to the identification of individuals. Information that identifies a person that is the subject of a record must be limited to the information that is necessary to pursue criminal investigations and to support statistical interpretation of results.

(5) The DNA identification index may be used:

(a) by law enforcement agencies for purposes of identification in the course of criminal investigations and proceedings;

(b) to assist in the identification of human remains, including identification of missing persons; and

(c) if information allowing a person to be identified is removed, for a population statistics database and for identification, research, and protocol development for forensic DNA analysis and quality control.

History: En. Sec. 2, Ch. 251, L. 1995; amd. Sec. 3, Ch. 147, L. 1999.

Compiler's Comments

1999 Amendment: Chapter 147 in (2)(a) near middle inserted "or a youth found under 41-5-1502 to have committed"; inserted (2)(b) concerning order of sentencing judge under 46-18-202; and made minor changes in style. Amendment effective March 23, 1999.

Cross-References

Registration of sexual and violent offenders, Title 46, ch. 23, part 5.

44-6-103. Collection of samples and maintenance of data. (1) Following entry of judgment, a person convicted of a sexual offense or violent offense, a youth found under 41-5-1502 to have committed a sexual offense or violent offense, or a defendant ordered under 46-18-202 to provide a biological sample for DNA testing shall provide a biological sample for DNA analysis to determine identification characteristics specific to the person. The sample must be provided to the department of corrections if the person is incarcerated in a facility administered by the department of corrections. If the person is not incarcerated in a facility administered by the department of corrections, the sample must be provided to a person or entity designated by the county sheriff.

(2) The biological sample must be collected, stored, and sent by the department of corrections or the person or entity designated by the county sheriff under subsection (1) to the department for entry in the DNA identification index in accordance with rules adopted by the department with the advice of the department of public health and human services.

(3) The forensic DNA laboratory may perform DNA analysis only for those markers that have value for law enforcement identification purposes.

(4) The knowing refusal or failure to provide a biological sample under this part is grounds for revocation of a suspended or deferred imposition of sentence.

History: En. Sec. 3, Ch. 251, L. 1995; amd. Sec. 4, Ch. 147, L. 1999.

Compiler's Comments

1999 Amendment: Chapter 147 in (1) in first sentence after "violent offense" inserted "or a defendant ordered under 46-18-202 to provide a biological sample for DNA testing", after "provide" deleted "to a person or entity designated by the county attorney", and substituted "biological sample" for "sample of blood", inserted second sentence concerning sample provided to department of corrections, and inserted third sentence concerning sample provided to person or entity designated by sheriff; near beginning of (2) substituted "biological sample" for "blood sample", after "sent by the" inserted "department of corrections or the", and substituted "county sheriff" for "county attorney"; inserted (4) concerning refusal to provide biological sample; and made minor changes in style. Amendment effective March 23, 1999.

44-6-104 and 44-6-105 reserved.

44-6-106. Release of DNA records. (1) The DNA records contained in the DNA identification index may be released only for the following purposes:

(a) to federal, state, and local law enforcement agencies for law enforcement identification purposes;

(b) for criminal defense purposes, to a defendant for whom there is a DNA record, who is also entitled to samples and analyses held as part of the record;

(c) to assist in the identification of human remains, including missing persons; and

(d) if information allowing a person to be identified is removed, for a population statistics database and for identification, research, and protocol development for forensic DNA analysis and quality control.

(2) Requests for DNA records must be in writing, signed by the requesting party, and maintained on file in the DNA identification index in accordance with rules adopted by the department.

(3) A defendant in a criminal proceeding is entitled to information in the DNA identification index relating to the number of requests previously made for comparison searches relating to the defendant and the names of the requesting parties.

History: En. Sec. 4, Ch. 251, L. 1995.

44-6-107. Expungement of DNA records. If a conviction of a sexual or violent offense is reversed, the record relating to the offense must be expunged from the DNA identification index. The county attorney of the county in which the conviction occurred shall notify the department of a reversal of a conviction for a sexual or violent offense.

History: En. Sec. 5, Ch. 251, L. 1995.

44-6-108. Confidentiality of records of DNA testing. Except as provided in this part or unless the person that they relate to consents to their release, records, findings, and results of DNA testing are confidential criminal justice information subject to the dissemination provisions of Title 44, chapter 5.

History: En. Sec. 6, Ch. 251, L. 1995.

44-6-109 reserved.

44-6-110. Rulemaking authority. The department shall adopt rules for the handling, collection, transportation, sampling, and storage of blood samples and to further define the term "marker". The rules concerning the handling of blood samples must ensure protection of the health of persons who may come into contact with the samples.

History: En. Sec. 7, Ch. 251, L. 1995.

CHAPTERS 7 THROUGH 9

RESERVED

CHAPTER 10

LAW ENFORCEMENT ACADEMY

Part 1 — General Provisions

44-10-101. Short title.
44-10-102. Purpose.
44-10-103. Establishment of academy.

Part 2 — Government of Academy

44-10-201. Department of justice to govern academy.
44-10-202. Powers and duties of department.
44-10-203. Sessions to be determined annually.

Part 3 — Officers Who Attend Academy

44-10-301. Eligibility.
44-10-302. Retention of employment rights.
44-10-303. Expenditure of funds by local governments authorized.

Chapter Cross-References

Training in victim assistance, 46-24-102.

Part 1

General Provisions

44-10-101. Short title. This chapter may be cited as the "Montana Law Enforcement Academy Act".

History: En. Sec. 1, Ch. 7, L. 1959; R.C.M. 1947, 75-5201.

44-10-102. Purpose. The purpose of this chapter shall be to establish a Montana law enforcement academy to provide Montana law enforcement officers and other qualified individuals with a means of securing training in the field of law enforcement.

History: En. Sec. 2, Ch. 7, L. 1959; R.C.M. 1947, 75-5202; amd. Sec. 1, Ch. 40, L. 1989.

44-10-103. Establishment of academy. There is hereby established a Montana law enforcement academy.

History: En. Sec. 3, Ch. 7, L. 1959; amd. Sec. 1, Ch. 233, L. 1967; R.C.M. 1947, 75-5203(part); amd. Sec. 1, Ch. 431, L. 1985.

Part 2
Government of Academy

44-10-201. Department of justice to govern academy. The Montana law enforcement academy shall be governed by the department of justice.

History: En. Sec. 5, Ch. 7, L. 1959; amd. Sec. 1, Ch. 28, L. 1961; amd. Sec. 1, Ch. 88, L. 1969; R.C.M. 1947, 75-5205.

44-10-202. Powers and duties of department. The department of justice shall have the power and it shall be its duty to:

(1) establish qualifications for admission to the academy;

(2) select from among qualified applicants those officers and other individuals who are to attend the academy each year;

(3) determine the curriculum and methods of training for officers and other individuals attending the academy;

(4) select and hire staff as it considers necessary to implement this chapter;

(5) establish rules for the conduct of officers and other individuals enrolled at the academy;

(6) award appropriate certificates to officers and other individuals who successfully complete their training;

(7) provide for the keeping of permanent records of enrollment, attendance, and graduation and other records as the department considers necessary;

(8) make a yearly report in writing of the activities of the academy. Copies of this report shall be sent to the governor, attorney general, and secretary of state.

(9) do all other things necessary and desirable for the establishment and operation of the academy not inconsistent with this chapter or the constitution and statutes of the state of Montana;

(10) accept and expend grants from federal, state, county, and city governments or private persons, associations, or corporations.

History: En. Sec. 6, Ch. 7, L. 1959; amd. Sec. 2, Ch. 233, L. 1967; amd. Sec. 1, Ch. 331, L. 1971; R.C.M. 1947, 75-5206; amd. Sec. 2, Ch. 431, L. 1985; amd. Sec. 2, Ch. 40, L. 1989.

44-10-203. Sessions to be determined annually. The academy shall be in session for a period to be annually determined by the department of justice.

History: En. Sec. 3, Ch. 7, L. 1959; amd. Sec. 1, Ch. 233, L. 1967; R.C.M. 1947, 75-5203(part).

Part 3
Officers Who Attend Academy

44-10-301. Eligibility. All bona fide Montana law enforcement officers and other individuals who meet the qualifications established by the department of justice shall be eligible to apply for admission to the Montana law enforcement academy.

History: En. Sec. 4, Ch. 7, L. 1959; R.C.M. 1947, 75-5204; amd. Sec. 3, Ch. 40, L. 1989.

44-10-302. Retention of employment rights. All officers shall be paid their regular salary during their attendance at the academy, and time spent in such attendance shall not be deducted from the vacation to which any attending officer is entitled. No officer shall lose any pension, seniority, or other rights by reason of attendance at the academy.

History: **En. Sec. 7, Ch. 7, L. 1959; R.C.M. 1947, 75-5207.**

44-10-303. Expenditure of funds by local governments authorized. The expenditure of funds by any city, town, municipality, or county for the board, room, and travel expenses of the officers attending the academy shall be a lawful expenditure.

History: **En. Sec. 8, Ch. 7, L. 1959; amd. Sec. 3, Ch. 233, L. 1967; R.C.M. 1947, 75-5208.**

CHAPTER 11

MUTUAL ASSISTANCE
RIGHTS OF ASSISTING OFFICERS

Part 1 — General Provisions

44-11-101. Mutual assistance authorized — powers and duties of assisting officers.
44-11-102. Liability of assisted entity for obligation resulting from assistance.

Part 2 — Rights of Employment

44-11-201. Retention of rights of employment.
44-11-202. Employing entity to pay normal expenses of assisting officer — reimbursement.

Part 3 — Interstate Law Enforcement Mutual Aid Act

44-11-301. Short title.
44-11-302. Purpose.
44-11-303. Definitions.
44-11-304. Authorization to enter agreement — general content — authority of peace officer.
44-11-305. Detailed content of agreement.
44-11-306. Right of state in actions involving agreements.
44-11-307. Agreement not to relieve agency of duties.
44-11-308. Limitation of powers.
44-11-309. Submission of agreement to attorney general.
44-11-310. Filing of agreement.
44-11-311. Authorization to appropriate funds for purpose of agreement.
44-11-312. Effect of other law.

Part 1
General Provisions

44-11-101. Mutual assistance authorized — powers and duties of assisting officers. A peace officer or any law enforcement entity of any county or municipality or a state government law enforcement entity may request the assistance of a peace officer from another law enforcement entity within the state of Montana. A peace officer, while in the jurisdiction of the requesting officer or entity and while on such request for assistance, has the same powers, duties, rights, privileges, and immunities as a peace officer of the requesting entity and is under the authority of the requesting officer or entity.

History: **En. 11-1851 by Sec. 1, Ch. 337, L. 1977; R.C.M. 1947, 11-1851; amd. Sec. 1, Ch. 22, L. 1985.**

Cross-References

Technical assistance by County Attorney Training Coordinator to law enforcement official, 44-4-103.

44-11-102. Liability of assisted entity for obligation resulting from assistance. A law enforcement entity requesting assistance under 44-11-101 shall indemnify the assisting peace officer, his legal representative in case of death, or the furnishing law enforcement entity for any liability or obligation to indemnify created by 2-9-305 that may result from the assistance furnished.

History: En. 11-1854 by Sec. 4, Ch. 337, L. 1977; R.C.M. 1947, 11-1854.

Part 2
Rights of Employment

44-11-201. Retention of rights of employment. A peace officer rendering assistance under 44-11-101 is entitled to the same wage, salary, pension, workers' compensation, and all other service rights for such service as for service rendered within the law enforcement entity in which he is normally employed.

History: En. 11-1852 by Sec. 2, Ch. 337, L. 1977; R.C.M. 1947, 11-1852.

44-11-202. Employing entity to pay normal expenses of assisting officer — reimbursement. (1) The law enforcement entity employing a peace officer who renders assistance shall make all wage, pension, and disability payments and payments for damage to clothing and equipment due to the officer as a result of the rendering of assistance and shall pay any medical expense incurred by the officer in rendering assistance for which the officer is not otherwise entitled to reimbursement by operation of law or a contract. The employing entity shall also provide workers' compensation coverage for its employees while they are rendering assistance.

(2) If it so requests, the law enforcement entity must be reimbursed by the law enforcement entity that requested the services for all payments made for wages and damage to clothing and equipment and for any medical expense for which neither the employing entity nor the officer is otherwise entitled to reimbursement by operation of law or a contract.

History: En. 11-1853 by Sec. 3, Ch. 337, L. 1977; R.C.M. 1947, 11-1853; amd. Sec. 26, Ch. 7, L. 1979.

Part 3
Interstate Law Enforcement Mutual Aid Act

44-11-301. Short title. This part shall be known and may be cited as the "Interstate Law Enforcement Mutual Aid Act".

History: En. Sec. 1, Ch. 318, L. 1983.

44-11-302. Purpose. It is the purpose of this part to permit one or more law enforcement agencies of this state to enter into mutual aid agreements, on the basis of mutual advantage, with one or more law enforcement agencies of any other state or the United States in order to facilitate and coordinate efficient, cooperative enforcement efforts directed at mutual law enforcement problems transcending jurisdictional boundaries and to insure the prompt and effective delivery of law enforcement and emergency services in areas that, due to geographic remoteness, population sparsity, and economic and other factors are in need of an increased law enforcement presence.

History: **En. Sec. 2, Ch. 318, L. 1983.**

44-11-303. Definitions. When used in this part, unless the context requires otherwise, the following definitions apply:

(1) "Law enforcement agency" means a public agency lawfully established by statute or executive order that is responsible for the prevention and detection of crime and the enforcement of penal, traffic, regulatory, or game laws.

(2) "Law enforcement agency of this state" or "law enforcement agency of another (or any other) state" includes, respectively, a law enforcement agency of a political subdivision of this state and a law enforcement agency of a political subdivision of another state.

(3) "Mutual aid agreement" or "agreement" means an agreement between two or more law enforcement agencies, consistent with the purposes of this part.

(4) "Party law enforcement agency" means a law enforcement agency that is a party to a mutual aid agreement as set forth in this part.

(5) "Peace officer" has the meaning as defined in 46-1-202.

History: **En. Sec. 3, Ch. 318, L. 1983; amd. Sec. 256, Ch. 800, L. 1991.**

44-11-304. Authorization to enter agreement — general content — authority of peace officer. (1) Any one or more law enforcement agencies of this state may enter into a mutual aid agreement with any one or more law enforcement agencies of any other state or the United States to provide the law enforcement or emergency services that all of the parties are authorized by law to perform. If required by applicable law, the agreement must be authorized and approved by the governing body of each party to the agreement.

(2) The agreement must fully set forth the powers, rights, and obligations of the parties to the agreement.

(3) Subject to 44-11-308, a mutual aid agreement may grant a peace officer of any party law enforcement agency acting within the territorial jurisdiction of any other party law enforcement agency authority to act as if he were a duly appointed and qualified peace officer of the law enforcement agency he is assisting.

History: **En. Sec. 4, Ch. 318, L. 1983.**

44-11-305. Detailed content of agreement. The agreement authorized by 44-11-304 must specify the following:

(1) its duration;

(2) the precise organization, composition, and nature of any separate legal entity created thereby;

(3) the purpose of the agreement;

(4) the manner of financing the agreement and establishing and maintaining a budget therefor;

(5) the method to be employed in accomplishing the partial or complete termination of the agreement and for disposing of property upon such partial or complete termination;

(6) provision for administering the agreement, which may include creation of a joint board responsible for such administration;

(7) the manner of acquiring, holding, and disposing of real and personal property used in the agreement;

(8) the minimum standards for law enforcement personnel implementing the provisions of the agreement;

(9) the respective liability of each party to the agreement for the actions of law enforcement officers when acting under the provisions of the agreement;

(10) the minimum insurance required of each party to the agreement;

(11) the exact chain of command or delegation of authority to be followed by law enforcement officials acting under the provisions of the agreement;

(12) the precise enforcement authority that the peace officers of each party law enforcement agency may exercise; and

(13) any other necessary and proper matters.

History: En. Sec. 5, Ch. 318, L. 1983.

44-11-306. Right of state in actions involving agreements. In any case or controversy involving performance or interpretation of or liability under a mutual aid agreement entered into between one or more law enforcement agencies of political subdivisions of this state and one or more law enforcement agencies of another state or of the United States, the parties to the agreement are the real parties in interest. This state may maintain an action against any law enforcement agency whose default, failure, performance, or other conduct caused or contributed to any liability incurred by this state.

History: En. Sec. 6, Ch. 318, L. 1983.

44-11-307. Agreement not to relieve agency of duties. No agreement made under this part may relieve any law enforcement agency of this state of any duty imposed upon it by law. Timely performance of such a duty by a joint board or other legal or administrative entity created by a mutual aid agreement may be offered in satisfaction of the duty.

History: En. Sec. 7, Ch. 318, L. 1983.

44-11-308. Limitation of powers. Except for the right granted by this part to jointly exercise powers, this part does not authorize any law enforcement agency of this state to exercise any power that it is not otherwise authorized to exercise.

History: En. Sec. 8, Ch. 318, L. 1983.

44-11-309. Submission of agreement to attorney general. (1) As a condition precedent to an agreement becoming effective under this part, the agreement must be submitted to and receive the approval of the attorney general of Montana.

(2) The attorney general shall approve an agreement submitted to him under this part unless he finds that it is not in proper form, does not meet the requirements set forth in this part, or otherwise does not conform to the laws of Montana. If he disapproves an agreement, he shall provide a detailed, written statement to the governing bodies of the party law enforcement agencies.

(3) If the attorney general does not disapprove an agreement within 60 days after its submission to him, it is considered approved by him.

History: En. Sec. 9, Ch. 318, L. 1983.

44-11-310. Filing of agreement. Within 20 days after approval by the attorney general, an agreement made pursuant to this part must be filed in the office of:

(1) each clerk and recorder of each county of this state where the principal office of one of the parties to the agreement is located; and

(2) the secretary of state.

History: En. Sec. 10, Ch. 318, L. 1983.

44-11-311. Authorization to appropriate funds for purpose of agreement. Any law enforcement agency of this state may appropriate funds for and may sell, lease, or otherwise supply material to any entity created for the purpose of performance of an agreement and may provide such personnel or services therefor as are within its authority to furnish.

History: En. Sec. 11, Ch. 318, L. 1983.

44-11-312. Effect of other law. The procedures and remedies provided in this part apply to the exclusion of those remedies and procedures for interlocal agreements generally under Title 7, chapter 11, part 1.

History: En. Sec. 12, Ch. 318, L. 1983.

CHAPTER 12

SEIZURES RELATED TO CONTROLLED SUBSTANCES

Part 1 — General Provisions

44-12-101. Definition of controlled substance.
44-12-102. Things subject to forfeiture.
44-12-103. When property may be seized.
44-12-104. Summary forfeiture of certain controlled substances.

Part 2 — Procedure

44-12-201. Petition to institute forfeiture proceedings — summons — service.
44-12-202. Answer to allegations concerning use of property.
44-12-203. Presumption — procedure following answer or expiration of time for answering.
44-12-204. Proof required or permitted at hearing.
44-12-205. Disposition of property following hearing.
44-12-206. Disposition of proceeds of sale.

Chapter Cross-References

Seizure, forfeiture, and sale of alcoholic beverages, 16-6-106, 16-6-107.

Dangerous drugs, Title 45, ch. 9.

Search and seizure, Title 46, ch. 5.

Health and safety — controlled substances, Title 50, ch. 32.

Part 1
General Provisions

44-12-101. Definition of controlled substance. As used in this chapter, "controlled substance" means any substance designated as a dangerous drug pursuant to Title 50, chapter 32, parts 1 and 2.

History: En. Sec. 1, Ch. 529, L. 1979.

44-12-102. Things subject to forfeiture. (1) The following are subject to forfeiture:

(a) all controlled substances that have been manufactured, distributed, prepared, cultivated, compounded, processed, or possessed in violation of Title 45, chapter 9;

(b) all money, raw materials, products, and equipment of any kind that are used or intended for use in manufacturing, preparing, cultivating, compounding, processing, delivering, importing, or exporting any controlled substance in violation of Title 45, chapter 9, except items used or intended for use in connection with quantities of marijuana in amounts less than 60 grams;

(c) except as provided in subsection (2)(d), all property that is used or intended for use as a container for anything enumerated in subsection (1)(a) or (1)(b);

(d) except as provided in subsection (2), all conveyances, including aircraft, vehicles, and vessels, that are used or intended for use in any manner to facilitate the commission of a violation of Title 45, chapter 9;

(e) all books, records, and research products and materials, including formulas, microfilm, tapes, and data, that are used or intended for use in violation of Title 45, chapter 9;

(f) all drug paraphernalia as defined in 45-10-101;

(g) everything of value furnished or intended to be furnished in exchange for a controlled substance in violation of Title 45, chapter 9; all proceeds traceable to such an exchange; and all money, negotiable instruments, and securities used or intended to be used to facilitate a violation of Title 45, chapter 9;

(h) any personal property constituting or derived from proceeds obtained directly or indirectly from a violation of Title 45, chapter 9, that is punishable by more than 5 years in prison; and

(i) real property, including any right, title, and interest in any lot or tract of land and any appurtenances or improvements, that is directly used or intended to be used in any manner or part to commit or facilitate the commission of or that is derived from or maintained by the proceeds resulting from a violation of Title 45, chapter 9, that is punishable by more than 5 years in prison. An owner's interest in real property is not subject to forfeit by reason of any act or omission unless it is proved that the act or omission was the owner's or was with his actual knowledge or express consent.

(2) (a) A conveyance used by a person as a common carrier in the transaction of business as a common carrier is not subject to forfeiture under this section unless it appears that the owner or other person in charge of the conveyance is a consenting party or privy to a violation of Title 45, chapter 9.

(b) A conveyance is not subject to forfeiture under this section because of any act or omission established by the owner of the conveyance to have been committed or omitted without his knowledge or consent.

(c) A forfeiture of a conveyance encumbered by a bona fide security interest is subject to the interest of the secured party if he neither had knowledge of nor consented to any violation of Title 45, chapter 9.

(d) No conveyance or container is subject to forfeiture under this section if it was used or intended for use in transporting less than 60 grams of marijuana.

History: **En. Sec. 2, Ch. 529, L. 1979; amd. Sec. 8, Ch. 481, L. 1981; amd. Sec. 1, Ch. 180, L. 1983; amd. Sec. 1, Ch. 476, L. 1987; amd. Sec. 1, Ch. 652, L. 1989.**

44-12-103. When property may be seized. (1) A peace officer who has probable cause to make an arrest for a violation of Title 45, chapter 9, probable cause to believe that a conveyance has been used or is intended to be used to unlawfully transport a controlled substance, or probable cause to believe that a conveyance has been used to keep, deposit, or conceal a controlled substance shall seize the conveyance so used or intended to be used or any conveyance in which a controlled substance is unlawfully possessed by an occupant. He shall immediately deliver a conveyance that he seizes to the offices of his law enforcement agency, to be held as evidence until forfeiture is declared or release ordered.

(2) All property subject to forfeiture under 44-12-102 may be seized by a peace officer under a search warrant issued by a district court having jurisdiction over the property. Seizure without a warrant may be made if:

(a) the seizure is incident to an arrest or a search under a search warrant issued for another purpose or an inspection under an administrative inspection warrant;

(b) the property subject to seizure has been the subject of a prior judgment in favor of the state in a criminal proceeding or a forfeiture proceeding based on this chapter;

(c) the peace officer has probable cause to believe that the property is directly or indirectly dangerous to health or safety; or

(d) the peace officer has probable cause to believe that the property was used or is intended to be used in violation of Title 45, chapter 9, or in violation of Title 45, chapter 10, part 1.

History: **En. Sec. 3, Ch. 529, L. 1979; amd. Sec. 9, Ch. 481, L. 1981; amd. Sec. 1, Ch. 489, L. 1989.**

44-12-104. Summary forfeiture of certain controlled substances. Controlled substances that are possessed, transferred, offered for transfer, manufactured, prepared, cultivated, compounded, or processed in violation of Title 45, chapter 9, and that are seized under the provisions of this chapter are contraband and shall be summarily forfeited to the state. Controlled substances which are seized or come into the possession of the state and the owners of which are unknown are contraband and shall be summarily forfeited to the state.

History: **En. Sec. 4, Ch. 529, L. 1979.**

Part 2
Procedure

Part Cross-References

Forfeiture of motor vehicle for third drug-related or alcohol-related conviction, 61-8-714, 61-8-722.

44-12-201. Petition to institute forfeiture proceedings — summons — service. A peace officer or an officer of an agency that seizes any property other than controlled substances under the provisions of this chapter shall, within 45 days of the seizure, file a petition to institute forfeiture proceedings with the clerk of the district court of the county in which the seizure occurs. The clerk shall issue a summons at the request of the petitioning party, who shall cause the same to be served upon all owners or claimants of the property by one of the following methods:

(1) upon an owner or claimant whose name and address are known, by personal service of a copy of the petition and summons as provided in the Montana Rules of Civil Procedure;

(2) upon an owner or claimant whose address is unknown but who is believed to have an interest in the property, by publication of the summons in one issue of a newspaper of general circulation in the county where the seizure occurred or, if there is no such newspaper, by publication in one issue of a newspaper of general circulation in an adjoining county, and by mailing a copy of the petition and summons to the most recent address of such owner or claimant, if any, shown in the records of the department of justice.

History: En. Sec. 5, Ch. 529, L. 1979; amd. Sec. 1, Ch. 563, L. 1985.

Cross-References

Service of process, Rule 4, M.R.Civ.P. (see Title 25, ch. 20).

44-12-202. Answer to allegations concerning use of property. Within 20 days after the service of the petition and summons or publication of the summons, as provided in 44-12-201, the owner or claimant of the seized property shall file a verified answer to the allegations concerning the use of the property described in the petition to institute forfeiture proceedings. No extension of the time for filing the answer may be granted, and failure to answer within 20 days bars the owner or claimant from presenting evidence at any subsequent evidentiary hearing unless extraordinary circumstances exist.

History: En. Sec. 6, Ch. 529, L. 1979; amd. Sec. 2, Ch. 563, L. 1985.

Cross-References

Service of process — answer, Rules 4 and 12, M.R.Civ.P. (see Title 25, ch. 20).

44-12-203. Presumption — procedure following answer or expiration of time for answering. (1) There is a rebuttable presumption of forfeiture as to all property listed in 44-12-102, except property listed in 44-12-102(1)(i).

(2) If a verified answer to the petition is not filed within 20 days after the service of the petition and summons, the court upon motion shall order the property forfeited to the state.

(3) If a verified answer is filed within 20 days, the forfeiture proceedings must be set for hearing without a jury no sooner than 60 days after the answer is filed. Notice of the hearing must be given in the manner provided for service of the petition and summons.

History: En. Sec. 7, Ch. 529, L. 1979; amd. Sec. 2, Ch. 180, L. 1983; amd. Sec. 3, Ch. 563, L. 1985; amd. Sec. 2, Ch. 652, L. 1989; amd. Sec. 42, Ch. 16, L. 1991.

44-12-204. Proof required or permitted at hearing. In order to rebut the presumption of forfeiture:

(1) an owner of property who has a verified answer on file must prove that the property was not used for the purpose charged;

(2) an owner of property listed in 44-12-102(1)(g) who has a verified answer on file may prove in the alternative that the use of the property occurred without his knowledge or consent;

(3) a claimant of a security interest in the property who has a verified answer on file must prove that his security interest is bona fide and that it was created after a reasonable investigation of the moral responsibility, character, and reputation of the purchaser and without knowledge that the property was being or was to be used for the purpose charged. However, no person who has a lien dependent upon possession for compensation to which he is legally entitled for making repairs or performing labor upon, furnishing supplies or materials for, or providing storage, repair, or safekeeping of any property and no person doing business under any law of this state or the United States relating to financial institutions, as defined in 32-6-103, loan companies, or licensed pawnbrokers or regularly engaged in the business of selling the property or of purchasing conditional sales contracts for the property may be required to prove that his security interest was created after a reasonable investigation of the moral responsibility, character, and reputation of the owner, purchaser, or person in possession of the property when it was brought to such person.

History: En. Sec. 8, Ch. 529, L. 1979; amd. Sec. 3, Ch. 180, L. 1983.

44-12-205. Disposition of property following hearing. (1) If the court finds that the property was not used for the purpose charged or that the property listed in 44-12-102(1)(g) was used without the knowledge or consent of the owner, it shall order the property released to the owner of record as of the date of the seizure.

(2) If the court finds that the property was used for the purpose charged and that the property listed in 44-12-102(1)(g) was used with the knowledge or consent of the owner, the property shall be disposed of as follows:

(a) If proper proof of his claim is presented at the hearing by the holder of a security interest, the court shall order the property released to the holder of the security interest if the amount due him is equal to or in excess of the value of the property as of the date of seizure, it being the purpose of this chapter to forfeit only the right, title, or interest of the owner. If the amount due the holder of the security interest is less than the value of the property, the property, if it is sold, must be sold at public auction by the law enforcement agency that seized the property in the same manner provided by law for the sale of property under execution or the law enforcement agency may return the property to the holder of the security interest without proceeding with an auction. The property may not be sold to an officer or employee of the law enforcement agency that seized the property or to a person related to an officer or employee by blood or marriage.

(b) If no claimant exists and the confiscating agency wishes to retain the property for its official use, it may do so. If such property is not to be retained, it must be sold as provided in subsection (2)(a).

(c) If a claimant who has presented proper proof of his claim exists and the confiscating agency wishes to retain the property for its official use, it may do so provided it compensates the claimant in the amount of the security interest outstanding at the time of the seizure.

(3) In making a disposition of property under this chapter, the court may take any action to protect the rights of innocent persons.

History: En. Sec. 9, Ch. 529, L. 1979; amd. Sec. 4, Ch. 180, L. 1983; amd. Sec. 2, Ch. 476, L. 1987; amd. Sec. 2, Ch. 489, L. 1989.

Cross-References

Property subject to execution, Title 25, ch. 13, part 5.

Property exempt from execution, Title 25, ch. 13, part 6.

Sale on execution, Title 25, ch. 13, part 7.

Validity of security agreement and rights of parties thereto, Title 30, ch. 9, part 2.

Alienability of debtor's rights — judicial process, 30-9-311.

44-12-206. Disposition of proceeds of sale. (1) Whenever property is seized, forfeited, and sold under the provisions of this chapter, the net proceeds of the sale must be distributed as follows:

(a) to the holders of security interests who have presented proper proof of their claims, if any, up to the amount of their interests in the property;

(b) the remainder, if any, to the county treasurer of the county in which the property was seized, who shall establish and maintain a drug forfeiture account and deposit the remainder into the account, except as provided in subsections (1)(c) through (1)(e);

(c) if the property was seized within the corporate limits of a city or town by a law enforcement agency of that city or town, the remainder, if any, to the city or town treasurer, who shall establish and maintain a drug forfeiture account and deposit the remainder into the account, except as provided in subsections (1)(d) and (1)(e);

(d) if the property was seized by an employee of the state, the remainder, if any, is allocated as provided in subsection (3), except as provided in subsection (1)(e); and

(e) if the property was seized as a result of the efforts of more than one law enforcement agency, the remainder, if any, to the accounts required by this subsection (1), pro rata in the proportions represented by the agencies' expenses of investigation, as determined by the attorney general.

(2) All proceeds from any source that are deposited into a county, city, or town drug forfeiture account must in each fiscal year be appropriated to and remain available until expended by the confiscating agency for drug laws enforcement and education concerning drugs.

(3) (a) Each year, the first $125,000 of net proceeds received by the state under subsections (1)(d) and (1)(e) must be deposited in an account in the state special revenue fund to the credit of the department of justice. The department may expend the money in the account only for purposes of enforcement of drug laws. An amount up to $125,000 each year is statutorily appropriated, as provided in 17-7-502, to the attorney general for enforcement of drug laws. Any expenditure in excess of $125,000 each fiscal year requires approval through budget amendment, as provided in Title 17, chapter 7, part 4.

(b) Each year, net proceeds in excess of $125,000 that are received by the state under subsections (1)(d) and (1)(e) must be deposited equally between the state special revenue account and the general fund.

History: En. Sec. 10, Ch. 529, L. 1979; amd. Sec. 5, Ch. 180, L. 1983; amd. Sec. 3, Ch. 476, L. 1987; amd. Sec. 2, Ch. 690, L. 1991; amd. Sec. 32, Ch. 349, L. 1993; amd. Sec. 64, Ch. 545, L. 1995; amd. Sec. 22, Ch. 389, L. 1999.

Compiler's Comments

1999 Amendment: Chapter 389 in (1)(d) near middle substituted "is allocated as provided" for "to the account established"; in (3)(a) at beginning inserted "Each year, the first $125,000 of"; inserted (3)(b) providing for disposition of net proceeds received in excess of $125,000; and made minor changes in style. Amendment effective July 1, 1999.

Cross-References

Proceeds — secured party's rights on disposition of collateral, 30-9-306.

Priority of certain liens arising by operation of law, 30-9-310.

Priorities among conflicting security interests in same collateral, 30-9-312.

CHAPTER 13

SPECIAL LAW ENFORCEMENT ASSISTANCE FUNDING

Part 1 — Special Law Enforcement Assistance Account

44-13-101. Law enforcement assistance account created.
44-13-102. Federal forfeitures deposited in account.
44-13-103. Limitations on use of special law enforcement assistance account.

Part 1

Special Law Enforcement Assistance Account

44-13-101. Law enforcement assistance account created. There is an account in the federal special revenue fund defined in 17-2-102 to be known as the special law enforcement assistance account.

History: En. Sec. 1, Ch. 625, L. 1985.

44-13-102. Federal forfeitures deposited in account. Except as provided in 46-23-1032, property and money forfeited under federal law and provided to the state by the federal government to support state and local law enforcement programs must be deposited to the special law enforcement assistance account established in 44-13-101. An amount up to $125,000 each fiscal year is statutorily appropriated, as provided in 17-7-502, to the attorney general for the support of state and local law enforcement programs. Any expenditure in excess of $125,000 each fiscal year requires approval through budget amendment, as provided in Title 17, chapter 7, part 4.

History: En. Sec. 2, Ch. 625, L. 1985; amd. Sec. 3, Ch. 690, L. 1991; amd. Sec. 2, Ch. 219, L. 1995.

44-13-103. Limitations on use of special law enforcement assistance account. (1) After property is credited to the account, the attorney general may:

(a) transfer the property to any local or state law enforcement agency to be used for criminal investigation purposes;

(b) sell the property by public sale;

(c) destroy any illegal or controlled substances and sell or destroy raw materials, products, and equipment used or intended for use in manufacturing, compounding, or processing a controlled substance;

(d) compromise and pay claims against the property; and

(e) make any other disposition of the property authorized by law.

(2) Money and proceeds from property credited to the account may be used by the attorney general for:

(a) the payment of any expenses necessary to seize, detain, appraise, inventory, safeguard, maintain, advertise, or sell seized, detained, or forfeited property, including but not limited to payment for contract services and reimbursement to a federal, state, or local agency for its expenses;

(b) the payment of awards for information or assistance leading to a criminal proceeding or a civil forfeiture proceeding;

(c) the compromise and payment of claims against property;

(d) the payment of sums for criminal investigation purposes, including but not limited to:

(i) payment of informants;

(ii) use by undercover agents to purchase unlawful substances, including, without limitation, counterfeit or real controlled substances, pornographic materials, stolen property, or other contraband;

(iii) use by undercover agents as gambling front money; and

(iv) payment of overtime to state or local law enforcement officers when engaged in special criminal investigations;

(e) the payment of funds into the account created by 53-9-109; and

(f) matching federal grants for criminal investigation purposes.

History: En. Sec. 3, Ch. 625, L. 1985; amd. Sec. 1, Ch. 206, L. 1987; amd. Sec. 36, Ch. 112, L. 1991; amd. Sec. 33, Ch. 349, L. 1993; amd. Sec. 65, Ch. 545, L. 1995.

TITLE 45

CRIMES

Ch.
1. General Preliminary Provisions.
2. General Principles of Liability.
3. Justifiable Use of Force.
4. Inchoate Offenses.
5. Offenses Against the Person.
6. Offenses Against Property.
7. Offenses Against Public Administration.
8. Offenses Against Public Order.
9. Dangerous Drugs.
10. Model Drug Paraphernalia Act.

CHAPTER 1

GENERAL PRELIMINARY PROVISIONS

Part 1 — Construction and Applicability

45-1-101. Short title.
45-1-102. General purposes and principles of construction.
45-1-103. Application to offenses committed before and after enactment.
45-1-104. Other limitations on applicability.

Part 2 — Classification and Limitations

45-1-201. Classification of offenses.
45-1-202 through 45-1-204 reserved.
45-1-205. General time limitations.
45-1-206. Periods excluded from limitation.

Part 1
Construction and Applicability

45-1-101. Short title. This title shall be known and may be cited as the "Criminal Code of 1973".

History: En. 94-1-101 by Sec. 1, Ch. 513, L. 1973; R.C.M. 1947, 94-1-101.

45-1-102. General purposes and principles of construction. (1) The general purposes of the provisions governing the definition of offenses are:

(a) to forbid and prevent conduct that unjustifiably and inexcusably inflicts or threatens harm to individual or public interests;

(b) to safeguard conduct that is without fault from condemnation as criminal;

(c) to give fair warning of the nature of the conduct declared to constitute an offense;

(d) to differentiate on reasonable grounds between serious and minor offenses.

(2) The rule of the common law that penal statutes are to be strictly construed has no application to this code. All its provisions are to be construed

according to the fair import of their terms with a view to effect its object and to promote justice.

History: En. 94-1-102 by Sec. 1, Ch. 513, L. 1973; R.C.M. 1947, 94-1-102.

Cross-References

Reasons for punishing offenders, Art. II, sec. 28, Mont. Const.

Criminal act and mental state, 45-2-103.

Sentence and judgment, 46-18-101, 46-18-102.

45-1-103. Application to offenses committed before and after enactment. (1) The provisions of this code apply to any offense defined in this code and committed after January 1, 1974.

(2) Unless otherwise expressly provided or unless the context otherwise requires, the provisions of this title and Title 46 govern the construction of and punishment for any offense defined outside of this code and committed after January 1, 1974, as well as the construction and application of any defense to a prosecution for such an offense.

(3) The provisions of this code do not apply to any offense defined outside of this code and committed before January 1, 1974. Such an offense must be construed and punished according to the provisions of law existing at the time of the commission thereof in the same manner as if this code had not been enacted.

History: En. 94-1-103 by Sec. 1, Ch. 513, L. 1973; amd. Sec. 7, Ch. 359, L. 1977; R.C.M. 1947, 94-1-103.

Cross-References

Other limitations as to applicability, 45-1-104.

Classification and limitations, 45-1-201 through 45-1-206.

Definitions and state of mind, 45-2-101 through 45-2-104.

Other factors affecting individual liability, 45-2-201 through 45-2-213.

Liability for acts committed by another, 45-2-301 through 45-2-312.

Justifiable use of force, 45-3-101 through 45-3-115.

45-1-104. Other limitations on applicability. (1) This code does not bar, suspend, or otherwise affect any right or liability to damages, penalty, forfeiture, or other remedy authorized by law to be recovered, and the civil injury is not merged into the offense.

(2) No conduct constitutes an offense unless it is described as an offense in this code or in another statute of this state. However, this provision does not affect the power of a court to punish for contempt or to employ any sanction authorized by law for the enforcement of an order, civil judgment, or decree.

History: En. 94-1-104 by Sec. 1, Ch. 513, L. 1973; R.C.M. 1947, 94-1-104.

Cross-References

Sentence, Title 46, ch. 18.

Part 2

Classification and Limitations

45-1-201. Classification of offenses. (1) For the determination of the court's jurisdiction at the commencement of the action and for the determination of the commencement of the period of limitations, the offense shall be designated a felony or misdemeanor based upon the maximum potential sentence which could be imposed by statute.

(2) An offense defined by any statute of this state other than this code shall be classified as provided in this section, and the sentence that may be imposed upon conviction thereof shall be governed by this title and Title 46.

History: En. 94-1-105 by Sec. 1, Ch. 513, L. 1973; amd. Sec. 8, Ch. 359, L. 1977; R.C.M. 1947, 94-1-105.

Cross-References

Application to offenses committed before and after enactment, 45-1-103.

Time limitations, 45-1-205, 45-1-206.

Definition of felony, 45-2-101.

Definition of misdemeanor, 45-2-101.

Deliberate homicide, 45-5-102.

Aggravated kidnapping, 45-5-303.

Burglary, 45-6-204.

Compounding a felony, 45-7-305.

When no penalty specified, 46-18-211 through 46-18-213.

45-1-202 through 45-1-204 reserved.

45-1-205. General time limitations. (1) (a) A prosecution for deliberate, mitigated, or negligent homicide may be commenced at any time.

(b) A prosecution under 45-5-502 through 45-5-505, 45-5-507, 45-5-625, or 45-5-627 may be commenced within 5 years after the victim reaches the age of 18 if the victim was less than 18 years old at the time that the offense occurred.

(2) Except as provided in subsection (7)(b) or as otherwise provided by law, prosecutions for other offenses are subject to the following periods of limitation:

(a) A prosecution for a felony must be commenced within 5 years after it is committed.

(b) A prosecution for a misdemeanor must be commenced within 1 year after it is committed.

(3) The periods prescribed in subsection (2) are extended in a prosecution for theft involving a breach of fiduciary obligation to an aggrieved person as follows:

(a) if the aggrieved person is a minor or incompetent, during the minority or incompetency or within 1 year after the termination of the minority or incompetency;

(b) in any other instance, within 1 year after the discovery of the offense by the aggrieved person or by a person who has legal capacity to represent an aggrieved person or has a legal duty to report the offense and is not personally a party to the offense or, in the absence of discovery, within 1 year after the prosecuting officer becomes aware of the offense.

(4) The period prescribed in subsection (2) must be extended in a prosecution for unlawful use of a computer, and prosecution must be brought within 1 year after the discovery of the offense by the aggrieved person or by a person who has legal capacity to represent an aggrieved person or has a legal duty to report the offense and is not personally a party to the offense or, in the absence of discovery, within 1 year after the prosecuting officer becomes aware of the offense.

(5) The period prescribed in subsection (2) is extended in a prosecution for misdemeanor fish and wildlife violations under Title 87, and prosecution must be brought within 3 years after an offense is committed.

(6) The period prescribed in subsection (2)(b) is extended in a prosecution for misdemeanor violations of the laws regulating the activities of outfitters

and guides under Title 37, chapter 47, and prosecution must be brought within 3 years after an offense is committed.

(7) (a) An offense is committed either when every element occurs or, when the offense is based upon a continuing course of conduct, at the time when the course of conduct is terminated. Time starts to run on the day after the offense is committed.

(b) A prosecution for theft under 45-6-301 may be commenced at any time during the 5 years following the date of the theft, whether or not the offender is in possession of or otherwise exerting unauthorized control over the property at the time the prosecution is commenced. After the 5-year period ends, a prosecution may be commenced at any time if the offender is still in possession of or otherwise exerting unauthorized control over the property, except that the prosecution must be commenced within 1 year after the investigating officer discovers that the offender still possesses or is otherwise exerting unauthorized control over the property.

(8) A prosecution is commenced either when an indictment is found or an information or complaint is filed.

History: En. 94-1-106 by Sec. 1, Ch. 513, L. 1973; amd. Sec. 9, Ch. 359, L. 1977; R.C.M. 1947, 94-1-106; amd. Sec. 4, Ch. 485, L. 1981; amd. Sec. 1, Ch. 227, L. 1985; amd. Sec. 1, Ch. 294, L. 1989; amd. Sec. 1, Ch. 435, L. 1989; amd. Sec. 1, Ch. 277, L. 1991; amd. Sec. 17, Ch. 220, L. 1993; amd. Sec. 2, Ch. 560, L. 1993; amd. Sec. 1, Ch. 247, L. 1995.

Cross-References

Classification of offenses, 45-1-201.

Definition of felony, 45-2-101.

Definition of misdemeanor, 45-2-101.

Homicide, 45-5-102 through 45-5-104.

Theft and related offenses, Title 45, ch. 6, part 3.

Methods of commencing prosecution, Title 46, ch. 11, parts 1 through 3.

Filing of information, 46-11-201, 46-11-203.

Guardians of incapacitated persons, 72-5-301 through 72-5-325.

45-1-206. Periods excluded from limitation. The period of limitation does not run during:

(1) any period in which the offender is not usually and publicly resident within this state or is beyond the jurisdiction of this state;

(2) any period in which the offender is a public officer and the offense charged is theft of public funds while in public office; or

(3) a prosecution pending against the offender for the same conduct, even if the indictment, complaint, or information which commences the prosecution is dismissed.

History: En. 94-1-107 by Sec. 1, Ch. 513, L. 1973; R.C.M. 1947, 94-1-107.

Cross-References

Rules for determining residence, 1-1-215.

General time limitations, 45-1-205.

Definition of offense, 45-2-101.

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CHAPTER 2

GENERAL PRINCIPLES OF LIABILITY

Part 1 — Definitions and State of Mind

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Part 1
Definitions and State of Mind

45-2-101. General definitions. Unless otherwise specified in the statute, all words will be taken in the objective standard rather than in the subjective, and unless a different meaning plainly is required, the following definitions apply in this title:

(1) "Acts" has its usual and ordinary meaning and includes any bodily movement, any form of communication, and when relevant, a failure or omission to take action.

(2) "Administrative proceeding" means a proceeding the outcome of which is required to be based on a record or documentation prescribed by law or in which a law or a regulation is particularized in its application to an individual.

(3) "Another" means a person or persons other than the offender.

(4) "Benefit" means gain or advantage or anything regarded by the beneficiary as gain or advantage, including benefit to another person or entity in whose welfare the beneficiary is interested. Benefit does not include an advantage promised generally to a group or class of voters as a consequence of public measures that a candidate engages to support or oppose.

(5) "Bodily injury" means physical pain, illness, or an impairment of physical condition and includes mental illness or impairment.

(6) "Cohabit" means to live together under the representation of being married.

(7) "Common scheme" means a series of acts or omissions motivated by a purpose to accomplish a single criminal objective or by a common purpose or plan that results in the repeated commission of the same offense or that affects the same person or the same persons or the property of the same person or persons.

(8) "Computer" means an electronic device that performs logical, arithmetic, and memory functions by the manipulation of electronic or magnetic impulses and includes all input, output, processing, storage, software,

or communication facilities that are connected or related to that device in a system or network.

(9) "Computer network" means the interconnection of communication systems between computers or computers and remote terminals.

(10) "Computer program" means an instruction or statement or a series of instructions or statements, in a form acceptable to a computer, that in actual or modified form permits the functioning of a computer or computer system and causes it to perform specified functions.

(11) "Computer services" include but are not limited to computer time, data processing, and storage functions.

(12) "Computer software" means a set of computer programs, procedures, and associated documentation concerned with the operation of a computer system.

(13) "Computer system" means a set of related, connected, or unconnected devices, computer software, or other related computer equipment.

(14) "Conduct" means an act or series of acts and the accompanying mental state.

(15) "Conviction" means a judgment of conviction or sentence entered upon a plea of guilty or nolo contendere or upon a verdict or finding of guilty of an offense rendered by a legally constituted jury or by a court of competent jurisdiction authorized to try the case without a jury.

(16) "Correctional institution" means a state prison, county or city jail, or other institution for the incarceration or custody of persons under sentence for offenses or awaiting trial or sentence for offenses.

(17) "Deception" means knowingly to:

(a) create or confirm in another an impression that is false and that the offender does not believe to be true;

(b) fail to correct a false impression that the offender previously has created or confirmed;

(c) prevent another from acquiring information pertinent to the disposition of the property involved;

(d) sell or otherwise transfer or encumber property without disclosing a lien, adverse claim, or other legal impediment to the enjoyment of the property, whether the impediment is or is not of value or is or is not a matter of official record; or

(e) promise performance that the offender does not intend to perform or knows will not be performed. Failure to perform, standing alone, is not evidence that the offender did not intend to perform.

(18) "Defamatory matter" means anything that exposes a person or a group, class, or association to hatred, contempt, ridicule, degradation, or disgrace in society or to injury to the person's or its business or occupation.

(19) "Deprive" means:

(a) to withhold property of another:

(i) permanently;

(ii) for such a period as to appropriate a portion of its value; or

(iii) with the purpose to restore it only upon payment of reward or other compensation; or

(b) to dispose of the property of another and use or deal with the property so as to make it unlikely that the owner will recover it.

(20) "Deviate sexual relations" means sexual contact or sexual intercourse between two persons of the same sex or any form of sexual intercourse with an animal.

(21) "Document" means, with respect to offenses involving the medicaid program, any application, claim, form, report, record, writing, or correspondence, whether in written, electronic, magnetic, microfilm, or other form.

(22) "Felony" means an offense in which the sentence imposed upon conviction is death or imprisonment in a state prison for a term exceeding 1 year.

(23) "Forcible felony" means a felony that involves the use or threat of physical force or violence against any individual.

(24) A "frisk" is a search by an external patting of a person's clothing.

(25) "Government" includes a branch, subdivision, or agency of the government of the state or a locality within it.

(26) "Harm" means loss, disadvantage, or injury or anything so regarded by the person affected, including loss, disadvantage, or injury to a person or entity in whose welfare the affected person is interested.

(27) A "house of prostitution" means a place where prostitution or promotion of prostitution is regularly carried on by one or more persons under the control, management, or supervision of another.

(28) "Human being" means a person who has been born and is alive.

(29) An "illegal article" is an article or thing that is prohibited by statute, rule, or order from being in the possession of a person subject to official detention.

(30) "Inmate" means a person who engages in prostitution in or through the agency of a house of prostitution.

(31) (a) "Intoxicating substance" means a controlled substance, as defined in Title 50, chapter 32, and an alcoholic beverage, including but not limited to a beverage containing 1/2 of 1% or more of alcohol by volume.

(b) Intoxicating substance does not include dealcoholized wine or a beverage or liquid produced by the process by which beer, ale, port, or wine is produced if it contains less than 1/2 of 1% of alcohol by volume.

(32) An "involuntary act" means an act that is:

(a) a reflex or convulsion;

(b) a bodily movement during unconsciousness or sleep;

(c) conduct during hypnosis or resulting from hypnotic suggestion; or

(d) a bodily movement that otherwise is not a product of the effort or determination of the actor, either conscious or habitual.

(33) "Juror" means a person who is a member of a jury, including a grand jury, impaneled by a court in this state in an action or proceeding or by an officer authorized by law to impanel a jury in an action or proceeding. The term "juror" also includes a person who has been drawn or summoned to attend as a prospective juror.

(34) "Knowingly"—a person acts knowingly with respect to conduct or to a circumstance described by a statute defining an offense when the person is aware of the person's own conduct or that the circumstance exists. A person acts knowingly with respect to the result of conduct described by a statute defining an offense when the person is aware that it is highly probable that the

result will be caused by the person's conduct. When knowledge of the existence of a particular fact is an element of an offense, knowledge is established if a person is aware of a high probability of its existence. Equivalent terms, such as "knowing" or "with knowledge", have the same meaning.

(35) "Medicaid" means the Montana medical assistance program provided for in Title 53, chapter 6.

(36) "Medicaid agency" has the meaning in 53-6-155.

(37) "Medicaid benefit" means the provision of anything of pecuniary value to or on behalf of a recipient under the medicaid program.

(38) (a) "Medicaid claim" means a communication, whether in oral, written, electronic, magnetic, or other form:

(i) that is used to claim specific services or items as payable or reimbursable under the medicaid program; or

(ii) that states income, expense, or other information that is or may be used to determine entitlement to or the rate of payment under the medicaid program.

(b) The term includes related documents submitted as a part of or in support of the claim.

(39) "Mentally defective" means that a person suffers from a mental disease or defect that renders the person incapable of appreciating the nature of the person's own conduct.

(40) "Mentally incapacitated" means that a person is rendered temporarily incapable of appreciating or controlling the person's own conduct as a result of the influence of an intoxicating substance.

(41) "Misdemeanor" means an offense for which the sentence imposed upon conviction is imprisonment in the county jail for a term or a fine, or both, or for which the sentence imposed is imprisonment in a state prison for a term of 1 year or less.

(42) "Negligently"—a person acts negligently with respect to a result or to a circumstance described by a statute defining an offense when the person consciously disregards a risk that the result will occur or that the circumstance exists or when the person disregards a risk of which the person should be aware that the result will occur or that the circumstance exists. The risk must be of a nature and degree that to disregard it involves a gross deviation from the standard of conduct that a reasonable person would observe in the actor's situation. "Gross deviation" means a deviation that is considerably greater than lack of ordinary care. Relevant terms, such as "negligent" and "with negligence", have the same meaning.

(43) "Nolo contendere" means a plea in which the defendant does not contest the charge or charges against the defendant and neither admits nor denies the charge or charges.

(44) "Obtain" means:

(a) in relation to property, to bring about a transfer of interest or possession, whether to the offender or to another; and

(b) in relation to labor or services, to secure the performance of the labor or service.

(45) "Obtains or exerts control" includes but is not limited to the taking, the carrying away, or the sale, conveyance, or transfer of title to, interest in, or possession of property.

(46) "Occupied structure" means any building, vehicle, or other place suitable for human occupancy or night lodging of persons or for carrying on business, whether or not a person is actually present. Each unit of a building consisting of two or more units separately secured or occupied is a separate occupied structure.

(47) "Offender" means a person who has been or is liable to be arrested, charged, convicted, or punished for a public offense.

(48) "Offense" means a crime for which a sentence of death or of imprisonment or a fine is authorized. Offenses are classified as felonies or misdemeanors.

(49) "Official detention" means imprisonment resulting from a conviction for an offense, confinement for an offense, confinement of a person charged with an offense, detention by a peace officer pursuant to arrest, detention for extradition or deportation, or lawful detention for the purpose of the protection of the welfare of the person detained or for the protection of society. Official detention does not include supervision of probation or parole, constraint incidental to release on bail, or an unlawful arrest unless the person arrested employed physical force, a threat of physical force, or a weapon to escape.

(50) "Official proceeding" means a proceeding heard or that may be heard before a legislative, a judicial, an administrative, or another governmental agency or official authorized to take evidence under oath, including any referee, hearings examiner, commissioner, notary, or other person taking testimony or deposition in connection with the proceeding.

(51) "Other state" means a state or territory of the United States, the District of Columbia, and the Commonwealth of Puerto Rico.

(52) "Owner" means a person other than the offender who has possession of or other interest in the property involved, even though the interest or possession is unlawful, and without whose consent the offender has no authority to exert control over the property.

(53) "Party official" means a person who holds an elective or appointive post in a political party in the United States by virtue of which the person directs or conducts or participates in directing or conducting party affairs at any level of responsibility.

(54) "Peace officer" means a person who by virtue of the person's office or public employment is vested by law with a duty to maintain public order or to make arrests for offenses while acting within the scope of the person's authority.

(55) "Pecuniary benefit" is benefit in the form of money, property, commercial interests, or anything else the primary significance of which is economic gain.

(56) "Person" includes an individual, business association, partnership, corporation, government, or other legal entity and an individual acting or purporting to act for or on behalf of a government or subdivision of government.

(57) "Physically helpless" means that a person is unconscious or is otherwise physically unable to communicate unwillingness to act.

(58) "Possession" is the knowing control of anything for a sufficient time to be able to terminate control.

(59) "Premises" includes any type of structure or building and real property.

(60) "Property" means a tangible or intangible thing of value. Property includes but is not limited to:

(a) real estate;

(b) money;

(c) commercial instruments;

(d) admission or transportation tickets;

(e) written instruments that represent or embody rights concerning anything of value, including labor or services, or that are otherwise of value to the owner;

(f) things growing on, affixed to, or found on land and things that are part of or affixed to a building;

(g) electricity, gas, and water;

(h) birds, animals, and fish that ordinarily are kept in a state of confinement;

(i) food and drink, samples, cultures, microorganisms, specimens, records, recordings, documents, blueprints, drawings, maps, and whole or partial copies, descriptions, photographs, prototypes, or models thereof;

(j) other articles, materials, devices, substances, and whole or partial copies, descriptions, photographs, prototypes, or models thereof that constitute, represent, evidence, reflect, or record secret scientific, technical, merchandising, production, or management information or a secret designed process, procedure, formula, invention, or improvement; and

(k) electronic impulses, electronically processed or produced data or information, commercial instruments, computer software or computer programs, in either machine- or human-readable form, computer services, any other tangible or intangible item of value relating to a computer, computer system, or computer network, and copies thereof.

(61) "Property of another" means real or personal property in which a person other than the offender has an interest that the offender has no authority to defeat or impair, even though the offender may have an interest in the property.

(62) "Public place" means a place to which the public or a substantial group has access.

(63) "Public servant" means an officer or employee of government, including but not limited to legislators, judges, and firefighters, and a person participating as a juror, adviser, consultant, administrator, executor, guardian, or court-appointed fiduciary. The term does not include witnesses. The term "public servant" includes one who has been elected or designated to become a public servant.

(64) "Purposely"—a person acts purposely with respect to a result or to conduct described by a statute defining an offense if it is the person's conscious object to engage in that conduct or to cause that result. When a particular purpose is an element of an offense, the element is established although the purpose is conditional, unless the condition negatives the harm or evil sought to be prevented by the law defining the offense. Equivalent terms, such as "purpose" and "with the purpose", have the same meaning.

(65) (a) "Serious bodily injury" means bodily injury that:

(i) creates a substantial risk of death;

(ii) causes serious permanent disfigurement or protracted loss or impairment of the function or process of a bodily member or organ; or

(iii) at the time of injury, can reasonably be expected to result in serious permanent disfigurement or protracted loss or impairment of the function or process of a bodily member or organ.

(b) The term includes serious mental illness or impairment.

(66) "Sexual contact" means touching of the sexual or other intimate parts of the person of another, directly or through clothing, in order to knowingly or purposely:

(a) cause bodily injury to or humiliate, harass, or degrade another; or

(b) arouse or gratify the sexual response or desire of either party.

(67) (a) "Sexual intercourse" means penetration of the vulva, anus, or mouth of one person by the penis of another person, penetration of the vulva or anus of one person by a body member of another person, or penetration of the vulva or anus of one person by a foreign instrument or object manipulated by another person to knowingly or purposely:

(i) cause bodily injury or humiliate, harass, or degrade; or

(ii) arouse or gratify the sexual response or desire of either party.

(b) For purposes of subsection (67)(a), any penetration, however slight, is sufficient.

(68) "Solicit" or "solicitation" means to command, authorize, urge, incite, request, or advise another to commit an offense.

(69) "State" or "this state" means the state of Montana, all the land and water in respect to which the state of Montana has either exclusive or concurrent jurisdiction, and the air space above the land and water.

(70) "Statute" means an act of the legislature of this state.

(71) "Stolen property" means property over which control has been obtained by theft.

(72) A "stop" is the temporary detention of a person that results when a peace officer orders the person to remain in the peace officer's presence.

(73) "Tamper" means to interfere with something improperly, meddle with it, make unwarranted alterations in its existing condition, or deposit refuse upon it.

(74) "Telephone" means any type of telephone, including but not limited to a corded, uncorded, cellular, or satellite telephone.

(75) "Threat" means a menace, however communicated, to:

(a) inflict physical harm on the person threatened or any other person or on property;

(b) subject any person to physical confinement or restraint;

(c) commit a criminal offense;

(d) accuse a person of a criminal offense;

(e) expose a person to hatred, contempt, or ridicule;

(f) harm the credit or business repute of a person;

(g) reveal information sought to be concealed by the person threatened;

(h) take action as an official against anyone or anything, withhold official action, or cause the action or withholding;

(i) bring about or continue a strike, boycott, or other similar collective action if the person making the threat demands or receives property that is not for the benefit of groups that the person purports to represent; or

(j) testify or provide information or withhold testimony or information with respect to another's legal claim or defense.

(76) (a) "Value" means the market value of the property at the time and place of the crime or, if the market value cannot be satisfactorily ascertained, the cost of the replacement of the property within a reasonable time after the crime. If the offender appropriates a portion of the value of the property, the value must be determined as follows:

(i) The value of an instrument constituting an evidence of debt, such as a check, draft, or promissory note, is considered the amount due or collectible. The figure is ordinarily the face amount of the indebtedness less any portion of the indebtedness that has been satisfied.

(ii) The value of any other instrument that creates, releases, discharges, or otherwise affects any valuable legal right, privilege, or obligation is considered the amount of economic loss that the owner of the instrument might reasonably suffer by virtue of the loss of the instrument.

(iii) The value of electronic impulses, electronically produced data or information, computer software or programs, or any other tangible or intangible item relating to a computer, computer system, or computer network is considered to be the amount of economic loss that the owner of the item might reasonably suffer by virtue of the loss of the item. The determination of the amount of economic loss includes but is not limited to consideration of the value of the owner's right to exclusive use or disposition of the item.

(b) When it cannot be determined if the value of the property is more or less than $1,000 by the standards set forth in subsection (76)(a), its value is considered to be an amount less than $1,000.

(c) Amounts involved in thefts committed pursuant to a common scheme or the same transaction, whether from the same person or several persons, may be aggregated in determining the value of the property.

(77) "Vehicle" means a device for transportation by land, water, or air or by mobile equipment, with provision for transport of an operator.

(78) "Weapon" means an instrument, article, or substance that, regardless of its primary function, is readily capable of being used to produce death or serious bodily injury.

(79) "Witness" means a person whose testimony is desired in an official proceeding, in any investigation by a grand jury, or in a criminal action, prosecution, or proceeding.

History: En. 94-2-101 by Sec. 1, Ch. 513, L. 1973; amd. Sec. 1, Ch. 190, L. 1975; amd. Sec. 1, Ch. 405, L. 1975; amd. Sec. 1, Ch. 443, L. 1975; amd. Sec. 10, Ch. 359, L. 1977; amd. Sec. 3, Ch. 489, L. 1977; R.C.M. 1947, 94-2-101; amd. Sec. 1, Ch. 10, L. 1979; amd. Sec. 1, Ch. 485, L. 1981; amd. Sec. 15, Ch. 3, L. 1985; amd. Sec. 1, Ch. 143, L. 1993; amd. Sec. 1, Ch. 616, L. 1993; amd. Sec. 50, Ch. 18, L. 1995; amd. Sec. 8, Ch. 354, L. 1995; amd. Sec. 1, Ch. 288, L. 1999; amd. Sec. 1, Ch. 354, L. 1999; amd. Sec. 2, Ch. 395, L. 1999; amd. Sec. 2, Ch. 397, L. 1999.

Compiler's Comments

1999 Amendments — Composite Section: Chapter 288 in definition of sexual contact after "another" substituted "directly or through clothing, in order to knowingly or purposely:

(a) cause bodily injury to or humiliate, harass, or degrade another; or

(b) arouse or gratify the sexual response or desire of either party" for "for the purpose of arousing or gratifying the sexual desire of either party"; in definition of sexual intercourse at end of (a) after "another person" substituted "to knowingly or purposely:

(i) cause bodily injury or humiliate, harass, or degrade; or

(ii) arouse or gratify the sexual response or desire of either party" for "for the purpose of arousing or gratifying the sexual desire of either party" and at beginning of (b) inserted reference to subsection (a); and made minor changes in style. Amendment effective October 1, 1999.

Chapter 354 inserted definition of telephone; and made minor changes in style. Amendment effective October 1, 1999.

Chapter 395 in definition of conviction after "plea of guilty" inserted "or nolo contendere"; inserted definition of nolo contendere; and made minor changes in style. Amendment effective October 1, 1999.

Chapter 397 in definition of value in (b) in two places increased value of property from $500 to $1,000; and made minor changes in style. Amendment effective October 1, 1999.

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Summoning witnesses to testify, Title 46, ch. 15, part 1.

45-2-102. Substitutes for negligence and knowledge. When the law provides that negligence suffices to establish an element of an offense, such element also is established if a person acts purposely or knowingly. When acting knowingly suffices to establish an element, such element also is established if a person acts purposely.

History: En. 94-2-110 by Sec. 1, Ch. 513, L. 1973; R.C.M. 1947, 94-2-110.

Cross-References

Definition of knowingly, 45-2-101.

Definition of negligently, 45-2-101.

Definition of purposely, 45-2-101.

General requirements of criminal act and mental state, 45-2-103.

45-2-103. General requirements of criminal act and mental state. (1) Except for deliberate homicide as defined in 45-5-102(1)(b) or an offense that involves absolute liability, a person is not guilty of an offense unless, with respect to each element described by the statute defining the offense, a person acts while having one of the mental states of knowingly, negligently, or purposely.

(2) In deliberate homicide under 45-5-102(1)(b), the offender must act while having the mental state of purposely or knowingly only as to the underlying felony referred to in 45-5-102(1)(b).

(3) The existence of a mental state may be inferred from the acts of the accused and the facts and circumstances connected with the offense.

(4) If the statute defining an offense prescribes a particular mental state with respect to the offense as a whole without distinguishing among the elements of the offense, the prescribed mental state applies to each element.

(5) Knowledge that certain conduct constitutes an offense or knowledge of the existence, meaning, or application of the statute defining an offense is not an element of the offense unless the statute clearly defines it as an element.

(6) A person's reasonable belief that the person's conduct does not constitute an offense is a defense if:

(a) the offense is defined by an administrative regulation or order that is not known to the person and has not been published or otherwise made reasonably available to the person and if the person could not have acquired the knowledge by the exercise of due diligence pursuant to facts known to the person;

(b) the person acts in reliance upon a statute that later is determined to be invalid;

(c) the person acts in reliance upon an order or opinion of the Montana supreme court or a United States appellate court later overruled or reversed; or

(d) the person acts in reliance upon an official interpretation of the statute, regulation, or order defining the offense made by a public officer or agency legally authorized to interpret the statute.

(7) If a person's reasonable belief is a defense under subsection (6), nevertheless the person may be convicted of an included offense of which the person would be guilty if the law were as the person believed it to be.

(8) A defense based upon this section is an affirmative defense.

History: En. 94-2-103 by Sec. 1, Ch. 513, L. 1973; amd. Sec. 11, Ch. 359, L. 1977; R.C.M. 1947, 94-2-103; amd. Sec. 1, Ch. 580, L. 1979; amd. Sec. 5, Ch. 485, L. 1981; amd. Sec. 2, Ch. 610, L. 1987; amd. Sec. 9, Ch. 354, L. 1995.

Cross-References

Montana Administrative Procedure Act, Title 2, ch. 4.

Definition of knowingly, 45-2-101.

Definition of negligently, 45-2-101.

Definition of purposely, 45-2-101.

Absolute liability, 45-2-104.

Inference of mental state in deliberate homicide, 45-5-112.

45-2-104. Absolute liability. A person may be guilty of an offense without having, as to each element of the offense, one of the mental states of knowingly, negligently, or purposely only if the offense is punishable by a fine not exceeding $500 or the statute defining the offense clearly indicates a legislative purpose to impose absolute liability for the conduct described.

History: En. 94-2-104 by Sec. 1, Ch. 513, L. 1973; amd. Sec. 12, Ch. 359, L. 1977; R.C.M. 1947, 94-2-104; amd. Sec. 6, Ch. 485, L. 1981; amd. Sec. 1, Ch. 350, L. 1987; amd. Sec. 10, Ch. 354, L. 1995.

Cross-References

Definition of knowingly, 45-2-101.
Definition of negligently, 45-2-101.
Definition of purposely, 45-2-101.
General requirements of criminal act and mental state, 45-2-103.
Voluntary act, 45-2-202.

Part 2

Other Factors Affecting Individual Liability

45-2-201. Causal relationship between conduct and result. (1) Conduct is the cause of a result if:

(a) without the conduct the result would not have occurred; and

(b) any additional causal requirements imposed by the specific statute defining the offense are satisfied.

(2) If purposely or knowingly causing a result is an element of an offense and the result is not within the contemplation or purpose of the offender, either element can nevertheless be established if:

(a) the result differs from that contemplated only in the respect that a different person or different property is affected or that the injury or harm caused is less than contemplated; or

(b) the result involves the same kind of harm or injury as contemplated but the precise harm or injury was different or occurred in a different way, unless the actual result is too remote or accidental to have a bearing on the offender's liability or on the gravity of the offense.

(3) If negligently causing a particular result is an element of an offense and the result is not within the risk of which the offender is aware or should be aware, either element can nevertheless be established if:

(a) the actual result differs from the probable result only in the respect that a different person or different property is affected or that the actual injury or harm is less; or

(b) the actual result involves the same kind of injury or harm as the probable result, unless the actual result is too remote or accidental to have a bearing on the offender's liability or on the gravity of the offense.

History: En. 94-2-105 by Sec. 1, Ch. 513, L. 1973; R.C.M. 1947, 94-2-105.

Cross-References

Definition of conduct, 45-2-101.
Definition of knowingly, 45-2-101.
Definition of negligently, 45-2-101.
Definition of purposely, 45-2-101.

45-2-202. Voluntary act. A material element of every offense is a voluntary act, which includes an omission to perform a duty which the law imposes on the offender and which he is physically capable of performing, except for deliberate homicide under 45-5-102(1)(b) for which there must be a voluntary act only as to the underlying felony. Possession is a voluntary act if the offender knowingly procured or received the thing possessed or was aware of his control thereof for a sufficient time to have been able to terminate his control.

History: En. 94-2-102 by Sec. 1, Ch. 513, L. 1973; R.C.M. 1947, 94-2-102; amd. Sec. 3, Ch. 610, L. 1987.

Cross-References
Definition of act, 45-2-101.
Definition of conduct, 45-2-101.
Definition of involuntary act, 45-2-101.
Definition of possession, 45-2-101.
Absolute liability, 45-2-104.

45-2-203. Responsibility — intoxicated condition. A person who is in an intoxicated condition is criminally responsible for his conduct and an intoxicated condition is not a defense to any offense and may not be taken into consideration in determining the existence of a mental state which is an element of the offense unless the defendant proves that he did not know that it was an intoxicating substance when he consumed, smoked, sniffed, injected, or otherwise ingested the substance causing the condition.

History: En. 94-2-109 by Sec. 1, Ch. 513, L. 1973; amd. Sec. 53, Ch. 329, L. 1974; R.C.M. 1947, 94-2-109; amd. Sec. 1, Ch. 251, L. 1987.

Cross-References
Definition of intoxicating substance, 45-2-101.
Robbery, 45-5-401.
Mental competency of accused, Title 46, ch. 14.

45-2-204 through 45-2-210 reserved.

45-2-211. Consent as a defense. (1) The consent of the victim to conduct charged to constitute an offense or to the result thereof is a defense.

(2) Consent is ineffective if:

(a) it is given by a person who is legally incompetent to authorize the conduct charged to constitute the offense;

(b) it is given by a person who by reason of youth, mental disease or defect, or intoxication is unable to make a reasonable judgment as to the nature or harmfulness of the conduct charged to constitute the offense;

(c) it is induced by force, duress, or deception; or

(d) it is against public policy to permit the conduct or the resulting harm, even though consented to.

History: En. 94-2-111 by Sec. 1, Ch. 513, L. 1973; amd. Sec. 13, Ch. 359, L. 1977; R.C.M. 1947, 94-2-111.

Cross-References
Sexual crimes, Title 45, ch. 5, part 5.

45-2-212. Compulsion. A person is not guilty of an offense, other than an offense punishable with death, by reason of conduct which he performs under the compulsion of threat or menace of the imminent infliction of death or serious bodily harm if he reasonably believes that death or serious bodily harm will be inflicted upon him if he does not perform such conduct.

History: En. 94-3-110 by Sec. 1, Ch. 513, L. 1973; R.C.M. 1947, 94-3-110.

45-2-213. Entrapment. A person is not guilty of an offense if his conduct is incited or induced by a public servant or his agent for the purpose of obtaining evidence for the prosecution of such person. However, this section is inapplicable if a public servant or his agent merely affords to such person the opportunity or facility for committing an offense in furtherance of criminal purpose which such person has originated.

History: En. 94-3-111 by Sec. 1, Ch. 513, L. 1973; R.C.M. 1947, 94-3-111.

Part 3

Liability for Acts Committed By or For Another

45-2-301. Accountability for conduct of another. A person is responsible for conduct which is an element of an offense if the conduct is either that of the person himself or that of another and he is legally accountable for such conduct as provided in 45-2-302, or both.

History: En. 94-2-106 by Sec. 1, Ch. 513, L. 1973; R.C.M. 1947, 94-2-106.

Cross-References

Definition of conduct, 45-2-101.

When accountability exists, 45-2-302.

Testimony of person legally accountable, 46-16-213.

45-2-302. When accountability exists. A person is legally accountable for the conduct of another when:

(1) having a mental state described by the statute defining the offense, he causes another to perform the conduct, regardless of the legal capacity or mental state of the other person;

(2) the statute defining the offense makes him so accountable; or

(3) either before or during the commission of an offense with the purpose to promote or facilitate such commission, he solicits, aids, abets, agrees, or attempts to aid such other person in the planning or commission of the offense. However, a person is not so accountable if:

(a) he is a victim of the offense committed, unless the statute defining the offense provides otherwise; or

(b) before the commission of the offense, he terminates his effort to promote or facilitate such commission and does one of the following:

(i) wholly deprives his prior efforts of effectiveness in such commission;

(ii) gives timely warning to the proper law enforcement authorities; or

(iii) otherwise makes proper effort to prevent the commission of the offense.

History: En. 94-2-107 by Sec. 1, Ch. 513, L. 1973; R.C.M. 1947, 94-2-107.

Cross-References

Definition of conduct, 45-2-101.

Accountability for conduct of another, 45-2-301.

Inchoate offenses, 45-4-101 through 45-4-103.

45-2-303. Separate conviction of person accountable. A person who is legally accountable for the conduct of another which is an element of an offense may be convicted upon proof that the offense was committed and that he was so accountable although the other person claimed to have committed the offense has not been prosecuted or convicted, has been convicted of a different offense, is not amenable to justice, or has been acquitted.

History: En. 94-2-108 by Sec. 1, Ch. 513, L. 1973; R.C.M. 1947, 94-2-108.

Cross-References

Definition of conduct, 45-2-101.

Accountability for conduct of another, 45-2-301.

When accountability exists, 45-2-302.

45-2-304 through 45-2-310 reserved.

45-2-311. Criminal responsibility of corporations. (1) A corporation may be prosecuted for the commission of an offense only if:

(a) the offense is a misdemeanor, is defined by 45-5-204, 45-6-315, 45-6-317, 45-6-318, 45-6-326, 45-6-327, 45-8-113, 45-8-114, 45-8-212, 45-8-214, 82-1-201, or 82-10-104, or is defined by another statute that clearly indicates a legislative purpose to impose liability on a corporation and an agent of the corporation performs the conduct that is an element of the offense while acting within the scope of the agent's office or employment and in behalf of the corporation, except that any limitation in the defining statute concerning the corporation's accountability for certain agents or under certain circumstances is applicable; or

(b) the commission of the offense is authorized, requested, commanded, or performed by the board of directors or by a high managerial agent who is acting within the scope of that agent's employment in behalf of the corporation.

(2) A corporation's proof that the high managerial agent having supervisory responsibility over the conduct that is the subject matter of the offense exercised due diligence to prevent the commission of the offense is a defense to a prosecution for any offense to which subsection (1)(a) refers, other than an offense for which absolute liability is imposed. This subsection is inapplicable if the legislative purpose of the statute defining the offense is inconsistent with the provisions of this subsection.

(3) For the purposes of this section:

(a) "agent" means any director, officer, servant, employee, or other person who is authorized to act in behalf of the corporation;

(b) "high managerial agent" means an officer of the corporation or any other agent who has a position of comparable authority for the formulation of corporate policy or the supervision of subordinate employees in a managerial capacity.

History: En. 94-2-112 by Sec. 1, Ch. 513, L. 1973; R.C.M. 1947, 94-2-112; amd. Sec. 2, Ch. 582, L. 1983; amd. Sec. 2, Ch. 365, L. 1985; amd. Sec. 193, Ch. 42, L. 1997.

Cross-References

Definition of conduct, 45-2-101.

Accountability for conduct of corporation, 45-2-312.

Summons to corporation, 46-6-212.

45-2-312. Accountability for conduct of corporation. (1) A person is legally accountable for conduct which is an element of an offense and which, in the name or in behalf of a corporation, he performs or causes to be performed to the same extent as if the conduct were performed in his own name or behalf.

(2) An individual who has been convicted of an offense by reason of his legal accountability for the conduct of a corporation is subject to the punishment authorized by law for an individual upon conviction of such offense although only a lesser or different punishment is authorized for the corporation.

History: En. 94-2-113 by Sec. 1, Ch. 513, L. 1973; R.C.M. 1947, 94-2-113.

Cross-References

Definition of conduct, 45-2-101.

Criminal responsibility of corporations, 45-2-311.

CHAPTER 3

JUSTIFIABLE USE OF FORCE

Part 1 — When Force Justified

45-3-101. Definitions.
45-3-102. Use of force in defense of person.

45-3-103. Use of force in defense of occupied structure.
45-3-104. Use of force in defense of other property.
45-3-105. Use of force by aggressor.
45-3-106. Use of force to prevent escape.
45-3-107. Use of force by parent, guardian, or teacher.
45-3-108. Use of force in resisting arrest.
45-3-109. Execution of death sentence.
45-3-110 through 45-3-114 reserved.
45-3-115. Affirmative defense.

Part 1
When Force Justified

Part Cross-References

Right to use force, 49-1-103.

45-3-101. Definitions. (1) "Force likely to cause death or serious bodily harm" within the meaning of this chapter includes but is not limited to:

(a) the firing of a firearm in the direction of a person, even though no purpose exists to kill or inflict serious bodily harm; and

(b) the firing of a firearm at a vehicle in which a person is riding.

(2) "Forcible felony" means any felony which involves the use or threat of physical force or violence against any individual.

History: En. 94-3-101 by Sec. 1, Ch. 513, L. 1973; R.C.M. 1947, 94-3-101.

Cross-References

Definition of forcible felony, 45-2-101, 45-3-101.

Justifiable use of force, Title 45, ch. 3.

45-3-102. Use of force in defense of person. A person is justified in the use of force or threat to use force against another when and to the extent that he reasonably believes that such conduct is necessary to defend himself or another against such other's imminent use of unlawful force. However, he is justified in the use of force likely to cause death or serious bodily harm only if he reasonably believes that such force is necessary to prevent imminent death or serious bodily harm to himself or another or to prevent the commission of a forcible felony.

History: En. 94-3-102 by Sec. 1, Ch. 513, L. 1973; R.C.M. 1947, 94-3-102.

Cross-References

Definition of forcible felony and of force likely to cause death or serious bodily harm, 45-3-101.

45-3-103. Use of force in defense of occupied structure. A person is justified in the use of force or threat to use force against another when and to the extent that he reasonably believes that such conduct is necessary to prevent or terminate such other's unlawful entry into or attack upon an occupied structure. However, he is justified in the use of force likely to cause death or serious bodily harm only if:

(1) the entry is made or attempted in violent, riotous, or tumultuous manner and he reasonably believes that such force is necessary to prevent an assault upon or offer of personal violence to him or another then in the occupied structure; or

(2) he reasonably believes that such force is necessary to prevent the commission of a forcible felony in the occupied structure.

History: **En. 94-3-103 by Sec. 1, Ch. 513, L. 1973; R.C.M. 1947, 94-3-103.**

Cross-References

Definition of conduct, 45-2-101.

Definition of occupied structure, 45-2-101.

Definition of enter or remain unlawfully, 45-6-201.

Criminal trespass to property, 45-6-203.

45-3-104. Use of force in defense of other property. A person is justified in the use of force or threat to use force against another when and to the extent that he reasonably believes that such conduct is necessary to prevent or terminate such other's trespass on or other tortious or criminal interference with either real property (other than an occupied structure) or personal property lawfully in his possession or in the possession of another who is a member of his immediate family or household or of a person whose property he has a legal duty to protect. However, he is justified in the use of force likely to cause death or serious bodily harm only if he reasonably believes that such force is necessary to prevent the commission of a forcible felony.

History: **En. 94-3-104 by Sec. 1, Ch. 513, L. 1973; R.C.M. 1947, 94-3-104.**

Cross-References

Definition of forcible felony, 45-2-101, 45-3-101.

Use of force in defense of person, 45-3-102.

Use of force in defense of occupied structure, 45-3-103.

Definition of enter or remain unlawfully, 45-6-201.

Criminal trespass to property, 45-6-203.

Arrest by private person, 46-6-502.

45-3-105. Use of force by aggressor. The justification described in 45-3-102 through 45-3-104 is not available to a person who:

(1) is attempting to commit, committing, or escaping after the commission of a forcible felony; or

(2) purposely or knowingly provokes the use of force against himself, unless:

(a) such force is so great that he reasonably believes that he is in imminent danger of death or serious bodily harm and that he has exhausted every reasonable means to escape such danger other than the use of force which is likely to cause death or serious bodily harm to the assailant; or

(b) in good faith, he withdraws from physical contact with the assailant and indicates clearly to the assailant that he desires to withdraw and terminate the use of force but the assailant continues or resumes the use of force.

History: **En. 94-3-105 by Sec. 1, Ch. 513, L. 1973; R.C.M. 1947, 94-3-105.**

Cross-References

Definition of forcible felony, 45-2-101, 45-3-101.

Definition of force likely to cause death or serious bodily harm, 45-3-101.

45-3-106. Use of force to prevent escape. (1) A peace officer or other person who has an arrested person in his custody is justified in the use of such force to prevent the escape of the arrested person from custody as he would be justified in using if he were arresting such person.

(2) A guard or other peace officer is justified in the use of force, including force likely to cause death or serious bodily harm, which he reasonably believes to be necessary to prevent the escape from a correctional institution of a person whom the officer reasonably believes to be lawfully detained in such institution under sentence for an offense or awaiting trial or commitment for an offense.

History: En. 94-3-106 by Sec. 1, Ch. 513, L. 1973; R.C.M. 1947, 94-3-106.

Cross-References

Definition of correctional institution, 45-2-101.

Resisting arrest, 45-7-301.

Escape, 45-7-306.

Stop and frisk, 46-5-401, 46-5-402.

Method of arrest, 46-6-104.

45-3-107. Use of force by parent, guardian, or teacher. A parent or an authorized agent of any parent or a guardian, master, or teacher is justified in the use of such force as is reasonable and necessary to restrain or correct his child, ward, apprentice, or pupil.

History: En. 94-3-107 by Sec. 1, Ch. 513, L. 1973; R.C.M. 1947, 94-3-107.

Cross-References

Homicide, 45-5-102 through 45-5-105.

Assault, 45-5-201 through 45-5-206, 45-5-211.

45-3-108. Use of force in resisting arrest. A person is not authorized to use force to resist an arrest which he knows is being made either by a peace officer or by a private person summoned and directed by a peace officer to make the arrest, even if he believes that the arrest is unlawful and the arrest in fact is unlawful.

History: En. 94-3-108 by Sec. 1, Ch. 513, L. 1973; R.C.M. 1947, 94-3-108.

Cross-References

Use of force in defense of person, 45-3-102.

Resisting arrest, 45-7-301.

Method of arrest, 46-6-104.

Manner of arrest without warrant, 46-6-312.

45-3-109. Execution of death sentence. A person who puts a person to death pursuant to a sentence of a court of competent jurisdiction is justified if he acts in accordance with the sentence pronounced and the law prescribing the procedure for execution of a death sentence.

History: En. 94-3-109 by Sec. 1, Ch. 513, L. 1973; R.C.M. 1947, 94-3-109; amd. Sec. 3, Ch. 411, L. 1983.

Cross-References

Death penalty, 46-18-301 through 46-18-310.

Execution of death sentence, 46-19-103.

45-3-110 through 45-3-114 reserved.

45-3-115. Affirmative defense. A defense of justifiable use of force based on the provisions of this part is an affirmative defense.

History: En. 94-3-112 by Sec. 1, Ch. 513, L. 1973; R.C.M. 1947, 94-3-112.

Cross-References

Defendant presumed innocent — reasonable doubt, 46-16-204.

CHAPTER 4

INCHOATE OFFENSES

Part 1 — Enumeration of Offenses and Extent of Liability

45-4-101. Solicitation.
45-4-102. Conspiracy.
45-4-103. Attempt.

Part 1
Enumeration of Offenses and Extent of Liability

45-4-101. Solicitation. (1) A person commits the offense of solicitation when, with the purpose that an offense be committed, he commands, encourages, or facilitates the commission of that offense.

(2) A person convicted of solicitation shall be punished not to exceed the maximum provided for the offense solicited.

History: En. 94-4-101 by Sec. 1, Ch. 513, L. 1973; R.C.M. 1947, 94-4-101.

Cross-References

Definition of offense, 45-2-101.

Definition of purpose, 45-2-101.

45-4-102. Conspiracy. (1) A person commits the offense of conspiracy when, with the purpose that an offense be committed, he agrees with another to the commission of that offense. No person may be convicted of conspiracy to commit an offense unless an act in furtherance of such agreement has been committed by him or by a coconspirator.

(2) It shall not be a defense to conspiracy that the person or persons with whom the accused has conspired:

(a) has not been prosecuted or convicted;

(b) has been convicted of a different offense;

(c) is not amenable to justice;

(d) has been acquitted; or

(e) lacked the capacity to commit the offense.

(3) A person convicted of the offense of conspiracy shall be punished not to exceed the maximum sentence provided for the offense which is the object of the conspiracy.

History: En. 94-4-102 by Sec. 1, Ch. 513, L. 1973; R.C.M. 1947, 94-4-102.

Cross-References

Admissibility of statements of coconspirator, Rule 801(d)(2)(E), M.R.Ev. (see Title 26, ch. 10).

Definition of acts, 45-2-101.

Definition of offense, 45-2-101.

Definition of purpose, 45-2-101.

Liability for acts committed by or for another, 45-2-301 through 45-2-312.

Charging two or more offenses as part of common plan, 46-11-404.

45-4-103. Attempt. (1) A person commits the offense of attempt when, with the purpose to commit a specific offense, he does any act toward the commission of such offense.

(2) It shall not be a defense to a charge of attempt that because of a misapprehension of the circumstances it would have been impossible for the accused to commit the offense attempted.

(3) A person convicted of the offense of attempt shall be punished not to exceed the maximum provided for the offense attempted.

(4) A person shall not be liable under this section if, under circumstances manifesting a voluntary and complete renunciation of his criminal purpose, he avoided the commission of the offense attempted by abandoning his criminal effort.

(5) Proof of the completed offense does not bar conviction for the attempt.

History: En. 94-4-103 by Sec. 1, Ch. 513, L. 1973; R.C.M. 1947, 94-4-103.

Cross-References

Definition of offense, 45-2-101.

Definition of purpose, 45-2-101.

CHAPTER 5

OFFENSES AGAINST THE PERSON

Part 1 — Homicide

45-5-101. Repealed.
45-5-102. Deliberate homicide.
45-5-103. Mitigated deliberate homicide.
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Part 1

Homicide

Part Cross-References

Family member of victim — reimbursement for mental health treatment, 53-9-128.

45-5-101. Repealed. Sec. 11, Ch. 610, L. 1987.

History: En. 94-5-101 by Sec. 1, Ch. 513, L. 1973; R.C.M. 1947, 94-5-101.

45-5-102. Deliberate homicide. (1) A person commits the offense of deliberate homicide if:

(a) the person purposely or knowingly causes the death of another human being; or

(b) the person attempts to commit, commits, or is legally accountable for the attempt or commission of robbery, sexual intercourse without consent, arson, burglary, kidnapping, aggravated kidnapping, felonious escape, assault with a weapon, aggravated assault, or any other forcible felony and in the course of the forcible felony or flight thereafter, the person or any person legally accountable for the crime causes the death of another human being.

(2) A person convicted of the offense of deliberate homicide shall be punished by death as provided in 46-18-301 through 46-18-310, unless the person is less than 18 years of age at the time of the commission of the offense, by life imprisonment, or by imprisonment in the state prison for a term of not

less than 10 years or more than 100 years, except as provided in 46-18-219 and 46-18-222.

History: En. 94-5-102 by Sec. 1, Ch. 513, L. 1973; amd. Sec. 11, Ch. 338, L. 1977; amd. Sec. 4, Ch. 584, L. 1977; R.C.M. 1947, 94-5-102; amd. Sec. 1, Ch. 322, L. 1979; amd. Sec. 1, Ch. 322, L. 1987; amd. Sec. 4, Ch. 610, L. 1987; amd. Sec. 2, Ch. 482, L. 1995; amd. Sec. 3, Ch. 432, L. 1999; amd. Sec. 3, Ch. 523, L. 1999.

Compiler's Comments

1999 Amendments — Composite Section: Chapter 432 in (1)(b) substituted "assault with a weapon" for "felony assault". Amendment effective October 1, 1999.

Chapter 523 in (2) after "46-18-310" inserted "unless the person is less than 18 years of age at the time of the commission of the offense"; and made minor changes in style. Amendment effective October 1, 1999.

Cross-References

Definition of felony, 45-2-101.

Definition of knowingly, 45-2-101.

Definition of purposely, 45-2-101.

Causal relationship between conduct and result, 45-2-201.

Burden of state in homicide trial, 45-5-111, 45-5-112.

Kidnapping, 45-5-301 through 45-5-304.

Robbery, 45-5-401.

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Arson, 45-6-103.

Burglary, 45-6-204.

Escape, 45-7-306.

Limitation on deferred imposition of sentence, 46-18-201.

Sentences for certain offenses committed in state prison, 46-18-220.

Killing of peace officer — aggravating circumstances, 46-18-303.

Protection of premature infants born alive, 50-20-108.

45-5-103. Mitigated deliberate homicide. (1) A person commits the offense of mitigated deliberate homicide when the person purposely or knowingly causes the death of another human being but does so under the influence of extreme mental or emotional stress for which there is reasonable explanation or excuse. The reasonableness of the explanation or excuse must be determined from the viewpoint of a reasonable person in the actor's situation.

(2) It is an affirmative defense that the defendant acted under the influence of extreme mental or emotional stress as provided in subsection (1). This defense constitutes a mitigating circumstance reducing deliberate homicide to mitigated deliberate homicide and must be proved by the defendant by a preponderance of the evidence.

(3) Mitigated deliberate homicide is not an included offense of deliberate homicide as defined in 45-5-102(1)(b).

(4) A person convicted of mitigated deliberate homicide shall be imprisoned in the state prison for a term of not less than 2 years or more than 40 years and may be fined not more than $50,000, except as provided in 46-18-219 and 46-18-222.

History: En. 94-5-103 by Sec. 1, Ch. 513, L. 1973; amd. Sec. 5, Ch. 584, L. 1977; R.C.M. 1947, 94-5-103; amd. Sec. 7, Ch. 198, L. 1981; amd. Sec. 5, Ch. 610, L. 1987; amd. Sec. 3, Ch. 482, L. 1995.

Cross-References

Deliberate homicide, 45-5-102.

Limitation on deferral or suspension of sentence, 46-18-201.

Sentences for certain offenses committed in state prison, 46-18-220.

Protection of premature infants born alive, 50-20-108.

Ground for suspension or revocation of driver's license, 61-5-405.

45-5-104. Negligent homicide. (1) A person commits the offense of negligent homicide if the person negligently causes the death of another human being.

(2) Negligent homicide is not an included offense of deliberate homicide as defined in 45-5-102(1)(b).

(3) A person convicted of negligent homicide shall be imprisoned in the state prison for any term not to exceed 20 years or be fined an amount not to exceed $50,000, or both.

History: En. 94-5-104 by Sec. 1, Ch. 513, L. 1973; R.C.M. 1947, 94-5-104; amd. Sec. 7, Ch. 198, L. 1981; amd. Sec. 6, Ch. 610, L. 1987; amd. Sec. 1, Ch. 381, L. 1999.

Compiler's Comments

1999 Amendment: Chapter 381 in (3) increased maximum imprisonment term from 10 years to 20 years; and made minor changes in style. Amendment effective October 1, 1999.

Cross-References

Classification of offenses, 45-1-201.

Definition of negligently, 45-2-101.

Protection of premature infants born alive, 50-20-108.

Ground for suspension or revocation of driver's license, 61-5-405.

45-5-105. Aiding or soliciting suicide. (1) A person who purposely aids or solicits another to commit suicide, but such suicide does not occur, commits the offense of aiding or soliciting suicide.

(2) A person convicted of the offense of aiding or soliciting a suicide shall be imprisoned in the state prison for any term not to exceed 10 years or be fined an amount not to exceed $50,000, or both.

History: En. 94-5-106 by Sec. 1, Ch. 513, L. 1973; R.C.M. 1947, 94-5-106; amd. Sec. 7, Ch. 198, L. 1981.

Cross-References

Definition of purposely, 45-2-101.

Causal relationship between conduct and result, 45-2-201.

When accountability exists, 45-2-302.

45-5-106 through 45-5-110 reserved.

45-5-111. Extrajudicial confession — evidence of death. In a homicide trial, before an extrajudicial confession may be admitted into evidence, the state must introduce independent evidence tending to establish the death and the fact that the death was caused by a criminal agency.

History: En. 95-3004 by Sec. 12, Ch. 513, L. 1973; amd. Sec. 49, Ch. 184, L. 1977; R.C.M. 1947, 95-3004; MCA 1981, 46-16-203(1); redes. 45-5-111 by Code Commissioner, 1983.

45-5-112. Inference of mental state. In a deliberate homicide, knowledge or purpose may be inferred from the fact that the accused committed a homicide and no circumstances of mitigation, excuse, or justification appear.

History: En. 95-3004 by Sec. 12, Ch. 513, L. 1973; amd. Sec. 49, Ch. 184, L. 1977; R.C.M. 1947, 95-3004; MCA 1981, 46-16-203(2); redes. 45-5-112 by Code Commissioner, 1983.

Cross-References

Inference of mental state generally, 45-2-103.

Part 2

Assault and Related Offenses

45-5-201. Assault. (1) A person commits the offense of assault if the person:

(a) purposely or knowingly causes bodily injury to another;

(b) negligently causes bodily injury to another with a weapon;

(c) purposely or knowingly makes physical contact of an insulting or provoking nature with any individual; or

(d) purposely or knowingly causes reasonable apprehension of bodily injury in another.

(2) A person convicted of assault shall be fined not to exceed $500 or be imprisoned in the county jail for any term not to exceed 6 months, or both.

History: En. 94-5-201 by Sec. 1, Ch. 513, L. 1973; R.C.M. 1947, 94-5-201; amd. Sec. 1, Ch. 261, L. 1979; amd. Sec. 7, Ch. 198, L. 1981; amd. Sec. 1, Ch. 188, L. 1991; amd. Sec. 4, Ch. 432, L. 1999.

Compiler's Comments

1999 Amendment: Chapter 432 at beginning of (2) deleted exception clause; deleted former (3) that read: "(3) If the victim is less than 14 years old and the offender is 18 or more years old, the offender, upon conviction under subsection (1)(a), shall be fined not to exceed $50,000 or be imprisoned in the state prison for a term not to exceed 5 years, or both"; and made minor changes in style. Amendment effective October 1, 1999.

Cross-References

Definition of bodily injury, 45-2-101.

Definition of knowingly, 45-2-101.

Definition of negligently, 45-2-101.

Definition of purposely, 45-2-101.

Definition of weapon, 45-2-101.

45-5-202. Aggravated assault. (1) A person commits the offense of aggravated assault if the person purposely or knowingly causes serious bodily injury to another.

(2) A person convicted of aggravated assault shall be imprisoned in the state prison for a term of not less than 2 years or more than 20 years and may be fined not more than $50,000, except as provided in 46-18-219 and 46-18-222.

History: En. 94-5-202 by Sec. 1, Ch. 513, L. 1973; amd. Sec. 6, Ch. 584, L. 1977; R.C.M. 1947, 94-5-202; amd. Sec. 7, Ch. 198, L. 1981; amd. Sec. 1, Ch. 289, L. 1981; amd. Sec. 1, Ch. 163, L. 1985; amd. Sec. 4, Ch. 482, L. 1995; amd. Sec. 1, Ch. 245, L. 1997; amd. Sec. 2, Ch. 433, L. 1997; amd. Sec. 6, Ch. 432, L. 1999.

Compiler's Comments

1999 Amendment: Chapter 432 deleted former (2) that read: "(2) A person commits the offense of felony assault if the person purposely or knowingly causes:

(a) bodily injury to another with a weapon; or

(b) reasonable apprehension of serious bodily injury in another by use of a weapon"; deleted former last sentence of (2)(a) that read: "Subject to the provisions of subsection (3)(b), a person convicted of felony assault shall be imprisoned in the state prison for a term not to exceed 10 years or be fined not more than $50,000, or both"; deleted former (3)(b) that read: "(b) In addition to any sentence imposed under subsection (3)(a), if the person convicted of felony assault is a partner or family member of the victim, as defined in 45-5-206, the person is required to pay for and complete a counseling assessment as required in 45-5-206(4)"; and made minor changes in style. Amendment effective October 1, 1999.

Cross-References

Definition of bodily injury, 45-2-101.

Definition of knowingly, 45-2-101.

Definition of purposely, 45-2-101.

Definition of serious bodily injury, 45-2-101.

Definition of weapon, 45-2-101.

Time of making arrest — domestic violence or aggravated assault against family or household member, 46-6-105.

Circumstances of making arrest — partner or family member assault against partner or family member, 46-6-311.

Written report when no arrest made in domestic violence situation, 46-6-601.

Notice of rights to victim upon arrest in domestic violence situation, 46-6-602.

Limitation on deferral or suspension of sentence, 46-18-201.

Sentences for certain offenses committed in state prison, 46-18-220.

45-5-203. Intimidation. (1) A person commits the offense of intimidation when, with the purpose to cause another to perform or to omit the performance of any act, he communicates to another, under circumstances which reasonably tend to produce a fear that it will be carried out, a threat to perform without lawful authority any of the following acts:

(a) inflict physical harm on the person threatened or any other person;

(b) subject any person to physical confinement or restraint; or

(c) commit any felony.

(2) A person commits the offense of intimidation if he knowingly communicates a threat or false report of a pending fire, explosion, or disaster which would endanger life or property.

(3) A person convicted of the offense of intimidation shall be imprisoned in the state prison for any term not to exceed 10 years or be fined an amount not to exceed $50,000, or both.

History: En. 94-5-203 by Sec. 1, Ch. 513, L. 1973; R.C.M. 1947, 94-5-203; amd. Sec. 7, Ch. 198, L. 1981; amd. Sec. 1, Ch. 268, L. 1985.

Cross-References

Definition of knowingly, 45-2-101.
Definition of offense, 45-2-101.
Definition of purposely, 45-2-101.

45-5-204. Mistreating prisoners. (1) A person commits the offense of mistreating prisoners if, being responsible for the care or custody of a prisoner, he purposely or knowingly:

(a) assaults or otherwise injures a prisoner;

(b) intimidates, threatens, endangers, or withholds reasonable necessities from the prisoner with the purpose to obtain a confession from him or for any other purpose; or

(c) violates any civil right of a prisoner.

(2) A person convicted of the offense of mistreating prisoners shall be removed from office or employment and shall be imprisoned in the state prison for a term not to exceed 10 years or be fined an amount not to exceed $50,000, or both.

History: En. 94-8-113 by Sec. 1, Ch. 513, L. 1973; R.C.M. 1947, 94-8-113; amd. Sec. 7, Ch. 198, L. 1981.

Cross-References

Definition of knowingly, 45-2-101.
Definition of purposely, 45-2-101.
Definition of threat, 45-2-101.
Criminal responsibility of corporations, 45-2-311.

45-5-205. Negligent vehicular assault — penalty. (1) A person who negligently operates a motor vehicle while under the influence of alcohol, a dangerous drug, any other drug, or any combination of the three, as provided for in 61-8-401(1), and who causes bodily injury to another commits the offense of negligent vehicular assault.

(2) Subject to subsection (3), a person convicted of the offense of negligent vehicular assault shall be fined an amount not to exceed $1,000 or shall be imprisoned in the county jail for a term not to exceed 1 year, or both, and shall be ordered to pay restitution as provided in 46-18-241.

(3) (a) A person convicted of the offense of negligent vehicular assault who caused serious bodily injury to another shall be fined an amount not to exceed $10,000 or shall be incarcerated for a term not to exceed 5 years, or both, and shall be ordered to pay restitution as provided in 46-18-241.

(b) If a term of incarceration is imposed, the judge may suspend the term of incarceration upon the condition of payment of any fine imposed and of restitution. If the person does not pay the fine or restitution, the term of incarceration may be imposed.

History: **En. Sec. 1, Ch. 93, L. 1985; amd. Sec. 1, Ch. 196, L. 1987; amd. Sec. 14, Ch. 789, L. 1991; amd. Sec. 1, Ch. 317, L. 1997.**

45-5-206. Partner or family member assault — penalty. (1) A person commits the offense of partner or family member assault if the person:

(a) purposely or knowingly causes bodily injury to a partner or family member;

(b) negligently causes bodily injury to a partner or family member with a weapon; or

(c) purposely or knowingly causes reasonable apprehension of bodily injury in a partner or family member.

(2) For the purposes of Title 40, chapter 15, 46-6-311, and this section, the following definitions apply:

(a) "Family member" means mothers, fathers, children, brothers, sisters, and other past or present family members of a household. These relationships include relationships created by adoption and remarriage, including stepchildren, stepparents, in-laws, and adoptive children and parents. These relationships continue regardless of the ages of the parties and whether the parties reside in the same household.

(b) "Partners" means spouses, former spouses, persons who have a child in common, and persons who have been or are currently in a dating or ongoing intimate relationship with a person of the opposite sex.

(3) (a) An offender convicted of partner or family member assault shall be fined an amount not less than $100 or more than $1,000 and be imprisoned in the county jail for a term not to exceed 1 year or not less than 24 hours for a first offense. An offender convicted of a second offense under this section shall be fined not less than $300 or more than $1,000 and be imprisoned in the county jail not less than 72 hours or more than 1 year. Upon a first or second conviction, the offender may be ordered into misdemeanor probation as provided in 46-23-1005. On a third or subsequent conviction for partner or family member assault, the offender shall be fined not less than $500 and not more than $50,000 and be imprisoned for a term not less than 30 days and not more than 5 years. If the term of imprisonment does not exceed 1 year, the person shall be imprisoned in the county jail. If the term of imprisonment exceeds 1 year, the person shall be imprisoned in the state prison.

(b) (i) For the purpose of determining the number of convictions under this section, a conviction means a conviction, as defined in 45-2-101, in this state, conviction for a violation of a similar statute in another state, or a forfeiture of bail or collateral deposited to secure the defendant's appearance in court in this state or in another state for a violation of a similar statute, which forfeiture has not been vacated. A prior conviction for domestic abuse under this section is a prior conviction for purposes of subsection (3)(a).

(ii) A conviction for assault with a weapon under 45-5-213, if the offender was a partner or family member of the victim, constitutes a conviction for the purpose of calculating prior convictions under this section.

(4) (a) An offender convicted of partner or family member assault is required to pay for and complete a counseling assessment with a focus on violence, dangerousness, and chemical dependency. The offender shall follow

through on all recommendations made by the counseling provider. The counseling provider must be approved by the court. The counseling must include a counseling assessment and a minimum of 25 hours of counseling, in addition to the assessment. The assessment and the counseling must be:

(i) with a person licensed under Title 37, chapter 17, 22, or 23;

(ii) with a professional person as defined in 53-21-102; or

(iii) in a specialized domestic violence intervention program.

(b) The counseling provided in subsection (4)(a) must be directed to the violent conduct of the offender. Other issues indicated by the assessment may be addressed in additional counseling beyond the minimum 25 hours. Subsection (4)(a) does not prohibit the placement of the offender in other appropriate treatment if the court determines that there is no available treatment program directed to the violent conduct of the offender.

(5) In addition to any sentence imposed under subsections (3) and (4), after determining the financial resources and future ability of the offender to pay restitution as provided for in 46-18-242, the court shall require the offender, if able, to pay the victim's reasonable actual medical, housing, wage loss, and counseling costs.

(6) In addition to the requirements of subsection (5), if financially able, the offender must be ordered to pay for the costs of the offender's probation, if probation is ordered by the court.

(7) The court may prohibit an offender convicted under this section from possession or use of the firearm used in the assault. The court may enforce 45-8-323 if a firearm was used in the assault.

(8) At the time of sentencing, the court shall provide an offender a written copy of the offender's sentence.

History: En. Sec. 1, Ch. 700, L. 1985; amd. Sec. 1, Ch. 480, L. 1989; amd. Sec. 257, Ch. 800, L. 1991; amd. Sec. 2, Ch. 425, L. 1993; amd. Sec. 51, Ch. 18, L. 1995; amd. Sec. 10, Ch. 350, L. 1995; amd. Sec. 2, Ch. 245, L. 1997; amd. Sec. 5, Ch. 484, L. 1997; amd. Sec. 8, Ch. 432, L. 1999.

Compiler's Comments

1999 Amendment: Chapter 432 in (3)(b)(ii) substituted "assault with a weapon under 45-5-213" for "felony assault under 45-5-202". Amendment effective October 1, 1999.

Cross-References

Justices' Courts — civil jurisdiction, 3-10-301.

Temporary order for maintenance or support, temporary injunction, or temporary restraining order — jurisdiction and venue, 40-4-123.

Partner and family member assault, Title 40, ch. 15.

Time of making arrest — domestic violence or aggravated assault against family or household member, 46-6-105.

Basis for arrest without warrant — arrest of primary aggressor, 46-6-311.

Written report when no arrest made in domestic violence situation, 46-6-601.

Peace officer notice of remedies to partner or family member assault victim, 46-6-602.

Necessity of appearing before judge for bail for stalking or for partner or family member assault, 46-9-302.

45-5-207. Criminal endangerment — penalty. (1) A person who knowingly engages in conduct that creates a substantial risk of death or serious bodily injury to another commits the offense of criminal endangerment. This conduct includes but is not limited to knowingly placing in a tree, log, or any other wood any steel, iron, ceramic, or other substance for the purpose of damaging a saw or other wood harvesting, processing, or manufacturing equipment.

(2) A person convicted of the offense of criminal endangerment shall be fined an amount not to exceed $50,000 or imprisoned in the state prison for a term not to exceed 10 years, or both.

History: En. Sec. 2, Ch. 196, L. 1987; amd. Sec. 1, Ch. 299, L. 1989.

45-5-208. Negligent endangerment — penalty. (1) A person who negligently engages in conduct that creates a substantial risk of death or serious bodily injury to another commits the offense of negligent endangerment.

(2) A person convicted of the offense of negligent endangerment shall be fined an amount not to exceed $1,000 or imprisoned in the county jail for a term not to exceed 1 year, or both.

History: En. Sec. 3, Ch. 196, L. 1987.

45-5-209 reserved.

45-5-210. Assault on peace officer or judicial officer. (1) A person commits the offense of assault on a peace officer or judicial officer if the person purposely or knowingly causes:

(a) bodily injury to a peace officer or judicial officer;

(b) reasonable apprehension of serious bodily injury in a peace officer or judicial officer by use of a weapon;

(c) bodily injury to a peace officer or judicial officer with a weapon; or

(d) serious bodily injury to a peace officer or judicial officer.

(2) (a) A person convicted of assault on a peace officer or judicial officer under subsection (1)(a), (1)(b), or (1)(c) shall be imprisoned in the state prison for a term of not less than 2 years or more than 10 years and may be fined an amount not to exceed $50,000.

(b) Except as provided in 46-18-222, a person convicted of assault on a peace officer or judicial officer under subsection (1)(d) shall be fined an amount not to exceed $50,000 or be imprisoned in the state prison for a term of not less than 5 years or more than 20 years, or both.

(3) As used in this section, the following definitions apply:

(a) "Judicial officer" has the meaning provided in 1-1-202 and includes the workers' compensation judge, water court judges, and judges pro tempore.

(b) "Peace officer" has the meaning provided in 45-2-101 and includes a person, sworn or unsworn, who is responsible for the care or custody of an adult or youth offender.

(4) Criminal endangerment, negligent endangerment, and assault, as defined in 45-5-201, are not included as offenses of assault on a peace officer or judicial officer.

History: En. Sec. 1, Ch. 433, L. 1997.

45-5-211. Assault upon sports official. (1) A person commits the offense of assault upon a sports official if, while a sports official is acting as an official at an athletic contest in any sport at any level of amateur or professional competition, the person:

(a) purposely or knowingly causes bodily injury to the sports official;

(b) negligently causes bodily injury to the sports official with a weapon;

(c) purposely or knowingly makes physical contact of an insulting or provoking nature with the sports official; or

(d) purposely or knowingly causes reasonable apprehension of bodily injury in the sports official.

(2) A person convicted of assault upon a sports official shall be fined an amount not to exceed $1,000 or be imprisoned in the county jail for any term not to exceed 6 months, or both.

History: En. Sec. 1, Ch. 408, L. 1993.

45-5-212. Assault on minor. (1) A person commits the offense of assault on a minor if the person commits an offense under 45-5-201, and at the time of the offense, the victim is under 14 years of age and the offender is 18 years of age or older.

(2) A person convicted of assault on a minor shall be imprisoned in a state prison for a term not to exceed 5 years or be fined not more than $50,000, or both.

History: En. Sec. 5, Ch. 432, L. 1999.

Compiler's Comments

Effective Date: This section is effective October 1, 1999.

45-5-213. Assault with weapon. (1) A person commits the offense of assault with a weapon if the person purposely or knowingly causes:

(a) bodily injury to another with a weapon; or

(b) reasonable apprehension of serious bodily injury in another by use of a weapon or what reasonably appears to be a weapon.

(2) (a) Subject to the provisions of subsection (2)(b), a person convicted of assault with a weapon shall be imprisoned in the state prison for a term not to exceed 20 years or be fined not more than $50,000, or both.

(b) In addition to any sentence imposed under subsection (2)(a), if the person convicted of assault with a weapon is a partner or family member of the victim, as defined in 45-5-206, the person is required to pay for and complete a counseling assessment as required in 45-5-206(4).

History: En. Sec. 7, Ch. 432, L. 1999.

Compiler's Comments

Effective Date: This section is effective October 1, 1999.

45-5-214. Assault with bodily fluid. (1) A person commits the offense of assault with a bodily fluid if the person purposely or knowingly causes one of the person's bodily fluids to make physical contact with a law enforcement officer or staff person of a correctional or detention facility:

(a) during or after an arrest for a criminal offense;

(b) while the person is incarcerated in or being transported to or from a state prison or a county, city, or regional jail or detention facility; or

(c) if the person is a minor, while the youth is detained in or being transported to or from a county, city, or regional jail or detention facility or a youth detention facility, secure detention facility, regional detention facility, short-term detention center, state youth correctional facility, or shelter care facility.

(2) A person convicted of the offense of assault with a bodily fluid shall be fined an amount not to exceed $1,000 or incarcerated in a county jail or a state prison for a term not to exceed 1 year, or both.

(3) The youth court has jurisdiction of any violation of this section by a minor, unless the charge is filed in district court, in which case the district court has jurisdiction.

(4) As used in this section, "bodily fluid" means any bodily secretion, including but not limited to feces, urine, blood, and saliva.

History: En. Sec. 1, Ch. 388, L. 1999.

Compiler's Comments

Effective Date: This section is effective October 1, 1999.

45-5-215 through 45-5-219 reserved.

45-5-220. Stalking — exemption — penalty. (1) A person commits the offense of stalking if the person purposely or knowingly causes another person substantial emotional distress or reasonable apprehension of bodily injury or death by repeatedly:

(a) following the stalked person; or

(b) harassing, threatening, or intimidating the stalked person, in person or by phone, by mail, or by other action, device, or method.

(2) This section does not apply to a constitutionally protected activity.

(3) For the first offense, a person convicted of stalking shall be imprisoned in the county jail for a term not to exceed 1 year or fined an amount not to exceed $1,000, or both. For a second or subsequent offense or for a first offense against a victim who was under the protection of a restraining order directed at the offender, the offender shall be imprisoned in the state prison for a term not to exceed 5 years or fined an amount not to exceed $10,000, or both. A person convicted of stalking may be sentenced to pay all medical, counseling, and other costs incurred by or on behalf of the victim as a result of the offense.

(4) Upon presentation of credible evidence of violation of this section, an order may be granted, as set forth in Title 40, chapter 15, restraining a person from engaging in the activity described in subsection (1).

(5) For the purpose of determining the number of convictions under this section, "conviction" means:

(a) a conviction, as defined in 45-2-101, in this state;

(b) a conviction for a violation of a statute similar to this section in another state; or

(c) a forfeiture of bail or collateral deposited to secure the defendant's appearance in court in this state or another state for a violation of a statute similar to this section, which forfeiture has not been vacated.

(6) Attempts by the accused person to contact or follow the stalked person after the accused person has been given actual notice that the stalked person does not want to be contacted or followed constitutes prima facie evidence that the accused person purposely or knowingly followed, harassed, threatened, or intimidated the stalked person.

History: En. Sec. 1, Ch. 292, L. 1993; amd. Sec. 11, Ch. 350, L. 1995.

Cross-References

Partner and family member assault, sexual assault, and stalking — safety and protection of victims, Title 40, ch. 15.

Basis for arrest without warrant — arrest of primary aggressor, 46-6-311.

Peace officer notice of remedies to partner or family member assault victim, 46-6-602.

Necessity of appearing before judge for bail for stalking or for partner or family member assault, 46-9-302.

45-5-221. Malicious intimidation or harassment relating to civil or human rights — penalty. (1) A person commits the offense of malicious intimidation or harassment when, because of another person's race, creed, religion, color, national origin, or involvement in civil rights or human rights activities, he purposely or knowingly, with the intent to terrify, intimidate, threaten, harass, annoy, or offend:

(a) causes bodily injury to another;

(b) causes reasonable apprehension of bodily injury in another; or

(c) damages, destroys, or defaces any property of another or any public property.

(2) For purposes of this section, "deface" includes but is not limited to cross burning or the placing of any word or symbol commonly associated with racial, religious, or ethnic identity or activities on the property of another person without his or her permission.

(3) A person convicted of the offense of malicious intimidation or harassment shall be imprisoned in the state prison for a term not to exceed 5 years or be fined an amount not to exceed $5,000, or both.

History: **En. Secs. 1, 2, Ch. 570, L. 1989.**

Cross-References

Freedom from discrimination, 49-1-102.

Prohibited discriminatory practices, Title 49, ch. 2, part 3.

45-5-222. Sentence enhancement — offenses committed because of victim's race, creed, religion, color, national origin, or involvement in civil rights or human rights activities. (1) A person who has pleaded guilty or nolo contendere to or who has been found guilty of any offense, except malicious intimidation or harassment, that was committed because of the victim's race, creed, religion, color, national origin, or involvement in civil rights or human rights activities or that involved damage, destruction, or attempted destruction of a building regularly used for religious worship, in addition to the punishment provided for commission of the offense, may be sentenced to a term of imprisonment of not less than 2 years or more than 10 years, except as provided in 46-18-222.

(2) An additional sentence prescribed by subsection (1) shall run consecutively to the sentence, except as provided in 46-18-222.

History: **En. Sec. 3, Ch. 570, L. 1989; amd. Sec. 3, Ch. 395, L. 1999.**

Compiler's Comments

1999 Amendment: Chapter 395 in (1) near beginning after "who has" inserted "pleaded guilty or nolo contendere to or who has". Amendment effective October 1, 1999.

Cross-References

Freedom from discrimination, 49-1-102.

Prohibited discriminatory practices, Title 49, ch. 2, part 3.

45-5-223. Surreptitious visual observation or recordation — place of residence — public establishment — exceptions. (1) A person commits the offense of surreptitious visual observation or recordation in a place of residence if a person purposely or knowingly hides, waits, or otherwise loiters in the vicinity of a private dwelling house, apartment, or other place of residence for the purpose of:

(a) watching, gazing at, or looking upon any occupant in the residence in a surreptitious manner; or

(b) by means of an electronic or mechanical recording device, surreptitiously recording the visual image of any occupant in the residence.

(2) An owner, manager, or employee of a business or a landlord who knowingly surreptitiously records a visual image of a person in a restroom,

washroom, shower, bedroom, fitting room, or other room used by a customer, guest, tenant, or member of the public to, with a reasonable expectation of privacy, change or try on clothes, bathe, perform intimate bodily functions, or appear nude or partially nude or in underclothes commits the offense of surreptitious visual recordation in a public establishment.

(3) Subsections (1) and (2) do not apply to a law enforcement officer, an agent or employee of an insurer, or a private investigator licensed pursuant to 37-60-301 or to any person engaged in fraud detection, prevention, or prosecution pursuant to 2-15-2015 or 39-71-211 while the officer, agent, employee, or private investigator is acting in the course and scope of employment for legitimate investigative purposes.

(4) (a) A person convicted of the offense of surreptitious visual observation or recordation in a place of residence shall be fined an amount not to exceed $500 or be incarcerated in the county jail for a term not to exceed 6 months, or both. Upon a second conviction, a person shall be fined an amount not to exceed $1,000 or be incarcerated for a term not to exceed 1 year, or both. Upon a third or subsequent conviction, a person shall be fined an amount not to exceed $10,000 or be incarcerated for a term not to exceed 5 years, or both.

(b) A person convicted of the offense of surreptitious visual recordation in a public establishment shall be fined an amount not to exceed $1,000 or incarcerated for a term not to exceed 6 months, or both, if the victim was an adult and shall be fined an amount not to exceed $5,000 or incarcerated for a term not to exceed 2 years, or both, if the victim was a minor.“

History: En. Sec. 1, Ch. 62, L. 1997; amd. Sec. 3, Ch. 303, L. 1997.

Part 3
Kidnapping

45-5-301. Unlawful restraint. (1) A person commits the offense of unlawful restraint if he knowingly or purposely and without lawful authority restrains another so as to interfere substantially with his liberty.

(2) A person convicted of the offense of unlawful restraint shall be fined not to exceed $500 or imprisoned in the county jail for any term not to exceed 6 months, or both.

History: En. 94-5-301 by Sec. 1, Ch. 513, L. 1973; R.C.M. 1947, 94-5-301.

Cross-References

Definition of knowingly, 45-2-101.

Definition of purposely, 45-2-101.

45-5-302. Kidnapping. (1) A person commits the offense of kidnapping if the person knowingly or purposely and without lawful authority restrains another person by either secreting or holding the other person in a place of isolation or by using or threatening to use physical force.

(2) A person convicted of the offense of kidnapping shall be imprisoned in the state prison for a term of not less than 2 years or more than 10 years and may be fined not more than $50,000, except as provided in 46-18-219 and 46-18-222.

History: En. 94-5-302 by Sec. 1, Ch. 513, L. 1973; amd. Sec. 7, Ch. 584, L. 1977; R.C.M. 1947, 94-5-302; amd. Sec. 7, Ch. 198, L. 1981; amd. Sec. 5, Ch. 482, L. 1995.

Cross-References

Definition of knowingly, 45-2-101.

Definition of purposely, 45-2-101.

Limitation upon deferral or suspension of sentence, 46-18-201.

45-5-303. Aggravated kidnapping. (1) A person commits the offense of aggravated kidnapping if the person knowingly or purposely and without lawful authority restrains another person by either secreting or holding the other person in a place of isolation or by using or threatening to use physical force, with any of the following purposes:

(a) to hold for ransom or reward or as a shield or hostage;

(b) to facilitate commission of any felony or flight thereafter;

(c) to inflict bodily injury on or to terrorize the victim or another;

(d) to interfere with the performance of any governmental or political function; or

(e) to hold another in a condition of involuntary servitude.

(2) Except as provided in 46-18-219 and 46-18-222, a person convicted of the offense of aggravated kidnapping shall be punished by death or life imprisonment as provided in 46-18-301 through 46-18-310 or be imprisoned in the state prison for a term of not less than 2 years or more than 100 years and may be fined not more than $50,000, unless the person has voluntarily released the victim alive, in a safe place, and with no serious bodily injury, in which event the person shall be imprisoned in the state prison for a term of not less than 2 years or more than 10 years and may be fined not more than $50,000.

History: En. 94-5-303 by Sec. 1, Ch. 513, L. 1973; amd. Sec. 12, Ch. 338, L. 1977; amd. Sec. 8, Ch. 584, L. 1977; R.C.M. 1947, 94-5-303; amd. Sec. 7, Ch. 198, L. 1981; amd. Sec. 6, Ch. 482, L. 1995.

Cross-References

Definition of knowingly, 45-2-101.

Definition of purposely, 45-2-101.

Unlawful restraint, 45-5-301.

Kidnapping, 45-5-302.

Limitation on deferral or suspension of sentence, 46-18-201.

Sentences for certain offenses committed in state prison, 46-18-220.

45-5-304. Custodial interference. (1) A person commits the offense of custodial interference if, knowing that the person has no legal right to do so, the person takes, entices, or withholds from lawful custody any child, incompetent person, or other person entrusted by authority of law to the custody of another person or institution.

(2) A person convicted of the offense of custodial interference shall be imprisoned in the state prison for any term not to exceed 10 years or be fined an amount not to exceed $50,000, or both.

(3) With respect to the first alleged commission of the offense only, a person who has not left the state does not commit an offense under this section if the person voluntarily returns the child, incompetent person, or other person to lawful custody before arraignment. With respect to the first alleged commission of the offense only, a person who has left the state does not commit an offense under this section if the person voluntarily returns the child, incompetent person, or other person to lawful custody before arrest.

History: En. 94-5-305 by Sec. 1, Ch. 513, L. 1973; R.C.M. 1947, 94-5-305; amd. Sec. 1, Ch. 274, L. 1979; amd. Sec. 7, Ch. 198, L. 1981; amd. Sec. 1, Ch. 518, L. 1987; amd. Sec. 4, Ch. 467, L. 1995; amd. Sec. 34, Ch. 343, L. 1997.

Cross-References

Parenting determination and modification, 40-4-211 through 40-4-221, 40-4-225.

Definition of knowingly, 45-2-101.

Kidnapping, 45-5-302.

Aggravated kidnapping, 45-5-303.

Part 4
Robbery

45-5-401. Robbery. (1) A person commits the offense of robbery if in the course of committing a theft, the person:

(a) inflicts bodily injury upon another;

(b) threatens to inflict bodily injury upon any person or purposely or knowingly puts any person in fear of immediate bodily injury; or

(c) commits or threatens immediately to commit any felony other than theft.

(2) A person convicted of the offense of robbery shall be imprisoned in the state prison for a term of not less than 2 years or more than 40 years and may be fined not more than $50,000, except as provided in 46-18-219 and 46-18-222.

(3) "In the course of committing a theft", as used in this section, includes acts that occur in an attempt to commit or in the commission of theft or in flight after the attempt or commission.

History: En. 94-5-401 by Sec. 1, Ch. 513, L. 1973; amd. Sec. 9, Ch. 584, L. 1977; R.C.M. 1947, 94-5-401; amd. Sec. 7, Ch. 198, L. 1981; amd. Sec. 7, Ch. 482, L. 1995.

Cross-References

Definition of bodily injury, 45-2-101.
Definition of felony, 45-2-101.
Definition of knowingly, 45-2-101.
Definition of threat, 45-2-101.
Theft, 45-6-301.
Limitation on deferral or suspension of sentence, 46-18-201.

Part 5
Sexual Crimes

Part Cross-References

Presentence investigation, 46-18-111.
Family member of minor victim — reimbursement for mental health treatment, 53-9-128.

45-5-501. Definition. (1) As used in 45-5-503, the term "without consent" means:

(a) the victim is compelled to submit by force against the victim or another; or

(b) the victim is incapable of consent because the victim is:

(i) mentally defective or incapacitated;

(ii) physically helpless;

(iii) less than 16 years old; or

(iv) incarcerated in an adult or juvenile correctional, detention, or treatment facility and the perpetrator is an employee, contractor, or volunteer of the facility and has supervisory or disciplinary authority over the victim, unless the act is part of a lawful search.

(2) As used in subsection (1), the term "force" means:

(a) the infliction, attempted infliction, or threatened infliction of bodily injury or the commission of a forcible felony by the offender; or

(b) the threat of substantial retaliatory action that causes the victim to reasonably believe that the offender has the ability to execute the threat.

History: En. 94-5-501 by Sec. 1, Ch. 513, L. 1973; amd. Sec. 2, Ch. 405, L. 1975; amd. Sec. 15, Ch. 359, L. 1977; R.C.M. 1947, 94-5-501; amd. Sec. 3, Ch. 175, L. 1991; amd. Sec. 1, Ch. 218, L. 1991; amd. Secs. 1, 8, Ch. 687, L. 1991; amd. Sec. 1, Ch. 84, L. 1999.

Compiler's Comments

1999 Amendment: Chapter 84 inserted (1)(b)(iv) concerning lack of consent by incarcerated victim; and made minor changes in style. Amendment effective October 1, 1999.

Cross-References

Definition of mentally defective, 45-2-101.

Definition of mentally incapacitated, 45-2-101.

Definition of physically helpless, 45-2-101.

Definition of sexual contact, 45-2-101.

Definition of sexual intercourse, 45-2-101.

Consent as defense, 45-2-211.

Sexual intercourse without consent, 45-5-503.

Deviate sexual conduct, 45-5-505.

Sexual abuse of children, 45-5-625.

45-5-502. Sexual assault. (1) A person who knowingly subjects another person to any sexual contact without consent commits the offense of sexual assault.

(2) A person convicted of sexual assault shall be fined not to exceed $500 or be imprisoned in the county jail for a term not to exceed 6 months, or both.

(3) If the victim is less than 16 years old and the offender is 3 or more years older than the victim or if the offender inflicts bodily injury upon anyone in the course of committing sexual assault, the offender shall be punished by life imprisonment or by imprisonment in the state prison for a term of not less than 2 years or more than 100 years and may be fined not more than $50,000.

(4) An act "in the course of committing sexual assault" includes an attempt to commit the offense or flight after the attempt or commission.

(5) Consent is ineffective under this section if:

(a) the victim is incarcerated in an adult or juvenile correctional, detention, or treatment facility and the perpetrator is an employee, contractor, or volunteer of the facility and has supervisory or disciplinary authority over the victim, unless the act is part of a lawful search; or

(b) the victim is less than 14 years old and the offender is 3 or more years older than the victim.

History: En. 94-5-502 by Sec. 1, Ch. 513, L. 1973; R.C.M. 1947, 94-5-502; amd. Sec. 1, Ch. 687, L. 1979; amd. Sec. 7, Ch. 198, L. 1981; amd. Sec. 1, Ch. 172, L. 1985; amd. Sec. 1, Ch. 564, L. 1991; amd. Sec. 2, Ch. 687, L. 1991; amd. Sec. 1, Ch. 550, L. 1995; amd. Sec. 2, Ch. 84, L. 1999.

Compiler's Comments

1999 Amendment: Chapter 84 inserted (5)(a) concerning ineffective consent by incarcerated person; and made minor changes in style. Amendment effective October 1, 1999.

Cross-References

Childhood sexual abuse — statute of limitations for civil action, 27-2-216.

Victim less than 16 years old — extension of statute of limitations, 45-1-205.

Definition of bodily injury, 45-2-101.

Definition of knowingly, 45-2-101.

Definition of purposely, 45-2-101.

Definition of sexual contact, 45-2-101.

Sexual abuse of children, 45-5-625.

45-5-503. Sexual intercourse without consent. (1) A person who knowingly has sexual intercourse without consent with another person commits the offense of sexual intercourse without consent. A person may not be convicted under this section based on the age of the person's spouse, as provided in 45-5-501(1)(b)(iii).

(2) A person convicted of sexual intercourse without consent shall be punished by life imprisonment or by imprisonment in the state prison for a term of not less than 2 years or more than 100 years and may be fined not more than $50,000, except as provided in 46-18-219 and 46-18-222.

(3) (a) If the victim is less than 16 years old and the offender is 3 or more years older than the victim or if the offender inflicts bodily injury upon anyone

in the course of committing sexual intercourse without consent, the offender shall be punished by life imprisonment or by imprisonment in the state prison for a term of not less than 4 years or more than 100 years and may be fined not more than $50,000, except as provided in 46-18-219 and 46-18-222.

(b) If two or more persons are convicted of sexual intercourse without consent with the same victim in an incident in which each offender was present at the location where another offender's offense occurred during a time period in which each offender could have reasonably known of the other's offense, each offender shall be punished by life imprisonment or by imprisonment in the state prison for a term of not less than 5 years or more than 100 years and may be fined not more than $50,000, except as provided in 46-18-219 and 46-18-222.

(c) If the offender was previously convicted of an offense under this section or of an offense under the laws of another state or of the United States that if committed in this state would be an offense under this section and if the offender inflicted serious bodily injury upon a person in the course of committing each offense, the offender shall be:

(i) punished by death as provided in 46-18-301 through 46-18-310, unless the offender is less than 18 years of age at the time of the commission of the offense; or

(ii) punished as provided in 46-18-219.

(d) If the victim was incarcerated in an adult or juvenile correctional, detention, or treatment facility at the time of the offense and the offender had supervisory or disciplinary authority over the victim, the offender shall be punished by imprisonment in the state prison for a term of not more than 5 years or fined an amount not to exceed $50,000, or both.

(4) In addition to any sentence imposed under subsection (2) or (3), after determining the financial resources and future ability of the offender to pay restitution as required by 46-18-242, the court shall require the offender, if able, to pay the victim's reasonable medical and counseling costs that result from the offense. The amount, method, and time of payment must be determined in the same manner as provided for in 46-18-244.

(5) As used in subsection (3), an act "in the course of committing sexual intercourse without consent" includes an attempt to commit the offense or flight after the attempt or commission.

History: En. 94-5-503 by Sec. 1, Ch. 513, L. 1973; amd. Sec. 1, Ch. 2, L. 1975; amd. Sec. 1, Ch. 129, L. 1975; amd. Sec. 1, Ch. 94, L. 1977; amd. Sec. 16, Ch. 359, L. 1977; amd. Sec. 10, Ch. 584, L. 1977; R.C.M. 1947, 94-5-503; amd. Sec. 7, Ch. 198, L. 1981; amd. Sec. 2, Ch. 172, L. 1985; amd. Sec. 1, Ch. 356, L. 1985; amd. Sec. 1, Ch. 644, L. 1985; amd. Sec. 1, Ch. 175, L. 1991; amd. Sec. 2, Ch. 218, L. 1991; amd. Sec. 3, Ch. 687, L. 1991; amd. Sec. 1, Ch. 85, L. 1993; amd. Sec. 8, Ch. 482, L. 1995; amd. Sec. 2, Ch. 550, L. 1995; amd. Sec. 1, Ch. 312, L. 1997; amd. Sec. 3, Ch. 84, L. 1999; amd. Sec. 4, Ch. 523, L. 1999.

Compiler's Comments

1999 Amendments — Composite Section: Chapter 84 inserted (3)(d) concerning incarcerated victim. Amendment effective October 1, 1999.

Chapter 523 in (3)(c)(i) inserted "unless the offender is less than 18 years of age at the time of the commission of the offense"; and made minor changes in style. Amendment effective October 1, 1999.

Cross-References

Childhood sexual abuse — statute of limitations for civil action, 27-2-216.

Victim less than 16 years old — extension of statute of limitations, 45-1-205.

Definition of knowingly, 45-2-101.

Definition of mentally defective, 45-2-101.

Definition of mentally incapacitated, 45-2-101.

Definition of sexual intercourse, 45-2-101.
Definition of without consent, 45-5-501.
Sexual abuse of children, 45-5-625.
Limitation on deferral or suspension of sentence, 46-18-201.

45-5-504. Indecent exposure. (1) A person commits the offense of indecent exposure if the person knowingly or purposely exposes the person's genitals under circumstances in which the person knows the conduct is likely to cause affront or alarm in order to:

(a) abuse, humiliate, harass, or degrade another; or

(b) arouse or gratify the person's own sexual response or desire or the sexual response or desire of any person.

(2) (a) A person convicted of the offense of indecent exposure shall be fined an amount not to exceed $500 or be imprisoned in the county jail for a term of not more than 6 months, or both.

(b) On a second conviction, the person shall be fined an amount not to exceed $1,000 or be imprisoned in the county jail for a term of not more than 1 year, or both.

(c) On a third or subsequent conviction, the person shall be punished by life imprisonment or by imprisonment in a state prison for a term of not less than 5 years or more than 100 years and may be fined not more than $10,000.

History: En. 94-5-504 by Sec. 1, Ch. 513, L. 1973; R.C.M. 1947, 94-5-504; amd. Sec. 1, Ch. 176, L. 1991; amd. Sec. 4, Ch. 687, L. 1991; amd. Sec. 3, Ch. 550, L. 1995; amd. Sec. 2, Ch. 288, L. 1999.

Compiler's Comments

1999 Amendment: Chapter 288 in (1) near beginning substituted "A person commits the offense of indecent exposure if the person knowingly or purposely" for "A person who, for the purpose of arousing or gratifying the person's own sexual desire or the sexual desire of any person" and at end after "alarm" substituted "in order to:

(a) abuse, humiliate, harass, or degrade another; or

(b) arouse or gratify the person's own sexual response or desire or the sexual response or desire of any person" for "commits the offense of indecent exposure"; and made minor changes in style. Amendment effective October 1, 1999.

Cross-References

Childhood sexual abuse — statute of limitations for civil action, 27-2-216.

Victim less than 18 years old — extension of statute of limitations, 45-1-205.

Definition of purposely, 45-2-101.

Causal relationship between conduct and result, 45-2-201.

Obscenity, 45-8-201.

45-5-505. Deviate sexual conduct. (1) A person who knowingly engages in deviate sexual relations or who causes another to engage in deviate sexual relations commits the offense of deviate sexual conduct.

(2) A person convicted of the offense of deviate sexual conduct shall be imprisoned in the state prison for any term not to exceed 10 years or be fined an amount not to exceed $50,000, or both.

(3) The fact that a person seeks testing or receives treatment for the HIV-related virus or another sexually transmitted disease may not be used as a basis for a prosecution under this section and is not admissible in evidence in a prosecution under this section.

History: En. 94-5-505 by Sec. 1, Ch. 513, L. 1973; R.C.M. 1947, 94-5-505; amd. Sec. 7, Ch. 198, L. 1981; amd. Sec. 2, Ch. 175, L. 1991; amd. Sec. 7, Ch. 687, L. 1991.

Cross-References

Childhood sexual abuse — statute of limitations for civil action, 27-2-216.

Victim less than 18 years old — extension of statute of limitations, 45-1-205.

Definition of deviate sexual relations, 45-2-101.

Definition of knowingly, 45-2-101.

Definition of sexual contact, 45-2-101.

Definition of without consent, 45-5-501, 45-5-511.

Sexual abuse of children, 45-5-625.

Sexually transmitted diseases, Title 50, ch. 18, part 1.

45-5-506. Renumbered 45-5-511 by Code Commissioner, 1983.

45-5-507. Incest. (1) A person commits the offense of incest if the person knowingly marries, cohabits with, has sexual intercourse with, or has sexual contact, as defined in 45-2-101, with an ancestor, a descendant, a brother or sister of the whole or half blood, or any stepson or stepdaughter. The relationships referred to in this subsection include blood relationships without regard to legitimacy, relationships of parent and child by adoption, and relationships involving a stepson or stepdaughter.

(2) Consent is a defense under this section to incest with or upon a stepson or stepdaughter, but consent is ineffective if the victim is less than 18 years old.

(3) A person convicted of incest shall be punished by life imprisonment or by imprisonment in the state prison for a term not to exceed 100 years or be fined an amount not to exceed $50,000.

(4) If the victim is under 16 years of age and the offender is 3 or more years older than the victim or if the offender inflicts bodily injury upon anyone in the course of committing incest, the offender shall be punished by life imprisonment or by imprisonment in the state prison for a term of not less than 4 years or more than 100 years and may be fined not more than $50,000.

(5) In addition to any sentence imposed under subsection (3) or (4), after determining the financial resources and future ability of the offender to pay restitution as required by 46-18-242, the court shall require the offender, if able, to pay the victim's reasonable costs of counseling that result from the offense. The amount, method, and time of payment must be determined in the same manner as provided for in 46-18-244.

History: En. 94-5-606 by Sec. 1, Ch. 513, L. 1973; R.C.M. 1947, 94-5-606; amd. Sec. 7, Ch. 198, L. 1981; MCA 1981, 45-5-613; redes. 45-5-507 by Code Commissioner, 1983; amd. Sec. 1, Ch. 438, L. 1983; amd. Sec. 2, Ch. 644, L. 1985; amd. Sec. 1, Ch. 174, L. 1989; amd. Sec. 5, Ch. 687, L. 1991; amd. Sec. 4, Ch. 550, L. 1995.

Cross-References

Childhood sexual abuse — statute of limitations for civil action, 27-2-216.

Victim less than 18 years old — extension of statute of limitations, 45-1-205.

Definition of cohabit, 45-2-101.

Definition of knowingly, 45-2-101.

Definition of sexual intercourse, 45-2-101.

45-5-508 through 45-5-510 reserved.

45-5-511. Provisions generally applicable to sexual crimes. (1) When criminality depends on the victim being less than 16 years old, it is a defense for the offender to prove that he reasonably believed the child to be above that age. Such belief shall not be deemed reasonable if the child is less than 14 years old.

(2) No evidence concerning the sexual conduct of the victim is admissible in prosecutions under this part except evidence of the victim's past sexual conduct with the offender or evidence of specific instances of the victim's sexual activity to show the origin of semen, pregnancy, or disease which is at issue in the prosecution.

(3) If the defendant proposes for any purpose to offer evidence described in subsection (2), the trial judge shall order a hearing out of the presence of the jury to determine whether the proposed evidence is admissible under subsection (2).

(4) Evidence of failure to make a timely complaint or immediate outcry does not raise any presumption as to the credibility of the victim.

(5) Resistance by the victim is not required to show lack of consent. Force, fear, or threat is sufficient alone to show lack of consent.

History: En. 94-5-506 by Sec. 1, Ch. 513, L. 1973; amd. Sec. 17, Ch. 359, L. 1977; R.C.M. 1947, 94-5-506; amd. Sec. 3, Ch. 407, L. 1979; MCA 1981, 45-5-506; redes. 45-5-511 by Code Commissioner, 1983; amd. Sec. 3, Ch. 172, L. 1985; amd. Sec. 1, Ch. 425, L. 1987; amd. Sec. 6, Ch. 687, L. 1991.

Cross-References

Definition of intoxicating substance, 45-2-101.

Definition of knowingly, 45-2-101.

Definition of mentally incapacitated, 45-2-101.

Definition of without consent, 45-5-501.

Sexual assault, 45-5-502.

Sexual intercourse without consent, 45-5-503.

Indecent exposure, 45-5-504.

Sexual abuse of children, 45-5-625.

Sex crime evidence — videotaping — payment for medical exam of victim, Title 46, ch. 15, part 4; 46-16-216.

45-5-512. Chemical treatment of sex offenders. (1) A person convicted of a first offense under 45-5-502(3), 45-5-503(3), or 45-5-507(4) may, in addition to the sentence imposed under those sections, be sentenced to undergo medically safe medroxyprogesterone acetate treatment or its chemical equivalent or other medically safe drug treatment that reduces sexual fantasies, sex drive, or both, administered by the department of corrections or its agent pursuant to subsection (4).

(2) A person convicted of a second or subsequent offense under 45-5-502(3), 45-5-503, or 45-5-507 may, in addition to the sentence imposed under those sections, be sentenced to undergo medically safe medroxyprogesterone acetate treatment or its chemical equivalent or other medically safe drug treatment that reduces sexual fantasies, sex drive, or both, administered by the department of corrections or its agent pursuant to subsection (4).

(3) A person convicted of a first or subsequent offense under 45-5-502, 45-5-503, or 45-5-507 who is not sentenced to undergo medically safe medroxyprogesterone acetate treatment or its chemical equivalent or other medically safe drug treatment that reduces sexual fantasies, sex drive, or both, may voluntarily undergo such treatment, which must be administered by the department of corrections or its agent and paid for by the department of corrections.

(4) Treatment under subsection (1) or (2) must begin 1 week before release from confinement and must continue until the department of corrections determines that the treatment is no longer necessary. Failure to continue treatment as ordered by the department of corrections constitutes a criminal contempt of court for failure to comply with the sentence, for which the sentencing court shall impose a term of incarceration without possibility of parole of not less than 10 years or more than 100 years.

(5) Prior to chemical treatment under this section, the person must be fully medically informed of its effects.

(6) A state employee who is a professional medical person may not be compelled against the employee's wishes to administer chemical treatment under this section.

History: En. Sec. 1, Ch. 334, L. 1997; amd. Sec. 2, Ch. 341, L. 1997.

Part 6

Offenses Against the Family

45-5-601. Prostitution. (1) A person commits the offense of prostitution if such person engages in or agrees or offers to engage in sexual intercourse with another person for compensation, whether such compensation is received or to be received or paid or to be paid.

(2) A person convicted of prostitution shall be fined not to exceed $500 or be imprisoned in the county jail for a term not to exceed 6 months, or both.

History: En. 94-5-602 by Sec. 1, Ch. 513, L. 1973; amd. Sec. 1, Ch. 80, L. 1975; R.C.M. 1947, 94-5-602.

Cross-References

Definition of public place, 45-2-101.

Definition of sexual intercourse, 45-2-101.

45-5-602. Promoting prostitution. (1) A person commits the offense of promoting prostitution if he purposely or knowingly commits any of the following acts:

(a) owns, controls, manages, supervises, resides in, or otherwise keeps, alone or in association with others, a house of prostitution or a prostitution business;

(b) procures an inmate for a house of prostitution or a place in a house of prostitution for one who would be an inmate;

(c) encourages, induces, or otherwise purposely causes another to become or remain a prostitute;

(d) solicits a person to patronize a prostitute;

(e) procures a prostitute for a patron;

(f) transports a person into or within this state with the purpose to promote that person's engaging in prostitution or procures or pays for transportation with that purpose;

(g) leases or otherwise permits a place controlled by the offender, alone or in association with others, to be regularly used for prostitution or for the procurement of prostitution or fails to make reasonable effort to abate such use by ejecting the tenant, notifying law enforcement authorities, or using other legally available means; or

(h) lives in whole or in part upon the earnings of a person engaging in prostitution, unless the person is the prostitute's minor child or other legal dependent incapable of self-support.

(2) A person convicted of promoting prostitution shall be fined not to exceed $500 or be imprisoned in the county jail for any term not to exceed 6 months, or both.

History: En. 94-5-603 by Sec. 1, Ch. 513, L. 1973; amd. Sec. 2, Ch. 2, L. 1975; R.C.M. 1947, 94-5-603(part).

Cross-References

Definition of house of prostitution, 45-2-101.

Definition of inmate, 45-2-101.

Definition of knowingly, 45-2-101.

Definition of purposely, 45-2-101.

Definition of solicit, 45-2-101.

Prostitution, 45-5-601.

Evidence in cases of promotion, 45-5-604.

45-5-603. Aggravated promotion of prostitution. (1) A person commits the offense of aggravated promotion of prostitution if he purposely or knowingly commits any of the following acts:

(a) compels another to engage in or promote prostitution;

(b) promotes prostitution of a child under the age of 18 years, whether or not he is aware of the child's age;

(c) promotes the prostitution of one's spouse, child, ward, or any person for whose care, protection, or support he is responsible.

(2) A person convicted of aggravated promotion of prostitution shall be imprisoned in the state prison for any term not to exceed 20 years or be fined an amount not to exceed $50,000, or both.

History: En. 94-5-603 by Sec. 1, Ch. 513, L. 1973; amd. Sec. 2, Ch. 2, L. 1975; R.C.M. 1947, 94-5-603(part); amd. Sec. 7, Ch. 198, L. 1981.

Cross-References

Definition of knowingly, 45-2-101.
Definition of purposely, 45-2-101.
Prostitution, 45-5-601.
Promoting prostitution, 45-5-602.
Evidence in cases of promotion, 45-5-604.

45-5-604. Evidence in cases of promotion. (1) On the issue whether a place is a house of prostitution, the following, in addition to all other admissible evidence, shall be admissible:

(a) its general repute;

(b) the repute of the persons who reside in or frequent the place; or

(c) the frequency, timing, and duration of visits by nonresidents.

(2) Testimony of a person against his spouse shall be admissible under 45-5-602, 45-5-603, and this section.

History: En. 94-5-603 by Sec. 1, Ch. 513, L. 1973; amd. Sec. 2, Ch. 2, L. 1975; R.C.M. 1947, 94-5-603(4).

Cross-References

Definition of house of prostitution, 45-2-101.
Prostitution, 45-5-601.
Promoting prostitution, 45-5-602.
Aggravated promotion of prostitution, 45-5-603.

45-5-605 through 45-5-610 reserved.

45-5-611. Bigamy. (1) A person commits the offense of bigamy if, while married, he knowingly contracts or purports to contract another marriage unless at the time of the subsequent marriage:

(a) the offender believes on reasonable grounds that the prior spouse is dead;

(b) the offender and the prior spouse have been living apart for 5 consecutive years throughout which the prior spouse was not known by the offender to be alive;

(c) a court has entered a judgment purporting to terminate or annul any prior disqualifying marriage and the offender does not know that judgment to be invalid; or

(d) the offender reasonably believes that he is legally eligible to remarry.

(2) A person convicted of bigamy shall be fined not to exceed $500 or be imprisoned in the county jail for any term not to exceed 6 months, or both.

History: En. 94-5-604 by Sec. 1, Ch. 513, L. 1973; R.C.M. 1947, 94-5-604.

Cross-References

Prohibited marriages, 40-1-401.

Definition of knowingly, 45-2-101.

45-5-612. Marrying a bigamist. (1) A person commits the offense of marrying a bigamist if he contracts or purports to contract a marriage with another knowing that the other is thereby committing bigamy.

(2) A person convicted of the offense of marrying a bigamist shall be fined not to exceed $500 or be imprisoned in the county jail for any period not to exceed 6 months, or both.

History: En. 94-5-605 by Sec. 1, Ch. 513, L. 1973; R.C.M. 1947, 94-5-605.

Cross-References

Definition of knowingly, 45-2-101.

Bigamy, 45-5-611.

45-5-613. Renumbered 45-5-507 by Code Commissioner, 1983.

45-5-614 through 45-5-619 reserved.

45-5-620. Definitions. As used in 45-5-625, the following definitions apply:

(1) "Sexual conduct" means actual or simulated:

(a) sexual intercourse, whether between persons of the same or opposite sex;

(b) penetration of the vagina or rectum by any object, except when done as part of a recognized medical procedure;

(c) bestiality;

(d) masturbation;

(e) sadomasochistic abuse;

(f) lewd exhibition of the genitals, breasts, pubic or rectal area, or other intimate parts of any person; or

(g) defecation or urination for the purpose of the sexual stimulation of the viewer.

(2) "Simulated" means any depicting of the genitals or pubic or rectal area that gives the appearance of sexual conduct or incipient sexual conduct.

(3) "Visual medium" means:

(a) any film, photograph, videotape, negative, slide, or photographic reproduction that contains or incorporates in any manner any film, photograph, videotape, negative, or slide; or

(b) any disk, diskette, or other physical media that allows an image to be displayed on a computer or other video screen and any image transmitted to a computer or other video screen by telephone line, cable, satellite transmission, or other method.

History: En. Sec. 2, Ch. 638, L. 1993; amd. Sec. 1, Ch. 187, L. 1995.

45-5-621. Nonsupport. (1) A person commits the offense of nonsupport if the person fails to provide support that the person can provide and that the person knows the person is legally obliged to provide to a spouse, child, or other dependent.

(2) (a) A person commits the offense of aggravated nonsupport if the person has:

(i) left the state without making reasonable provisions for the support of a spouse, child, or other dependent; or

(ii) been previously convicted of the offense of nonsupport.

(b) For purposes of this section, "conviction" means a conviction, as defined in 45-2-101, in this state, conviction for a violation of a statute similar to this section in another state, or a forfeiture of bail or collateral deposited to secure a person's appearance in court in this state or another state, which forfeiture has not been vacated.

(3) If a defense to the charge of nonsupport is inability to pay, the person's inability must be the result of circumstances over which the person had no control. In determining ability to pay, after an allowance for the person's minimal subsistence needs, the support of a spouse, child, or other dependent has priority over any other obligations of the person.

(4) When a person is ordered to pay support by a court or administrative agency with jurisdiction to enter the order, the support order is prima facie evidence of the person's legal obligation to provide support.

(5) Payment records maintained by the court or administrative agency that issued the support order are prima facie evidence of the amount of support paid and the arrearages that have accrued.

(6) It is not a defense to a charge of nonsupport that any other person, organization, or agency furnishes necessary food, clothing, shelter, medical attention, or other essential needs for the support of the spouse, child, or other dependent.

(7) (a) Except as provided in subsection (7)(b) or (7)(c), a person convicted of nonsupport shall be fined not to exceed $500 or be imprisoned in the county jail for a term not to exceed 6 months, or both.

(b) A person convicted of nonsupport who has failed to provide support under a court or administrative order for 6 months or more or who has failed to provide support in a cumulative amount equal to or in excess of 6 months' support shall be fined not to exceed $5,000 or be imprisoned in the state prison for a term not to exceed 2 years, or both.

(c) A person convicted of aggravated nonsupport shall be fined not to exceed $50,000 or be imprisoned in the state prison for a term not to exceed 10 years, or both.

(8) Before trial with the consent of the defendant, on entry of a plea of guilty or nolo contendere, or after conviction, instead of the penalty provided in subsection (7) or in addition to that penalty, the defendant may post a bond, undertaking, or other security. This security must be for a period of 2 years or, in the case of aggravated nonsupport, for a period of 10 years. The court shall fix the sum of the security in an amount sufficient to ensure payment of support by the defendant. After the security is posted, the court shall release the defendant on the condition that the defendant comply with any order for support. If there is no order for support, the court shall order the defendant to pay support to the spouse, child, or other dependent in an amount that is consistent with the defendant's ability to pay and, if applicable, the child support guidelines adopted under 40-5-209.

(9) The bond, undertaking, or other security posted pursuant to subsection (8) is forfeited if the defendant fails to pay support as ordered, and the court may proceed to try the defendant upon the original charge of nonsupport, sentence the defendant under the original plea or conviction, or enforce a suspended sentence.

(10) As part of any prosecution under this section, the court shall also order the offender to make restitution to the spouse, the child's caretaker, or any other dependent or to the person or agency that provided support to the spouse, child, or other dependent. The amount of restitution is the sum of the arrearages payable under a support order or, if there is no support order, an amount determined reasonable by the court. The terms for payment of restitution must be determined by the court.

(11) The court may order, in its discretion, any fine levied or any bond forfeited upon a charge of nonsupport paid to or for the benefit of any person that the offender has failed to support. A bond, undertaking, or other security forfeited under subsection (9) must be paid to the person or agency entitled to receive support from the offender.

(12) When a payment of public assistance money has been made for the benefit of a child by the department of public health and human services under the provisions of Title 53, a representative of the department may sign a criminal complaint against the person obligated by law to support the child who received the public assistance.

(13) The court may order that a term of imprisonment imposed under this section be served in another facility made available by the county and approved by the sentencing court. The offender, if financially able, shall bear the expense of the imprisonment. The court may impose restrictions on the offender's ability to leave the premises of the facility and require that the defendant follow the rules of that facility. The facility may be a community-based prerelease center as provided for in 53-1-203. The prerelease center may accept or reject an offender referred by the sentencing court.

History: En. 94-5-608 by Sec. 1, Ch. 513, L. 1973; amd. Sec. 19, Ch. 359, L. 1977; R.C.M. 1947, 94-5-608; amd. Sec. 7, Ch. 198, L. 1981; amd. Sec. 3, Ch. 429, L. 1993; amd. Sec. 199, Ch. 546, L. 1995; amd. Sec. 4, Ch. 395, L. 1999.

Compiler's Comments

1999 Amendment: Chapter 395 in (8) near beginning after "guilty" inserted "or nolo contendere"; and made minor changes in style. Amendment effective October 1, 1999.

Cross-References

Mutual obligations of husband and wife, 40-2-101.

Duties of husband and wife as to support, 40-2-102.

Support of spouse, 40-2-103.

Liability of married person when abandoned by spouse, 40-2-104.

Child support, 40-4-204.

Enforcement of support, Title 40, ch. 5.

Reciprocal duties of parents and children in maintaining each other, 40-6-214.

Definition of knowingly, 45-2-101.

45-5-622. Endangering welfare of children. (1) A parent, guardian, or other person supervising the welfare of a child less than 18 years old commits the offense of endangering the welfare of children if the parent, guardian, or other person knowingly endangers the child's welfare by violating a duty of care, protection, or support.

(2) Except as provided in 16-6-305, a parent or guardian or any person who is 18 years of age or older, whether or not the parent, guardian, or other person is supervising the welfare of the child, commits the offense of endangering the welfare of children if the parent, guardian, or other person knowingly contributes to the delinquency of a child less than:

(a) 18 years old by:

(i) supplying or encouraging the use of an intoxicating substance by the child; or

(ii) assisting, promoting, or encouraging the child to enter a place of prostitution; or

(b) 16 years old by assisting, promoting, or encouraging the child to:

(i) abandon the child's place of residence without the consent of the child's parents or guardian; or

(ii) engage in sexual conduct.

(3) A parent, guardian, or other person supervising the welfare of a child less than 16 years of age may verbally or in writing request a person who is 18 years of age or older and who has no legal right of supervision or control over the child to stop contacting the child if the requestor believes that the contact is not in the child's best interests. If the person continues to contact the child, the parent, guardian, or other person supervising the welfare of the child may petition or the county attorney may upon the person's request petition for an order of protection under Title 40, chapter 15. To the extent that they are consistent with this subsection, the provisions of Title 40, chapter 15, apply. A person who purposely or knowingly violates an order of protection commits the offense of endangering the welfare of children and upon conviction shall be sentenced as provided in subsection (4).

(4) A person convicted of endangering the welfare of children shall be fined an amount not to exceed $500 or be imprisoned in the county jail for any term not to exceed 6 months, or both. A person convicted of a second offense of endangering the welfare of children shall be fined an amount not to exceed $1,000 or be imprisoned in the county jail for any term not to exceed 6 months, or both.

(5) On the issue of whether there has been a violation of the duty of care, protection, and support, the following, in addition to all other admissible evidence, is admissible: cruel treatment; abuse; infliction of unnecessary and cruel punishment; abandonment; neglect; lack of proper medical care, clothing, shelter, and food; and evidence of past bodily injury.

(6) The court may order, in its discretion, any fine levied or any bond forfeited upon a charge of endangering the welfare of children paid to or for the benefit of the person or persons whose welfare the defendant has endangered.

History: En. 94-5-607 by Sec. 1, Ch. 513, L. 1973; amd. Sec. 1, Ch. 85, L. 1975; amd. Sec. 1, Ch. 218, L. 1977; amd. Sec. 18, Ch. 359, L. 1977; R.C.M. 1947, 94-5-607; amd. Sec. 1, Ch. 405, L. 1987; amd. Sec. 3, Ch. 448, L. 1989; amd. Sec. 1, Ch. 333, L. 1997.

Cross-References

Liability of one furnishing alcoholic beverage for injuries arising from event involving consumer, 27-1-710.

Definition of knowingly, 45-2-101.

45-5-623. Unlawful transactions with children. (1) Except as provided for in 16-6-305, a person commits the offense of unlawful transactions with children if the person knowingly:

(a) sells or gives explosives to a child under the age of majority except as authorized under appropriate city ordinances;

(b) sells or gives intoxicating substances other than alcoholic beverages to a child under the age of majority;

(c) sells or gives an alcoholic beverage to a person under 21 years of age;

(d) being a junk dealer, pawnbroker, or secondhand dealer, receives or purchases goods from a child under the age of majority without authorization of the parent or guardian; or

(e) tattoos a child under the age of majority without the explicit in-person consent of the child's parent or guardian. For purposes of this subsection, "tattoo" has the meaning provided in 50-2-116(2)(k)(vi). Failure to adequately verify the identity of a parent or guardian is not an excuse for violation of this subsection.

(2) A person convicted of the offense of unlawful transactions with children shall be fined an amount not to exceed $500 or be imprisoned in the county jail for any term not to exceed 6 months, or both. A person convicted of a second offense of unlawful transactions with children shall be fined an amount not to exceed $1,000 or be imprisoned in the county jail for any term not to exceed 6 months, or both. *(See compiler's comments for contingent termination of certain text.)*

History: En. 94-5-609 by Sec. 1, Ch. 513, L. 1973; R.C.M. 1947, 94-5-609; amd. Sec. 2, Ref. 74, app. Nov. 7, 1978; amd. Sec. 4, Ch. 217, L. 1987; amd. Sec. 4, Ch. 448, L. 1989; amd. Sec. 1, Ch. 155, L. 1997.

Compiler's Comments

Contingent Termination Date: Section 9(2), Ch. 217, L. 1987, read: "If the United States congress repeals or removes or a final judgment invalidates the provisions of federal law that require states to raise the legal age for purchasing and possessing alcoholic beverages to 21 as a condition of full receipt of federal highway funds, the governor of Montana shall immediately certify the fact of the repeal, removal, or invalidation to the secretary of state of Montana. This act terminates on the date of such certification."

Cross-References

Adult rights, Art. II, sec. 14, Mont. Const.

Presumption of legal age to purchase alcoholic beverage — defense for seller, 16-3-301.

Liability of one furnishing alcoholic beverage for injuries arising from event involving consumer, 27-1-710.

Definition of intoxicating substance, 45-2-101.

Definition of knowingly, 45-2-101.

45-5-624. Unlawful attempt to purchase or possession of intoxicating substance — interference with sentence or court order. (1) A person under 21 years of age commits the offense of possession of an intoxicating substance if the person knowingly consumes or has in the person's possession an intoxicating substance. A person does not commit the offense if the person consumes or gains possession of the beverage because it was lawfully supplied to the person under 16-6-305 or when in the course of employment it is necessary to possess alcoholic beverages.

(2) In addition to any disposition by the youth court under 41-5-1512, a person under 18 years of age who is convicted of the offense of possession of an intoxicating substance:

(a) for the first offense, shall be fined an amount not to exceed $100 and:

(i) must have the person's driver's license confiscated by the court for not less than 30 days and not more than 90 days and shall be ordered not to drive during that period if the person was driving or was otherwise in actual physical control of a motor vehicle when the offense occurred;

(ii) shall be ordered to perform community service if a community service program is available; and

(iii) shall be ordered to complete and pay, either directly with money or indirectly through court-ordered community service, if any is available, all costs of participation in a community-based substance abuse information course, if one is available;

(b) for a second offense, shall be fined an amount not to exceed $200 and:

(i) must have the person's driver's license suspended for not less than 60 days and not more than 120 days;

(ii) shall be ordered to perform community service if a community service program is available; and

(iii) shall be ordered to complete and pay, either directly with money or indirectly through court-ordered community service, if any is available, all costs of participation in a community-based substance abuse information course, if one is available;

(c) for a third or subsequent offense, shall be fined an amount not less than $300 or more than $500 and:

(i) must have the person's driver's license suspended for not less than 120 days and not more than 1 year, except that if the person was driving or was otherwise in actual physical control of a motor vehicle when the offense occurred, must have the person's driver's license revoked for 1 year or until the person reaches the age of 18, whichever occurs last;

(ii) shall be ordered to complete and pay, either directly with money or indirectly through court-ordered community service, if any is available, all costs of participation in a community-based substance abuse information course, if one is available, which may include alcohol or drug treatment, or both, approved by the department of public health and human services, if determined by the court to be appropriate.

(3) A person 18 years of age or older who is convicted of the offense of possession of an intoxicating substance:

(a) for a first offense, shall be fined an amount not to exceed $50 and be ordered to perform community service if a community service program is available;

(b) for a second offense, shall be fined an amount not to exceed $100 and:

(i) shall be ordered to perform community service if a community service program is available; and

(ii) must have the person's driver's license suspended for not more than 60 days if the person was driving or otherwise in actual physical control of a motor vehicle when the offense occurred;

(c) for a third or subsequent offense, shall be fined an amount not to exceed $200 and:

(i) shall be ordered to perform community service if a community service program is available;

(ii) must have the person's driver's license suspended for not more than 120 days if the person was driving or otherwise in actual physical control of a motor vehicle when the offense occurred;

(iii) shall be ordered to complete an alcohol information course at an alcohol treatment program approved by the department of public health and human services, which may, in the sentencing court's discretion and upon recommendation of a certified chemical dependency counselor, include alcohol or drug treatment, or both; and

(iv) in the discretion of the court, shall be imprisoned in the county jail for a term not to exceed 6 months.

(4) A person under 21 years of age commits the offense of attempt to purchase an intoxicating substance if the person knowingly attempts to purchase an alcoholic beverage. A person convicted of attempt to purchase an intoxicating substance shall be fined an amount not to exceed $50 if the person was 18 years of age or older at the time that the offense was committed or $100 if the person was under 18 years of age at the time that the offense was committed.

(5) A defendant who fails to comply with a sentence and is under 21 years of age and was under 18 years of age when the defendant failed to comply must be transferred to the youth court. If proceedings for failure to comply with a sentence are held in the youth court, the offender must be treated as an alleged youth in need of intervention as defined in 41-5-103. The youth court may enter its judgment under 41-5-1512.

(6) A person commits the offense of interference with a sentence or court order if the person purposely or knowingly causes a child or ward to fail to comply with a sentence imposed under this section or a youth court disposition order for a youth found to have violated this section and upon conviction shall be fined $100 or imprisoned in the county jail for 10 days, or both.

(7) A conviction or youth court adjudication under this section must be reported by the court to the department of justice under 61-11-101 for the purpose of keeping a record of the number of offenses committed but may not be considered part of the person's driving record for insurance purposes unless a second or subsequent conviction or adjudication under this section occurs. *(See compiler's comments for contingent termination of certain text.)*

History: En. 94-5-610 by Sec. 1, Ch. 513, L. 1973; amd. Sec. 1, Ch. 87, L. 1974; amd. Sec. 1, Ch. 536, L. 1977; R.C.M. 1947, 94-5-610; amd. Sec. 3, Ref. 74, app. Nov. 7, 1978; amd. Sec. 1, Ch. 105, L. 1985; amd. Sec. 5, Ch. 217, L. 1987; amd. Sec. 65, Ch. 609, L. 1987; amd. Sec. 1, Ch. 412, L. 1989; amd. Sec. 5, Ch. 448, L. 1989; amd. Sec. 1, Ch. 477, L. 1989; amd. Sec. 1, Ch. 502, L. 1991; amd. Sec. 1, Ch. 233, L. 1993; amd. Sec. 6, Ch. 481, L. 1995; amd. Sec. 194, Ch. 42, L. 1997; amd. Sec. 1, Ch. 182, L. 1997; amd. Sec. 54, Ch. 550, L. 1997.

Compiler's Comments

Contingent Termination Date: Section 9(2), Ch. 217, L. 1987, read: "If the United States congress repeals or removes or a final judgment invalidates the provisions of federal law that require states to raise the legal age for purchasing and possessing alcoholic beverages to 21 as a condition of full receipt of federal highway funds, the governor of Montana shall immediately certify the fact of the repeal, removal, or invalidation to the secretary of state of Montana. This act terminates on the date of such certification."

Cross-References

Adult rights, Art. II, sec. 14, Mont. Const.

Unlawful purchase of alcoholic beverage, 16-3-301.

Penalty for violation of liquor code by underage person, 16-6-314.

Definition of intoxicating substance, 45-2-101.

Definition of knowingly, 45-2-101.

45-5-625. Sexual abuse of children. (1) A person commits the offense of sexual abuse of children if the person:

(a) knowingly employs, uses, or permits the employment or use of a child in an exhibition of sexual conduct, actual or simulated;

(b) knowingly photographs, films, videotapes, develops or duplicates the photographs, films, or videotapes, or records a child engaging in sexual conduct, actual or simulated;

(c) knowingly persuades, entices, counsels, or procures a child to engage in sexual conduct, actual or simulated, for use as designated in subsection (1)(a), (1)(b), or (1)(d);

(d) knowingly processes, develops, prints, publishes, transports, distributes, sells, exhibits, or advertises any visual or print medium in which children are engaged in sexual conduct, actual or simulated;

(e) knowingly possesses any visual or print medium in which children are engaged in sexual conduct, actual or simulated;

(f) finances any of the activities described in subsections (1)(a) through (1)(d) and (1)(g), knowing that the activity is of the nature described in those subsections; or

(g) possesses with intent to sell any visual or print medium in which children are engaged in sexual conduct, actual or simulated.

(2) (a) A person convicted of the offense of sexual abuse of children shall be punished by life imprisonment or by imprisonment in the state prison for a term not to exceed 100 years and may be fined not more than $10,000.

(b) Except as provided in 46-18-219, if the victim is under 16 years of age, a person convicted of the offense of sexual abuse of children shall be punished by life imprisonment or by imprisonment in the state prison for a term of not less than 4 years or more than 100 years and may be fined not more than $10,000.

(c) Except as provided in 46-18-219, a person convicted of the offense of sexual abuse of children for the possession of material, as provided in subsection (1)(e), shall be fined not to exceed $10,000 or be imprisoned in the state prison for a term not to exceed 10 years, or both.

(3) An offense is not committed under subsections (1)(d) through (1)(g) if the visual or print medium is processed, developed, printed, published, transported, distributed, sold, possessed, or possessed with intent to sell, or if the activity is financed, as part of a sex offender information or treatment course or program conducted or approved by the department of corrections.

History: En. Sec. 1, Ch. 505, L. 1979; amd. Sec. 1, Ch. 638, L. 1993; amd. Sec. 2, Ch. 187, L. 1995; amd. Sec. 9, Ch. 482, L. 1995; amd. Sec. 200, Ch. 546, L. 1995; amd. Sec. 5, Ch. 550, L. 1995.

Cross-References

Childhood sexual abuse — statute of limitations for civil action, 27-2-216.

Victim less than 18 years old — extension of statute of limitations, 45-1-205.

Definition of knowingly, 45-2-101.

Definition of sexual contact, 45-2-101.

Sexual crimes, Title 45, ch. 5, part 5.

Family member of minor victim — reimbursement for mental health treatment, 53-9-128.

45-5-626. Violation of order of protection. (1) A person commits the offense of violation of an order of protection if the person, with knowledge of the order, purposely or knowingly violates a provision of any order provided for in 40-4-121 or an order of protection under Title 40, chapter 15. It may be inferred that the defendant had knowledge of an order at the time of an offense if the defendant had been served with the order before the time of the offense. Service of the order is not required upon a showing that the defendant had knowledge of the order and its content.

(2) Only the respondent under an order of protection may be cited for a violation of the order. The petitioner who filed for an order of protection may not be cited for a violation of that order of protection.

(3) An offender convicted of violation of an order of protection shall be fined not to exceed $500 or be imprisoned in the county jail for a term not to

exceed 6 months, or both, for a first offense. Upon conviction for a second offense, an offender shall be fined not less than $200 and not more than $500 and be imprisoned in the county jail not less than 24 hours and not more than 6 months. Upon conviction for a third or subsequent offense, an offender shall be fined not less than $500 and not more than $2,000 and be imprisoned in the county jail or state prison for a term not less than 10 days and not more than 2 years.

History: En. Sec. 9, Ch. 526, L. 1985; amd. Sec. 12, Ch. 350, L. 1995.

45-5-627. Ritual abuse of minor — exceptions — penalty. (1) A person commits the offense of ritual abuse of a minor if the person purposely or knowingly and as part of any ceremony, rite, or ritual or of any training or practice for any ceremony, rite, or ritual:

(a) has sexual intercourse without consent with a person less than 16 years of age; commits assault, aggravated assault, assault on a minor, or assault with a weapon against a victim less than 16 years of age; or kills a person less than 16 years of age;

(b) actually or by simulation tortures, mutilates, or sacrifices an animal or person in the presence of the minor;

(c) dissects, mutilates, or incinerates a human corpse or remains in the presence of the minor;

(d) forces upon the minor or upon another person in the presence of a minor the ingestion or the external bodily application of human or animal urine, feces, flesh, blood, bone, or bodily secretions or drugs or chemical compounds;

(e) places a living minor or another living person in the presence of a minor in a coffin or open grave that is empty or that contains a human corpse or remains; or

(f) threatens the minor or, in the presence of the minor, threatens any person or animal with death or serious bodily harm and the minor reasonably believes that the threat will or may be carried out.

(2) This section does not apply to activities, practices, and procedures otherwise allowed by law.

(3) Except as provided in 46-18-219, a person convicted of ritual abuse of a minor shall:

(a) for the first offense, be imprisoned in the state prison for a term of not less than 2 years or more than 20 years and may be fined not more than $50,000, or both; and

(b) for a second or subsequent offense, be imprisoned in the state prison for any term of not less than 2 years or more than 40 years and may be fined not more than $50,000, or both.

(4) In addition to any sentence imposed under subsection (3), after determining pursuant to 46-18-242 the financial resources and future ability of the offender to pay restitution, the court shall require the offender, if able, to pay the victim's reasonable costs of counseling that result from the offense. The amount, method, and time of payment must be determined in the same manner as provided for in 46-18-244.

History: En. Sec. 1, Ch. 560, L. 1993; amd. Sec. 10, Ch. 482, L. 1995; amd. Sec. 9, Ch. 432, L. 1999.

Compiler's Comments

1999 Amendment: Chapter 432 in (1)(a) inserted "assault on a minor" and substituted "assault with a weapon" for "felony assault". Amendment effective October 1, 1999.

45-5-628 through 45-5-630 reserved.

45-5-631. Interference with parent-child contact. (1) A person who has been granted parent-child contact under a parenting plan commits the offense of interference with parent-child contact if the person knowingly or purposely prevents, obstructs, or frustrates the rights of another person entitled to parent-child contact under an existing court order.

(2) A person convicted of the offense of interference with parent-child contact shall be fined an amount not to exceed $500 or be imprisoned in the county jail for a term not to exceed 5 days, or both.

History: En. Sec. 1, Ch. 493, L. 1987; amd. Sec. 36, Ch. 343, L. 1997.

Cross-References

Parental contact, 40-4-217.

45-5-632. Aggravated interference with parent-child contact. (1) A person who commits the offense of interference with parent-child contact by changing the residence of the minor child to another state without giving written notice as required in 40-4-217, unless the notice requirement has been precluded under 40-4-234, or without written consent of the person entitled to parent-child contact pursuant to an existing court order commits the offense of aggravated interference with parent-child contact.

(2) A person convicted of the offense of aggravated interference with parent-child contact shall be fined an amount not to exceed $1,000 or be imprisoned in the state prison for a term not to exceed 18 months, or both.

History: En. Sec. 2, Ch. 493, L. 1987; amd. Sec. 37, Ch. 343, L. 1997.

Cross-References

Parental contact, 40-4-217.

45-5-633. Defenses to interference with parent-child contact and aggravated interference with parent-child contact. (1) A person does not commit the offense of interference with parent-child contact or aggravated interference with parent-child contact if the person acts:

(a) with the consent of the person entitled to parent-child contact;

(b) under an existing court order; or

(c) with reasonable cause.

(2) Return of the child before arrest is a defense only with respect to the first commission of interference with parent-child contact or aggravated interference with parent-child contact.

History: En. Sec. 3, Ch. 493, L. 1987; amd. Sec. 38, Ch. 343, L. 1997.

Cross-References

Parental contact, 40-4-217.

45-5-634. Parenting interference. (1) A person commits the offense of parenting interference if, knowing that the person has no legal right to do so, the person:

(a) before the entry of a court order determining parenting rights, takes, entices, or withholds a child from the other parent when the action manifests a purpose to substantially deprive that parent of parenting rights; or

(b) is one of two persons who has parenting authority of a child under a court order and takes, entices, or withholds the child from the other when the action manifests a purpose to substantially deprive the other parent of parenting rights.

(2) A person convicted of the offense of parenting interference shall be imprisoned in the state prison for any term not to exceed 10 years or be fined an amount not to exceed $50,000, or both.

(3) With respect to the first alleged commission of the offense only, a person who has not left the state does not commit an offense under this section if the person voluntarily returns the child before arraignment. With respect to the first alleged commission of the offense only, a person who has left the state does not commit an offense under this section if the person voluntarily returns the child before arrest.

History: En. Sec. 35, Ch. 343, L. 1997.

45-5-635 and 45-5-636 reserved.

45-5-637. Tobacco possession or consumption by persons under 18 years of age prohibited — penalties. (1) A person under 18 years of age who knowingly possesses or consumes a tobacco product, as defined in 16-11-302, commits the offense of possession or consumption of a tobacco product.

(2) A person convicted of possession or consumption of a tobacco product:

(a) shall be fined $35 for a first offense, no less than $75 or more than $100 for a second offense, and no less than $100 or more than $250 for a third or subsequent offense; or

(b) may be adjudicated on a petition alleging the person to be a youth in need of intervention under the provisions of the Montana Youth Court Act provided for in Title 41, chapter 5.

(3) A person convicted of possession or consumption of a tobacco product may also be required to perform community service or to attend a tobacco cessation program.

(4) The fines collected under subsection (2) must be deposited to the credit of the general fund of the local government that employs the arresting officer, or if the arresting officer is an officer of the highway patrol, the fines must be credited to the county general fund in the county in which the arrest was made.

History: En. Sec. 1, Ch. 376, L. 1995; amd. Sec. 55, Ch. 550, L. 1997.

Cross-References

Control of youth access to tobacco products, Title 16, ch. 11, part 3.

Justices', Municipal, and City Courts' concurrent jurisdiction with Youth Court over youth tobacco violations, 41-5-203.

CHAPTER 6

OFFENSES AGAINST PROPERTY

Part 1 — Criminal Mischief and Arson

45-6-101. Criminal mischief.
45-6-102. Negligent arson.
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45-6-202. Criminal trespass to vehicles.
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Part 3 — Theft and Related Offenses

45-6-301. Theft.
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45-6-305. Theft of labor or services or use of property.
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45-6-307. Aiding the avoidance of telecommunications charges.
45-6-308. Unauthorized use of motor vehicles.
45-6-309. Failure to return rented or leased personal property.
45-6-310. Definition — computer use.
45-6-311. Unlawful use of a computer.
45-6-312. Unauthorized acquisition or transfer of food stamps.
45-6-313. Medicaid fraud.
45-6-314. Theft by disposal of stolen property.
45-6-315. Defrauding creditors.
45-6-316. Issuing a bad check.
45-6-317. Deceptive practices.
45-6-318. Deceptive business practices.
45-6-319. Chain distributor schemes.
45-6-320 through 45-6-324 reserved.
45-6-325. Forgery.
45-6-326. Obscuring the identity of a machine.
45-6-327. Illegal branding or altering or obscuring a brand.

Part 1

Criminal Mischief and Arson

45-6-101. Criminal mischief. (1) A person commits the offense of criminal mischief if the person knowingly or purposely:

(a) injures, damages, or destroys any property of another or public property without consent;

(b) without consent tampers with property of another or public property so as to endanger or interfere with persons or property or its use;

(c) damages or destroys property with the purpose to defraud an insurer; or

(d) fails to close a gate previously unopened that the person has opened, leading in or out of any enclosed premises. This does not apply to gates located in cities or towns.

(2) A person convicted of criminal mischief must be ordered to make restitution in an amount and manner to be set by the court. The court shall determine the manner and amount of restitution after full consideration of the convicted person's ability to pay the restitution. Upon good cause shown by the convicted person, the court may modify any previous order specifying the amount and manner of restitution. Full payment of the amount of restitution

ordered must be made prior to the release of state jurisdiction over the person convicted.

(3) A person convicted of the offense of criminal mischief shall be fined not to exceed $1,000 or be imprisoned in the county jail for any term not to exceed 6 months, or both. If the offender commits the offense of criminal mischief and causes pecuniary loss in excess of $1,000, injures or kills a commonly domesticated hoofed animal, or causes a substantial interruption or impairment of public communication, transportation, supply of water, gas, or power, or other public services, the offender shall be fined an amount not to exceed $50,000 or be imprisoned in the state prison for a term not to exceed 10 years, or both.

(4) Amounts involved in criminal mischiefs committed pursuant to a common scheme or the same transaction, whether against the public or the same person or several persons, may be aggregated in determining pecuniary loss.

History: En. 94-6-102 by Sec. 1, Ch. 513, L. 1973; amd. Sec. 1, Ch. 88, L. 1975; R.C.M. 1947, 94-6-102; amd. Sec. 7, Ch. 198, L. 1981; amd. Sec. 3, Ch. 560, L. 1981; amd. Sec. 1, Ch. 581, L. 1983; amd. Sec. 1, Ch. 98, L. 1989; amd. Sec. 2, Ch. 616, L. 1993; amd. Sec. 3, Ch. 397, L. 1999.

Compiler's Comments

1999 Amendment: Chapter 397 in (3) in first sentence increased maximum fine from $500 to $1,000 and in second sentence increased maximum value of pecuniary loss from more than $500 to more than $1,000; and made minor changes in style. Amendment effective October 1, 1999.

Cross-References

Injury to election equipment, materials, and records, 13-35-206.

Definition of knowingly, 45-2-101.

Definition of property, 45-2-101.

Definition of property of another, 45-2-101.

Definition of purposely, 45-2-101.

Definition of tamper, 45-2-101.

Definition of value, 45-2-101.

Injury to water distribution system in irrigation district, 85-7-1924.

Duty of state conservation officers to enforce — where, 87-1-504.

Disturbance or theft of traps or trapped animals, 87-3-507.

45-6-102. Negligent arson. (1) A person commits the offense of negligent arson if he purposely or knowingly starts a fire or causes an explosion, whether on his own property or property of another, and thereby negligently:

(a) places another person in danger of death or bodily injury, including a firefighter responding to or at the scene of a fire or explosion; or

(b) places property of another in danger of damage or destruction.

(2) A person convicted of the offense of negligent arson shall be fined not to exceed $500 or be imprisoned in the county jail for any term not to exceed 6 months, or both. If the offender places another person in danger of death or bodily injury, he shall be fined not to exceed $50,000 or be imprisoned in the state prison for any term not to exceed 10 years, or both.

History: En. 94-6-103 by Sec. 1, Ch. 513, L. 1973; R.C.M. 1947, 94-6-103; amd. Sec. 7, Ch. 198, L. 1981; amd. Sec. 1, Ch. 590, L. 1985.

Cross-References

Definition of bodily injury, 45-2-101.

Definition of knowingly, 45-2-101.

Definition of property, 45-2-101.

Definition of property of another, 45-2-101.

Definition of purposely, 45-2-101.

Penalty for setting or leaving fire causing damage, 50-63-102.

Failure to extinguish campfire, 76-13-123.

45-6-103. Arson. (1) A person commits the offense of arson when, by means of fire or explosives, the person knowingly or purposely:

(a) damages or destroys a structure, vehicle, personal property (other than a vehicle) that exceeds $1,000 in value, crop, pasture, forest, or other real property that is property of another without consent;

(b) damages or destroys a structure, vehicle, crop, pasture, forest, or other property that the person owns or has a possessory interest in, with the purpose of obtaining a pecuniary or other gain through fraud or deception; or

(c) places another person in danger of death or bodily injury, including a firefighter responding to or at the scene of a fire or explosion.

(2) A person convicted of the offense of arson shall be imprisoned in the state prison for a term not to exceed 20 years or be fined an amount not to exceed $50,000, or both.

History: En. 94-6-104 by Sec. 1, Ch. 513, L. 1973; amd. Sec. 1, Ch. 261, L. 1975; R.C.M. 1947, 94-6-104; amd. Sec. 7, Ch. 198, L. 1981; amd. Sec. 2, Ch. 590, L. 1985; amd. Sec. 1, Ch. 124, L. 1995; amd. Sec. 4, Ch. 397, L. 1999.

Compiler's Comments

1999 Amendment: Chapter 397 in (1)(a) increased minimum value of property from more than $500 to more than $1,000. Amendment effective October 1, 1999.

Cross-References

Definition of bodily injury, 45-2-101.

Definition of knowingly, 45-2-101.

Definition of occupied structure, 45-2-101.

Definition of purposely, 45-2-101.

Causal relationship between conduct and result, 45-2-201.

Definition of without consent, 45-5-501, 45-5-511.

Release of arsonist — notification of Department of Justice, 53-1-104.

45-6-104. Desecration of capitol, place of worship, cemetery, or public memorial. (1) In this section, "capitol" means the Montana state capitol building and any permanent monuments on the capitol grounds.

(2) A person commits the offense of desecration if the person purposely:

(a) defiles or defaces the capitol or a place of worship, cemetery, or public memorial;

(b) places on or attaches to the capitol or a place of worship, cemetery, or public memorial any mark, design, or material not properly a part of the capitol, place of worship, cemetery, or public memorial; or

(c) injures, damages, or destroys any portion of the capitol or of a place of worship, cemetery, or public memorial.

(3) A person convicted of the offense of desecration shall be:

(a) incarcerated for any term not to exceed 6 months or be fined an amount not to exceed $500, or both, if the damage does not exceed $1,000; or

(b) imprisoned in the state prison for any term not to exceed 10 years or be fined an amount not to exceed $50,000, or both, if there is $1,000 or more of damage.

(4) With regard to the capitol, this section does not apply to displays or actions authorized by the department of administration.

History: En. Sec. 1, Ch. 533, L. 1995; amd. Sec. 1, Ch. 141, L. 1999.

Compiler's Comments

1999 Amendment: Chapter 141 in (2) and (3) after "desecration" deleted "of the capitol"; in (2) after "purposely" deleted "or knowingly"; in (2)(a), in two places in (2)(b), and in (2)(c) inserted references to place of worship, cemetery, or public memorial; inserted (3)(a) concerning penalty for damage not exceeding $1,000; in (3)(b) reduced term of imprisonment from 20 years to 10 years, reduced fine from $100,000 to $50,000, and at end inserted "if there is $1,000 or more of damage"; at beginning of (4) inserted "With regard to the capitol"; and made minor changes in style. Amendment effective October 1, 1999.

Part 2

Criminal Trespass and Burglary

45-6-201. Definition of "enter or remain unlawfully". (1) A person enters or remains unlawfully in or upon any vehicle, occupied structure, or premises when he is not licensed, invited, or otherwise privileged to do so. Privilege to enter or remain upon land is extended either by the explicit permission of the landowner or other authorized person or by the failure of the landowner or other authorized person to post notice denying entry onto private land. The privilege may be revoked at any time by personal communication of notice by the landowner or other authorized person to the entering person.

(2) To provide for effective posting of private land through which the public has no right-of-way, the notice provided for in subsection (1) must satisfy the following requirements:

(a) notice must be placed on a post, structure, or natural object by marking it with written notice or with not less than 50 square inches of fluorescent orange paint, except that when metal fenceposts are used, the entire post must be painted; and

(b) the notice described in subsection (2)(a) must be placed at each outer gate and normal point of access to the property, including both sides of a water body crossing the property wherever the water body intersects an outer boundary line.

(3) To provide for effective posting of private land through which or along which the public has an unfenced right-of-way by means of a public road, a landowner shall:

(a) place a conspicuous sign no closer than 30 feet of the centerline of the roadway where it enters the private land, stating words substantially similar to "PRIVATE PROPERTY, NO TRESPASSING OFF ROAD NEXT ___ MILES"; or

(b) place notice, as described in subsection (2)(a), no closer than 30 feet of the centerline of the roadway at regular intervals of not less than one-fourth mile along the roadway where it borders unfenced private land, except that orange markings may not be placed on posts where the public roadway enters the private land.

(4) If property has been posted in substantial compliance with subsection (2) or (3), it is considered closed to public access unless explicit permission to enter is given by the landowner or his authorized agent.

(5) The department of fish, wildlife, and parks shall attempt to educate and inform all persons holding hunting, fishing, or trapping licenses or permits by including on any publication concerning the licenses or permits, in condensed form, the provisions of this section concerning entry on private land. The department shall use public media, as well as its own publications, in attempting to educate and inform other recreational users of the provisions of this section. In the interests of providing the public with clear information regarding the public nature of certain unfenced rural rights-of-way, the department may develop and distribute posting signs that satisfy the requirements of subsection (3).

(6) For purposes of this section, "land" means land as defined in 70-15-102.

(7) In no event may civil liability be imposed upon the owner or occupier of premises by reason of any privilege created by this section.

History: En. 94-6-201 by Sec. 1, Ch. 513, L. 1973; amd. Sec. 21, Ch. 359, L. 1977; R.C.M. 1947, 94-6-201; amd. Sec. 1, Ch. 599, L. 1985; amd. Sec. 1, Ch. 268, L. 1991.

Cross-References

Definition of knowingly, 45-2-101.
Definition of occupied structure, 45-2-101.
Definition of premises, 45-2-101.
Definition of purposely, 45-2-101.
Definition of vehicle, 45-2-101.

45-6-202. Criminal trespass to vehicles. (1) A person commits the offense of criminal trespass to vehicles when he purposely or knowingly and without authority enters any vehicle or any part thereof.

(2) A person convicted of the offense of criminal trespass to vehicles shall be fined not to exceed $500 or be imprisoned in the county jail for any term not to exceed 6 months, or both.

History: En. 94-6-202 by Sec. 1, Ch. 513, L. 1973; R.C.M. 1947, 94-6-202.

Cross-References

Definition of knowingly, 45-2-101.
Definition of purposely, 45-2-101.
Definition of vehicle, 45-2-101.
Criminal mischief, 45-6-101, 45-6-104.
Theft, 45-6-301.
Unauthorized use of motor vehicles, 45-6-308.

45-6-203. Criminal trespass to property. (1) Except as provided in 70-16-111, a person commits the offense of criminal trespass to property if the person knowingly:

(a) enters or remains unlawfully in an occupied structure; or

(b) enters or remains unlawfully in or upon the premises of another.

(2) A person convicted of the offense of criminal trespass to property shall be fined not to exceed $500 or be imprisoned in the county jail for any term not to exceed 6 months, or both.

History: En. 94-6-203 by Sec. 1, Ch. 513, L. 1973; R.C.M. 1947, 94-6-203; amd. Sec. 1, Ch. 604, L. 1993.

Cross-References

Definition of knowingly, 45-2-101.
Definition of occupied structure, 45-2-101.
Definition of premises, 45-2-101.
Definition of enter or remain unlawfully, 45-6-201.
State conservation officers to enforce — where, 87-1-504.

45-6-204. Burglary. (1) A person commits the offense of burglary if he knowingly enters or remains unlawfully in an occupied structure with the purpose to commit an offense therein.

(2) A person commits the offense of aggravated burglary if he knowingly enters or remains unlawfully in an occupied structure with the purpose to commit an offense therein and:

(a) in effecting entry or in the course of committing the offense or in immediate flight thereafter, he or another participant in the offense is armed with explosives or a weapon; or

(b) in effecting entry or in the course of committing the offense or in immediate flight thereafter, he purposely, knowingly, or negligently inflicts or attempts to inflict bodily injury upon anyone.

(3) A person convicted of the offense of burglary shall be imprisoned in the state prison for any term not to exceed 20 years or be fined an amount not to exceed $50,000, or both. A person convicted of the offense of aggravated

burglary shall be imprisoned in the state prison for any term not to exceed 40 years or be fined an amount not to exceed $50,000, or both.

History: En. 94-6-204 by Sec. 1, Ch. 513, L. 1973; amd. Sec. 1, Ch. 260, L. 1975; R.C.M. 1947, 94-6-204; amd. Sec. 7, Ch. 198, L. 1981; amd. Sec. 1, Ch. 357, L. 1987.

Cross-References

Definition of bodily injury, 45-2-101.
Definition of felony, 45-2-101.
Definition of knowingly, 45-2-101.
Definition of negligently, 45-2-101.
Definition of occupied structure, 45-2-101.
Definition of offense, 45-2-101.
Definition of purpose, 45-2-101.
Definition of weapon, 45-2-101.
Definition of enter or remain unlawfully, 45-6-201.

45-6-205. Possession of burglary tools. (1) A person commits the offense of possession of burglary tools when he knowingly possesses any key, tool, instrument, device, or explosive suitable for breaking into an occupied structure or vehicle or any depository designed for the safekeeping of property or any part thereof with the purpose to commit an offense therewith.

(2) A person convicted of possession of burglary tools shall be fined not to exceed $500 or be imprisoned in the county jail for any term not to exceed 6 months, or both.

History: En. 94-6-205 by Sec. 1, Ch. 513, L. 1973; R.C.M. 1947, 94-6-205.

Cross-References

Definition of knowingly, 45-2-101.
Definition of occupied structure, 45-2-101.
Definition of offense, 45-2-101.
Definition of possession, 45-2-101.
Definition of purpose, 45-2-101.
Definition of vehicle, 45-2-101.

Part 3
Theft and Related Offenses

45-6-301. Theft. (1) A person commits the offense of theft when the person purposely or knowingly obtains or exerts unauthorized control over property of the owner and:

(a) has the purpose of depriving the owner of the property;

(b) purposely or knowingly uses, conceals, or abandons the property in a manner that deprives the owner of the property; or

(c) uses, conceals, or abandons the property knowing that the use, concealment, or abandonment probably will deprive the owner of the property.

(2) A person commits the offense of theft when the person purposely or knowingly obtains by threat or deception control over property of the owner and:

(a) has the purpose of depriving the owner of the property;

(b) purposely or knowingly uses, conceals, or abandons the property in a manner that deprives the owner of the property; or

(c) uses, conceals, or abandons the property knowing that the use, concealment, or abandonment probably will deprive the owner of the property.

(3) A person commits the offense of theft when the person purposely or knowingly obtains control over stolen property knowing the property to have been stolen by another and:

(a) has the purpose of depriving the owner of the property;

(b) purposely or knowingly uses, conceals, or abandons the property in a manner that deprives the owner of the property; or

(c) uses, conceals, or abandons the property knowing that the use, concealment, or abandonment probably will deprive the owner of the property.

(4) A person commits the offense of theft when the person purposely or knowingly obtains or exerts unauthorized control over any part of any public assistance provided under Title 52 or 53 by a state or county agency, regardless of the original source of assistance, by means of:

(a) a knowingly false statement, representation, or impersonation; or

(b) a fraudulent scheme or device.

(5) A person commits the offense of theft when the person purposely or knowingly obtains or exerts or helps another obtain or exert unauthorized control over any part of any benefits provided under Title 39, chapter 71 or 72, by means of:

(a) a knowingly false statement, representation, or impersonation; or

(b) deception or other fraudulent action.

(6) A person commits the offense of theft when the person purposely or knowingly commits insurance fraud as provided in 33-1-1202.

(7) (a) A person convicted of the offense of theft of property not exceeding $1,000 in value shall be fined not to exceed $1,000 or be imprisoned in the county jail for any term not to exceed 6 months, or both. A person convicted of a second offense shall be fined $1,000 or be imprisoned in the county jail for a term not to exceed 6 months, or both. A person convicted of a third or subsequent offense shall be fined $1,000 and be imprisoned in the county jail for a term of not less than 30 days or more than 6 months.

(b) A person convicted of the offense of theft of property exceeding $1,000 in value or theft of any commonly domesticated hoofed animal shall be fined not to exceed $50,000 or be imprisoned in the state prison for any term not to exceed 10 years, or both.

(8) Amounts involved in thefts committed pursuant to a common scheme or the same transaction, whether from the same person or several persons, may be aggregated in determining the value of the property.

History: En. 94-6-302 by Sec. 1, Ch. 513, L. 1973; amd. Sec. 22, Ch. 359, L. 1977; R.C.M. 1947, 94-6-302; amd. Sec. 1, Ch. 374, L. 1979; amd. Sec. 7, Ch. 198, L. 1981; amd. Sec. 2, Ch. 581, L. 1983; amd. Sec. 21, Ch. 670, L. 1985; amd. Sec. 65, Ch. 464, L. 1987; amd. Sec. 2, Ch. 739, L. 1991; amd. Sec. 1, Ch. 190, L. 1993; amd. Sec. 3, Ch. 616, L. 1993; amd. Sec. 2, Ch. 618, L. 1993; amd. Sec. 9, Ch. 237, L. 1995; amd. Sec. 5, Ch. 397, L. 1999.

Compiler's Comments

1999 Amendment: Chapter 397 in (7)(a) in first sentence increased maximum value of property for first offense from $500 to $1,000 and increased maximum fine for first offense from $500 to $1,000 and in second sentence increased mandatory fine for second offense from $500 to $1,000; and in (7)(b) increased minimum value of property from more than $500 to more than $1,000. Amendment effective October 1, 1999.

Cross-References

Photographs of items allegedly taken or converted — admissibility procedure, 26-1-608.

Civil penalty for shoplifting, 27-1-718.

Fraudulent obtaining of unemployment benefits, 39-51-3203.

Definition of deception, 45-2-101.

Definition of deprive, 45-2-101.

Definition of knowingly, 45-2-101.

Definition of obtains or exerts control, 45-2-101.

Definition of owner, 45-2-101.

Definition of property, 45-2-101.

Definition of purposely, 45-2-101.

Definition of stolen property, 45-2-101.

Definition of threat, 45-2-101.

Definition of value, 45-2-101.

Theft by disposal of stolen property, 45-6-314.

Fraudulent obtaining of public assistance, 53-2-107.

Unlawful transportation of trees, 76-13-601.

Disturbance or theft of traps or trapped animals, 87-3-507.

45-6-302. Theft of lost or mislaid property. (1) A person who obtains control over lost or mislaid property commits the offense of theft when he:

(a) knows or learns the identity of the owner or knows, is aware of, or learns of a reasonable method of identifying the owner;

(b) fails to take reasonable measures to restore the property to the owner; and

(c) has the purpose of depriving the owner permanently of the use or benefit of the property.

(2) A person convicted of theft of lost or mislaid property shall be fined not to exceed $500 or be imprisoned in the county jail for a period not to exceed 6 months.

History: En. 94-6-303 by Sec. 1, Ch. 513, L. 1973; R.C.M. 1947, 94-6-303.

Cross-References

Definition of knowledge, 45-2-101.

Definition of obtains or exerts control, 45-2-101.

Definition of owner, 45-2-101.

Definition of property, 45-2-101.

Definition of purposely, 45-2-101.

45-6-303. Offender's interest in the property. (1) It is no defense to a charge of theft of property that the offender has an interest therein when the owner also has an interest to which the offender is not entitled.

(2) It is no defense that theft was from the offender's spouse, except that misappropriation of household and personal effects or other property normally accessible to both spouses is theft only if it occurs after the parties have ceased living together.

History: En. 94-6-306 by Sec. 1, Ch. 513, L. 1973; R.C.M. 1947, 94-6-306.

Cross-References

Definition of owner, 45-2-101.

Definition of property, 45-2-101.

Theft, 45-6-301.

45-6-304. Repealed. Sec. 2, Ch. 188, L. 1991.

History: En. 94-6-314 by Sec. 1, Ch. 513, L. 1973; R.C.M. 1947, 94-6-314.

45-6-305. Theft of labor or services or use of property. (1) A person commits the offense of theft when he obtains the temporary use of property, labor, or services of another which are available only for hire, by means of threat or deception or knowing that such use is without the consent of the person providing the property, labor, or services.

(2) A person convicted of theft of labor or services or use of property shall be fined not to exceed $500 or be imprisoned in the county jail for a term not to exceed 6 months, or both.

History: En. 94-6-304 by Sec. 1, Ch. 513, L. 1973; R.C.M. 1947, 94-6-304.

Cross-References

Definition of deception, 45-2-101.

Definition of obtain, 45-2-101.

Definition of property, 45-2-101.

Definition of threat, 45-2-101.

Theft, 45-6-301.

45-6-306. Obtaining communication services with intent to defraud. In a prosecution under 45-6-305 for theft of telephone, telegraph, or cable television services, the element of deception is established by proof that the defendant obtained such services by any of the following means:

(1) by use of a code, prearranged scheme, or other similar stratagem or device whereby said person, in effect, sends or receives information;

(2) by installing, rearranging, or tampering with any facilities or equipment, whether physically, inductively, acoustically, or electronically;

(3) by any other trick, stratagem, impersonation, false pretense, false representation, false statement, contrivance, device, or means; or

(4) by making, assembling, or possessing any instrument, apparatus, equipment, or device or the plans or instructions for the making or assembling of any instrument, apparatus, equipment, or device which is designed, adapted, or otherwise intended to be used to avoid the lawful charge, in whole or in part, for any telecommunications service by concealing the existence, place of origin, or destination of any telecommunications.

History: En. 94-6-304.1 by Sec. 1, Ch. 156, L. 1974; amd. Sec. 1, Ch. 175, L. 1977; R.C.M. 1947, 94-6-304.1.

Cross-References

Definition of obtain, 45-2-101.

Definition of tamper, 45-2-101.

45-6-307. Aiding the avoidance of telecommunications charges. (1) A person commits the offense of aiding the avoidance of telecommunications charges when the person:

(a) publishes the number or code of an existing, canceled, revoked, expired, or nonexistent telephone credit card or the numbering or coding that is employed in the issuance of credit cards with the purpose that it will be used to avoid the payment of lawful telecommunications charges;

(b) publishes, advertises, sells, gives, or otherwise transfers to another plans or instructions for the making or assembling of any apparatus, instrument, equipment, or device described in 45-6-306(4) with the purpose that it will be used or with the knowledge or reason to believe that it will be used to avoid the payment of lawful telecommunications charges; or

(c) manufactures, assembles, possesses, sells, gives, or otherwise transfers any apparatus, instrument, equipment, or device described in 45-6-306(4) with the purpose that it will be used to avoid the payment of lawful telecommunications charges.

(2) A person convicted of the offense of aiding the avoidance of telecommunications charges shall be fined not to exceed $500 or be imprisoned in the county jail for a term not to exceed 6 months, or both.

(3) For the purposes of this section, the term "publish" means to communicate information to any one or more persons, either orally; in person; by computer, telephone, radio, or television; or in a writing of any kind, including but not limited to a letter, memorandum, circular, handbill, newspaper or magazine article, or book.

History: En. 94-6-304.2 by Sec. 2, Ch. 175, L. 1977; R.C.M. 1947, 94-6-304.2; amd. Sec. 1, Ch. 282, L. 1979; amd. Sec. 2, Ch. 354, L. 1999.

Compiler's Comments

1999 Amendment: Chapter 354 in (3) before "telephone" inserted "computer"; and made minor changes in style. Amendment effective October 1, 1999.

45-6-308. Unauthorized use of motor vehicles. (1) A person commits the offense of unauthorized use of motor vehicles if he knowingly operates the automobile, airplane, motorcycle, quadricycle, motorboat, or other motor-propelled vehicle of another without his consent.

(2) A person convicted of unauthorized use of motor vehicles shall be fined not to exceed $500 or be imprisoned in the county jail for any term not to exceed 6 months, or both. It is an affirmative defense that the offender reasonably believed that the owner would have consented to the operation had he known of it.

History: En. 94-6-305 by Sec. 1, Ch. 513, L. 1973; R.C.M. 1947, 94-6-305; amd. Sec. 14, Ch. 516, L. 1985.

Cross-References

Definition of knowingly, 45-2-101.
Definition of vehicle, 45-2-101.
Motor Vehicles, Title 61.
Motorcycle defined, 61-1-105.
Quadricycle defined, 61-1-133.

45-6-309. Failure to return rented or leased personal property. (1) A person commits the offense of failure to return rented or leased personal property if, without notice to and permission of the lessor, the person purposely and knowingly fails to return the property within 48 hours after the time provided for return in the rental agreement, provided that clear written notice, in bold print, of the date and time when return of the property is required and of the penalty prescribed in this section is stated in the rental or lease agreement.

(2) Presentation to the lessor by the lessee of identification that is false for the purpose of obtaining a rental or lease agreement constitutes prima facie evidence of commission of the offense.

(3) After the rental or lease period specified in the rental or lease agreement has expired, failure to return rented or leased personal property within 72 hours of written demand by the lessor, sent by certified mail to the renter or lessee at the address given at the time of entering the rental or lease agreement, constitutes prima facie evidence of commission of the offense.

(4) (a) A person convicted of failure to return rented or leased personal property not exceeding $1,000 in value shall be fined not to exceed $1,000 or be imprisoned in the county jail for a term not to exceed 6 months, or both.

(b) A person convicted of failure to return rented or leased personal property exceeding $1,000 in value shall be imprisoned in the state prison for a term not to exceed 10 years.

History: En. Sec. 1, Ch. 239, L. 1981; amd. Sec. 3, Ch. 581, L. 1983; amd. Sec. 4, Ch. 616, L. 1993; amd. Sec. 6, Ch. 397, L. 1999.

Compiler's Comments

1999 Amendment: Chapter 397 in (4)(a) increased maximum value of property and maximum fine from $500 to $1,000; and in (4)(b) increased minimum value of property from more than $500 to more than $1,000. Amendment effective October 1, 1999.

45-6-310. Definition — computer use. As used in 45-6-311, the term "obtain the use of" means to instruct, communicate with, store data in, retrieve data from, cause input to, cause output from, or otherwise make use of any resources of a computer, computer system, or computer network or to cause another to instruct, communicate with, store data in, retrieve data from, cause input to, cause output from, or otherwise make use of any resources of a computer, computer system, or computer network.

History: En. Sec. 2, Ch. 485, L. 1981.

45-6-311. Unlawful use of a computer. (1) A person commits the offense of unlawful use of a computer if the person knowingly or purposely:

(a) obtains the use of any computer, computer system, or computer network without consent of the owner;

(b) alters or destroys or causes another to alter or destroy a computer program or computer software without consent of the owner; or

(c) obtains the use of or alters or destroys a computer, computer system, computer network, or any part thereof as part of a deception for the purpose of obtaining money, property, or computer services from the owner of the computer, computer system, computer network, or part thereof or from any other person.

(2) A person convicted of the offense of unlawful use of a computer involving property not exceeding $1,000 in value shall be fined not to exceed $1,000 or be imprisoned in the county jail for a term not to exceed 6 months, or both. A person convicted of the offense of unlawful use of a computer involving property exceeding $1,000 in value shall be fined not more than 2 ½ times the value of the property used, altered, destroyed, or obtained or be imprisoned in the state prison for a term not to exceed 10 years, or both.

History: En. Sec. 3, Ch. 485, L. 1981; amd. Sec. 4, Ch. 581, L. 1983; amd. Sec. 5, Ch. 616, L. 1993; amd. Sec. 7, Ch. 397, L. 1999.

Compiler's Comments

1999 Amendment: Chapter 397 in (2) in first sentence increased maximum value of property and maximum fine from $500 to $1,000 and in second sentence increased minimum value of property from more than $500 to more than $1,000. Amendment effective October 1, 1999.

45-6-312. Unauthorized acquisition or transfer of food stamps. (1) A person commits the offense of unauthorized acquisition or transfer of food stamps if the person knowingly:

(a) acquires, purchases, possesses, or uses any food stamp or coupon that the person is not entitled to; or

(b) transfers, sells, trades, gives, or otherwise disposes of any food stamp or coupon to another person not entitled to receive or use it.

(2) A person convicted of an offense under this section shall be fined not more than $1,000 or be imprisoned in the county jail for not more than 6 months, or both. A person convicted of an offense under this section, which offense is part of a common scheme or in which the value of the food stamps exceeds $1,000, shall be fined not more than $50,000 or be imprisoned in the state prison for not more than 10 years, or both.

(3) As used in this section, "food stamp or coupon" means any stamp, coupon, or type of certification provided for the purchase of eligible food pursuant to the Food Stamp Act of 1977, 7 U.S.C. 2011 through 2029, or any similar public assistance program.

History: En. Sec. 1, Ch. 87, L. 1983; amd. Sec. 6, Ch. 616, L. 1993; amd. Sec. 8, Ch. 397, L. 1999.

Compiler's Comments

1999 Amendment: Chapter 397 in (2) in first sentence increased maximum fine from $500 to $1,000 and in second sentence increased minimum value of food stamps from more than $500 to more than $1,000. Amendment effective October 1, 1999.

Cross-References

Common scheme defined, 45-2-101.

Food stamp program, Title 53, ch. 2, part 9.

45-6-313. Medicaid fraud. (1) A person commits the offense of medicaid fraud when:

(a) the person obtains a medicaid payment or benefit for the person or another person by purposely or knowingly:

(i) making, submitting, or authorizing the making or submitting of a false or misleading medicaid claim, statement, representation, application, or document to a medicaid agency for a service or item when the person knows or has reason to know that the person is not entitled under applicable statutes, regulations, rules, or policies to medicaid payment or benefits for the service or item or for the amount of payment requested or claimed; or

(ii) making, submitting, or authorizing the making or submitting of a medicaid claim, statement, representation, application, or document under the medicaid program for a service or item when the person knows or has reason to know that the person is not entitled under applicable statutes, regulations, rules, or policies to medicaid payment or benefit for the service or item or for the amount of payment requested or claimed;

(b) the person purposely or knowingly:

(i) solicits, accepts, offers, or provides any remuneration, including but not limited to a kickback, bribe, or rebate, other than an amount legally payable under the medical assistance program, for furnishing services or items for which payment may be made under the medicaid program or in return for purchasing, leasing, ordering, arranging for, or recommending the purchasing, leasing, or ordering of any services or items from a provider for which payment may be made under the medicaid program; or

(ii) makes, offers, or accepts a remuneration, a rebate of a fee, or a charge for referring a recipient to another provider for the furnishing of services or items for which payment may be made under the medicaid program; or

(c) the person, with respect to a managed care contract, health maintenance organization contract, or similar contract or subcontract under the medicaid program, purposely or knowingly fails or refuses to provide covered medically necessary services to eligible recipients as required by the contract.

(2) Any conduct or activity that does not violate or that is protected under the provisions of, or federal regulations adopted under, 42 U.S.C. 1395nn or 42 U.S.C. 1320a-7b(b), as may be amended, is not considered an offense under subsection (1)(b), and the conduct or activity must be accorded the same protections allowed under federal laws and regulations.

(3) In a prosecution for a violation of this section, it is a defense if the person acted in reliance upon the written authorization or advice of the department.

(4) (a) A person convicted of the offense of medicaid fraud involving payments, benefits, or claims not exceeding $1,000 in value shall be fined an amount not to exceed $1,000 or be imprisoned in the county jail for a term not to exceed 6 months, or both. A person convicted of a second offense shall be fined $1,000 and be imprisoned in the county jail for a term not less than 10 days or more than 6 months. A person convicted of a third or subsequent offense shall be fined $1,000 and be imprisoned in the county jail for a term not less than 30 days or more than 1 year.

(b) A person convicted of the offense of medicaid fraud involving payments, benefits, or claims exceeding $1,000 in value shall be fined an amount not to exceed the greater of $50,000 or 10 times the value of the payments obtained or be imprisoned in the state prison for a term not to exceed 10 years, or both.

(c) For purposes of imposing sentence for a conviction under subsection (1)(b), the value of payments or benefits involved is the greater of the value of medicaid payments or benefits received as a result of the illegal conduct or activity or the value of the remuneration, rebate, or charge involved.

(d) Amounts involved in medicaid fraud committed pursuant to a common scheme or the same transaction may be aggregated in determining the value involved.

(e) A person convicted of the offense of medicaid fraud must be suspended from participation in the medicaid program:

(i) for any period of time not less than 1 year for a first offense, or the person may be permanently terminated from participation in the medical assistance program;

(ii) for any period of time not less than 3 years for a second offense, or the person may be permanently terminated from participation in the medical assistance program; or

(iii) permanently for a third offense.

(5) In addition to any other penalty provided by law, a person convicted of medicaid fraud is not entitled to bill or collect from the recipient, the medicaid program, or any other third-party payor for the services or items involved and shall repay to the medicaid program any payments or benefits obtained by any person for the services or items involved.

(6) The establishment of the criminal offenses specified in this section does not preclude the application of any other provision of law.

History: En. Sec. 7, Ch. 354, L. 1995; amd. Sec. 9, Ch. 397, L. 1999.

Compiler's Comments

1999 Amendment: Chapter 397 in (4)(a) in first sentence increased maximum value of payments, benefits, or claims and maximum fine from $500 to $1,000 and in second sentence increased mandatory fine for second offense from $500 to $1,000; and in (7)(b) increased minimum value of payments, benefits, or claims from more than $500 to more than $1,000. Amendment effective October 1, 1999.

Cross-References

Medical assistance — Medicaid, Title 53, ch. 6, part 1.

Medicaid Fraud Control Unit — powers and duties, 53-6-155 through 53-6-160.

45-6-314. Theft by disposal of stolen property. A pawnbroker or dealer who buys and sells secondhand merchandise and allows stolen property to be sold, bartered, or otherwise disposed of after a peace officer has requested him to hold the property for 30 days, as provided in 46-5-212, commits the offense of theft as defined in 45-6-301.

History: En. Sec. 1, Ch. 470, L. 1989.

Cross-References

Definition of peace officer, 45-2-101.

Definition of stolen property, 45-2-101.

Penalty for theft, 45-6-301.

Pawnbroker to surrender stolen property, 46-5-212.

45-6-315. Defrauding creditors. (1) A person commits the offense of defrauding secured creditors if he destroys, conceals, encumbers, transfers, removes from the state, or otherwise deals with property subject to a security interest with the purpose to hinder enforcement of that interest.

(2) "Security interest" means an interest in personal property or fixtures as defined in the Uniform Commercial Code (30-1-201(37)).

(3) A person convicted of the offense of defrauding secured creditors shall be fined not to exceed $500 or be imprisoned in the county jail for a term not to exceed 6 months, or both.

(4) A person who destroys, conceals, encumbers, transfers, removes from the state, or otherwise deals with property subject to a security interest with

the purpose of depriving the owner of the property or of the proceeds and value therefrom may be prosecuted under 45-6-301.

History: En. 94-6-313 by Sec. 1, Ch. 513, L. 1973; amd. Sec. 2, Ch. 367, L. 1975; R.C.M. 1947, 94-6-313.

Cross-References

Definition of security interest, 30-1-201.
Definition of property, 45-2-101.
Definition of purpose, 45-2-101.
Criminal responsibility of corporation, 45-2-311.

45-6-316. Issuing a bad check. (1) A person commits the offense of issuing a bad check when the person issues or delivers a check or other order upon a real or fictitious depository for the payment of money knowing that it will not be paid by the depository.

(2) If the offender has an account with the depository, failure to make good the check or other order within 5 days after written notice of nonpayment has been received by the issuer is prima facie evidence that the offender knew that it would not be paid by the depository.

(3) A person convicted of issuing a bad check shall be fined not to exceed $1,000 or be imprisoned in the county jail for any term not to exceed 6 months, or both. If the offender has engaged in issuing bad checks that are part of a common scheme or if the value of any property, labor, or services obtained or attempted to be obtained exceeds $1,000, the offender shall be fined not to exceed $50,000 or be imprisoned in the state prison for any term not to exceed 10 years, or both.

History: En. 94-6-309 by Sec. 1, Ch. 513, L. 1973; R.C.M. 1947, 94-6-309; amd. Sec. 7, Ch. 198, L. 1981; amd. Sec. 5, Ch. 581, L. 1983; amd. Sec. 1, Ch. 383, L. 1985; amd. Sec. 7, Ch. 616, L. 1993; amd. Sec. 10, Ch. 397, L. 1999.

Compiler's Comments

1999 Amendment: Chapter 397 in (3) in first sentence increased maximum fine from $500 to $1,000 and in second sentence increased minimum value of property, labor, or services from more than $500 to more than $1,000. Amendment effective October 1, 1999.

Cross-References

Treble damages for issuing bad check, 27-1-717.
Definition of common scheme, 45-2-101.
Definition of knowingly, 45-2-101.
Definition of property, 45-2-101.
Definition of value, 45-2-101.

45-6-317. Deceptive practices. (1) A person commits the offense of deceptive practices when the person purposely or knowingly:

(a) causes another, by deception or threat, to execute a document disposing of property or a document by which a pecuniary obligation is incurred;

(b) makes or directs another to make a false or deceptive statement addressed to the public or any person for the purpose of promoting or procuring the sale of property or services;

(c) makes or directs another to make a false or deceptive statement to any person respecting the financial condition of the person making or directing another to make the statement for the purpose of procuring a loan or credit or accepts a false or deceptive statement from any person who is attempting to procure a loan or credit regarding that person's financial condition; or

(d) obtains or attempts to obtain property, labor, or services by any of the following means:

(i) using a credit card that was issued to another without the other's consent;

(ii) using a credit card that has been revoked or canceled;

(iii) using a credit card that has been falsely made, counterfeited, or altered in any material respect;

(iv) using the pretended number or description of a fictitious credit card;

(v) using a credit card that has expired when the credit card clearly indicates the expiration date.

(2) A person convicted of the offense of deceptive practices shall be fined not to exceed $1,000 or imprisoned in the county jail for a term not to exceed 6 months, or both. If the deceptive practices are part of a common scheme or the value of any property, labor, or services obtained or attempted to be obtained exceeds $1,000, the offender shall be fined not to exceed $50,000 or be imprisoned in the state prison for a term not to exceed 10 years, or both.

History: En. 94-6-307 by Sec. 1, Ch. 513, L. 1973; amd. Sec. 23, Ch. 359, L. 1977; R.C.M. 1947, 94-6-307; amd. Sec. 7, Ch. 198, L. 1981; amd. Sec. 6, Ch. 581, L. 1983; amd. Sec. 8, Ch. 616, L. 1993; amd. Sec. 11, Ch. 397, L. 1999.

Compiler's Comments

1999 Amendment: Chapter 397 in (2) in first sentence increased maximum fine from $500 to $1,000 and in second sentence increased minimum value of property, labor, or services from more than $500 to more than $1,000; and made minor changes in style. Amendment effective October 1, 1999.

Cross-References

Applicability of Title 37, ch. 51, 37-51-104.
Definition of deception, 45-2-101.
Definition of knowingly, 45-2-101.
Definition of property, 45-2-101.
Definition of purposely, 45-2-101.
Definition of threat, 45-2-101.
Criminal responsibility of corporation, 45-2-311.

45-6-318. Deceptive business practices. (1) A person commits the offense of deceptive business practices if in the course of engaging in a business, occupation, or profession he purposely or knowingly:

(a) uses or possesses for use a false weight or measure or any other device for falsely determining or recording any quality or quantity;

(b) sells, offers, exposes for sale, or delivers less than the represented quantity of any commodity or service;

(c) takes or attempts to take more than the represented quantity of any commodity or service when as buyer he furnished the weight or measure;

(d) sells, offers, or exposes for sale adulterated commodities;

(e) sells, offers, or exposes for sale mislabeled commodities; or

(f) makes a deceptive statement regarding the quantity or price of goods in any advertisement addressed to the public.

(2) "Adulterated" means varying from the standard of composition or quality prescribed by statute or lawfully promulgated administrative regulation or, if none, as set by established commercial usage.

(3) "Mislabeled" means:

(a) varying from the standard of truth or disclosure in labeling prescribed by statute or lawfully promulgated administrative regulation or, if none, as set by established commercial usage; or

(b) represented as being another person's produce though otherwise labeled accurately as to quality and quantity.

(4) A person convicted of the offense of deceptive business practices shall be fined not to exceed $500 or be imprisoned in the county jail for a term not to exceed 6 months, or both.

History: En. 94-6-308 by Sec. 1, Ch. 513, L. 1973; R.C.M. 1947, 94-6-308.

Cross-References

Applicability of Title 37, ch. 51, 37-51-104.
Definition of knowingly, 45-2-101.
Definition of purposely, 45-2-101.

Criminal responsibility of corporation, 45-2-311.

45-6-319. Chain distributor schemes. (1) As used in this section, the following definitions apply:

(a) "Chain distributor scheme" means a sales device whereby a person, under a condition that he make an investment, is granted a license or right to recruit for consideration one or more additional persons who are also granted such license or right upon condition of making an investment and may further perpetuate the chain of persons who are granted such license or right upon such condition.

(b) "Person" means a natural person, corporation, partnership, trust, or other entity; and in the case of an entity it shall include any other entity which has a majority interest in such entity or effectively controls such other entity as well as the individual officers, directors, and other persons in act of control of the activities of each entity.

(2) It is unlawful for any person to promote, sell, or encourage participation in any chain distributor scheme.

(3) Any person violating the provisions of this section shall, upon conviction, be imprisoned in the state prison for a period not to exceed 1 year or fined not to exceed $1,000, or both.

(4) Any person convicted of a second offense under this section shall be imprisoned in the state prison for a period not to exceed 5 years or fined not to exceed $5,000, or both.

History: En. Secs. 1 to 3, Ch. 465, L. 1973; amd. Sec. 24, Ch. 359, L. 1977; R.C.M. 1947, 94-6-308.1.

45-6-320 through 45-6-324 reserved.

45-6-325. Forgery. (1) A person commits the offense of forgery when with purpose to defraud the person knowingly:

(a) without authority makes or alters a document or other object apparently capable of being used to defraud another in a manner that it purports to have been made by another or at another time or with different provisions or of different composition;

(b) issues or delivers the document or other object knowing it to have been thus made or altered;

(c) possesses with the purpose of issuing or delivering any such document or other object knowing it to have been thus made or altered; or

(d) possesses with knowledge of its character any plate, die, or other device, apparatus, equipment, or article specifically designed for use in counterfeiting or otherwise forging written instruments.

(2) A purpose to defraud means the purpose of causing another to assume, create, transfer, alter, or terminate any right, obligation, or power with reference to any person or property.

(3) A document or other object capable of being used to defraud another includes but is not limited to one by which any right, obligation, or power with reference to any person or property may be created, transferred, altered, or terminated.

(4) A person convicted of the offense of forgery shall be fined not to exceed $1,000 or be imprisoned in the county jail for any term not to exceed 6 months,

or both. If the forgery is part of a common scheme or if the value of the property, labor, or services obtained or attempted to be obtained exceeds $1,000, the offender shall be fined not to exceed $50,000 or be imprisoned in the state prison for any term not to exceed 20 years, or both.

History: En. 94-6-310 by Sec. 1, Ch. 513, L. 1973; R.C.M. 1947, 94-6-310; amd. Sec. 7, Ch. 198, L. 1981; amd. Sec. 7, Ch. 581, L. 1983; amd. Sec. 9, Ch. 616, L. 1993; amd. Sec. 12, Ch. 397, L. 1999.

Compiler's Comments

1999 Amendment: Chapter 397 in (4) in first sentence increased maximum fine from $500 to $1,000 and in second sentence increased minimum value of property, labor, or services from more than $500 to more than $1,000; and made minor changes in style. Amendment effective October 1, 1999.

Cross-References

Definition of common scheme, 45-2-101.
Definition of knowingly, 45-2-101.
Definition of property, 45-2-101.
Definition of purpose, 45-2-101.
Definition of value, 45-2-101.

45-6-326. Obscuring the identity of a machine. (1) A person commits the offense of obscuring the identity of a machine if he:

(a) removes, defaces, covers, alters, destroys, or otherwise obscures the manufacturer's serial number or any other distinguishing identification number or mark upon any machine, vehicle, electrical device, or firearm with the purpose to conceal, misrepresent, or transfer any such machine, vehicle, electrical device, or firearm; or

(b) possesses with the purpose to conceal, misrepresent, or transfer any machine, vehicle, device, or firearm knowing that the serial number or other identification number or mark has been removed or otherwise obscured.

(2) A person convicted of obscuring the identity of a machine shall be fined not to exceed $500 or be imprisoned in the county jail for a term not to exceed 6 months, or both.

(3) The fact of possession or transfer of any such machine, vehicle, electrical device, or firearm creates a presumption that the person knew the serial number or other identification number or mark had been removed or otherwise obscured.

History: En. 94-6-311 by Sec. 1, Ch. 513, L. 1973; amd. Sec. 1, Ch. 167, L. 1977; R.C.M. 1947, 94-6-311.

Cross-References

Definition of knowingly, 45-2-101.
Definition of purposely, 45-2-101.
Definition of vehicle, 45-2-101.
Criminal responsibility of corporations, 45-2-311.

45-6-327. Illegal branding or altering or obscuring a brand. (1) A person commits the offense of illegal branding or altering or obscuring a brand if he marks or brands any commonly domesticated hoofed animal or removes, covers, alters, or defaces any existing mark or brand on any commonly domesticated hoofed animal with the purpose to obtain or exert unauthorized control over said animal or with the purpose to conceal, misrepresent, transfer, or prevent identification of said animal.

(2) A person convicted of the offense of illegal branding or altering or obscuring a brand shall be imprisoned in the state prison for any term not to exceed 10 years or be fined an amount not to exceed $50,000, or both.

History: En. 94-6-312 by Sec. 1, Ch. 513, L. 1973; R.C.M. 1947, 94-6-312; amd. Sec. 7, Ch. 198, L. 1981.

Cross-References

Definition of obtains or exerts control, 45-2-101.

Definition of purpose, 45-2-101.

Criminal responsibility of corporations, 45-2-311.

CHAPTER 7

OFFENSES AGAINST PUBLIC ADMINISTRATION

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Part 1

Bribery and Corrupt Influence

45-7-101. Bribery in official and political matters. (1) A person commits the offense of bribery if he purposely or knowingly offers, confers, or agrees to confer upon another or solicits, accepts, or agrees to accept from another:

(a) any pecuniary benefit as a consideration for the recipient's decision, opinion, recommendation, vote, or other exercise of discretion as a public servant, party official, or voter;

(b) any benefit as consideration for the recipient's decision, vote, recommendation, or other exercise of official discretion in a judicial or administrative proceeding; or

(c) any benefit as consideration for a violation of a known duty as a public servant or party official.

(2) It is no defense to prosecution under this section that a person whom the offender sought to influence was not qualified to act in the desired way whether because he had not yet assumed office or lacked jurisdiction or for any other reason.

(3) A person convicted of the offense of bribery shall be imprisoned in the state prison for any term not to exceed 10 years or be fined an amount not to exceed $50,000, or both, and shall forever be disqualified from holding any public office in this state.

History: En. 94-7-102 by Sec. 1, Ch. 513, L. 1973; R.C.M. 1947, 94-7-102; amd. Sec. 7, Ch. 198, L. 1981.

Cross-References

Code of ethics, Title 2, ch. 2, part 1.

Election and campaign practices and criminal provisions, Title 13, ch. 35.

Definition of administrative proceeding, 45-2-101.

Definition of benefit, 45-2-101.

Definition of knowingly, 45-2-101.

Definition of party official, 45-2-101.

Definition of pecuniary benefit, 45-2-101.

Definition of public servant, 45-2-101.

Definition of purpose, 45-2-101.

Definition of solicit, 45-2-101.

Improperly influencing grain inspector, sampler, or weigher, 80-4-703.

45-7-102. Threats and other improper influence in official and political matters. (1) A person commits an offense under this section if the person purposely or knowingly:

(a) (i) threatens harm to any person, the person's spouse, child, parent, or sibling, or the person's property with the purpose to influence the person's decision, opinion, recommendation, vote, or other exercise of discretion as a public servant, party official, or voter;

(ii) threatens harm to any public servant, to the public servant's spouse, child, parent, or sibling, or to the public servant's property with the purpose to influence the public servant's decision, opinion, recommendation, vote, or other exercise of discretion in a judicial or administrative proceeding;

(iii) threatens harm to any public servant or party official, the person's spouse, child, parent, or sibling, or the person's property with the purpose to influence the person to violate the person's duty or to prevent the public servant or party official from accepting or holding any public office;

(iv) privately addresses to any public servant who has or will have official discretion in a judicial or administrative proceeding any representation, entreaty, argument, or other communication designed to influence the outcome on the basis of considerations other than those authorized by law;

(v) as a juror or officer in charge of a jury receives or permits to be received any communication relating to any matter pending before the jury, except according to the regular course of proceedings; or

(b) injures the person or property of a public servant or injures the servant's spouse, child, parent, or sibling because of the public servant's lawful discharge of the duties of the office or to prevent the public servant from discharging the public servant's official duties.

(2) It is no defense to prosecution under subsections (1)(a)(i) through (1)(a)(iv) and (1)(b) that a person whom the offender sought to influence was not qualified to act in the desired way, whether because the person had not yet assumed office or lacked jurisdiction or for any other reason.

(3) A person convicted under this section shall be fined not to exceed $50,000 or be imprisoned in the state prison for a term not to exceed 10 years, or both.

History: En. 94-7-103 by Sec. 1, Ch. 513, L. 1973; amd. Sec. 25, Ch. 359, L. 1977; R.C.M. 1947, 94-7-103; amd. Sec. 7, Ch. 198, L. 1981; amd. Sec. 1, Ch. 351, L. 1995.

Cross-References

Code of ethics, Title 2, ch. 2, part 1.

Election and campaign practices and criminal provisions, Title 13, ch. 35.

Definition of administrative proceeding, 45-2-101.

Definition of party official, 45-2-101.

Definition of public servant, 45-2-101.

Definition of purpose, 45-2-101.

Definition of threat, 45-2-101.

Intimidation, 45-5-203.

45-7-103. Compensation for past official behavior. (1) A person commits an offense under this section if he knowingly solicits, accepts, or agrees to accept any pecuniary benefit as compensation for having, as a public servant, given a decision, opinion, recommendation, or vote favorable to another, for having otherwise exercised a discretion in another's favor, or for having violated his duty. A person commits an offense under this section if he knowingly offers, confers, or agrees to confer compensation which is prohibited by this section.

(2) A person convicted under this section shall be fined not to exceed $500 or imprisoned in the county jail for any term not to exceed 6 months, or both.

History: En. 94-7-104 by Sec. 1, Ch. 513, L. 1973; amd. Sec. 26, Ch. 359, L. 1977; R.C.M. 1947, 94-7-104.

Cross-References

Code of ethics, Title 2, ch. 2, part 1.

Definition of administrative proceeding, 45-2-101.

Definition of knowingly, 45-2-101.

Definition of pecuniary benefit, 45-2-101.

Definition of public servant, 45-2-101.

Definition of solicit, 45-2-101.

45-7-104. Gifts to public servants by persons subject to their jurisdiction. (1) No public servant in any department or agency exercising regulatory function, conducting inspections or investigations, carrying on a civil or criminal litigation on behalf of the government, or having custody of prisoners shall solicit, accept, or agree to accept any pecuniary benefit from a person known to be subject to such regulation, inspection, investigation, or custody or against whom such litigation is known to be pending or contemplated.

(2) No public servant having any discretionary function to perform in connection with contracts, purchases, payments, claims, or other pecuniary transactions of the government shall solicit, accept, or agree to accept any pecuniary benefit from any person known to be interested in or likely to become interested in any such contract, purchase, payment, claim, or transaction.

(3) No public servant having judicial or administrative authority and no public servant employed by or in a court or other tribunal having such authority or participating in the enforcement of its decision shall solicit, accept, or agree

to accept any pecuniary benefit from a person known to be interested in or likely to become interested in any matter before such public servant or tribunal with which he is associated.

(4) No legislator or public servant employed by the legislature or by any committee or agency thereof shall solicit, accept, or agree to accept any pecuniary benefit from a person known to be interested in or likely to become interested in any matter before the legislature or any committee or agency thereof.

(5) This section shall not apply to:

(a) fees prescribed by law to be received by a public servant or any other benefit for which the recipient gives legitimate consideration or to which he is otherwise entitled; or

(b) trivial benefits incidental to personal, professional, or business contacts and involving no substantial risk of undermining official impartiality.

(6) No person shall knowingly confer or offer or agree to confer any benefit prohibited by subsections (1) through (5).

(7) A person convicted of an offense under this section shall be fined not to exceed $500 or be imprisoned in the county jail for any term not to exceed 6 months, or both.

History: En. 94-7-105 by Sec. 1, Ch. 513, L. 1973; R.C.M. 1947, 94-7-105.

Cross-References

Code of ethics, Title 2, ch. 2, part 1.
Definition of knowingly, 45-2-101.
Definition of pecuniary benefit, 45-2-101.
Definition of public servant, 45-2-101.
Definition of solicit, 45-2-101.

Part 2

Perjury and Other Falsification in Official Matters

45-7-201. Perjury. (1) A person commits the offense of perjury if in any official proceeding he knowingly makes a false statement under oath or equivalent affirmation or swears or affirms the truth of a statement previously made, when the statement is material.

(2) A person convicted of perjury shall be punished by imprisonment in the state prison for any term not to exceed 10 years or shall be punished by a fine of not more than $50,000, or by both such fine and imprisonment.

(3) Falsification is material, regardless of the admissibility of the statement under rules of evidence, if it could have affected the course or outcome of the proceeding. It is no defense that the declarant mistakenly believed the falsification to be immaterial. Whether a falsification is material in a given factual situation is a question of law.

(4) It is not a defense to prosecution under this section that the oath or affirmation was administered or taken in an irregular manner or that the declarant was not competent to make the statement. A document purporting to be made upon oath or affirmation at any time when the offender presents it as being so verified shall be deemed to have been duly sworn or affirmed.

(5) No person shall be guilty of an offense under this section if he retracted the falsification in the course of the proceeding in which it was made before it became manifest that the falsification was or would be exposed and before the falsification substantially affected the proceeding.

(6) Where the defendant made inconsistent statements under oath or equivalent affirmation, both having been made within the period of the statute of limitations, the prosecution may proceed by setting forth the inconsistent statements in a single count alleging in the alternative that one or the other was false and not believed by the defendant. In such case it shall not be necessary for the prosecution to prove which statement was false but only that one or the other was false and not believed by the defendant to be true.

(7) No person shall be convicted of an offense under this section where proof of falsity rests solely upon the testimony of a single person other than the defendant.

History: En. 94-7-202 by Sec. 1, Ch. 513, L. 1973; R.C.M. 1947, 94-7-202; amd. Sec. 7, Ch. 198, L. 1981.

Cross-References

Witness required to answer questions, 26-2-302.

General time limitations, 45-1-205.

Periods excluded from limitation, 45-1-206.

Definition of knowingly, 45-2-101.

Definition of offense, 45-2-101.

Definition of official proceeding, 45-2-101.

45-7-202. False swearing. (1) A person commits the offense of false swearing if he knowingly makes a false statement under oath or equivalent affirmation or swears or affirms the truth of such a statement previously made when he does not believe the statement to be true and:

(a) the falsification occurs in an official proceeding;

(b) the falsification is purposely made to mislead a public servant in performing his official function; or

(c) the statement is one which is required by law to be sworn or affirmed before a notary or other person authorized to administer oaths.

(2) Subsections (4) through (7) of 45-7-201 apply to this section.

(3) A person convicted of false swearing shall be fined not to exceed $500 or be imprisoned in the county jail for any term not to exceed 6 months, or both.

History: En. 94-7-203 by Sec. 1, Ch. 513, L. 1973; R.C.M. 1947, 94-7-203.

Cross-References

Deceptive election practices, 13-35-207.

Application for certain property classifications, 15-6-191.

False affirmation in response to elector challenge at school election, 20-20-303.

Assumed business name filings — false swearing, 30-13-218.

Trademark filings — false swearing, 30-13-319.

Business corporation filings — false swearing, 35-1-428.

Definition of knowingly, 45-2-101.

Definition of official proceeding, 45-2-101.

Definition of public servant, 45-2-101.

Definition of purposely, 45-2-101.

False information in driver's license application, 61-5-303.

Aircraft registration violations, 67-3-202.

False statement that public officer is not enforcing The Strip and Underground Mine Siting Act, 82-4-142.

False statement that public officer is not enforcing The Strip and Underground Mine Reclamation Act, 82-4-252.

Affidavit stating metal mine reclamation law is not being enforced, 82-4-354.

45-7-203. Unsworn falsification to authorities. (1) A person commits an offense under this section if, with purpose to mislead a public servant in performing his official function, he:

(a) makes any written false statement which he does not believe to be true;

(b) purposely creates a false impression in a written application for any pecuniary or other benefit by omitting information necessary to prevent statements therein from being misleading;

(c) submits or invites reliance on any writing which he knows to be forged, altered, or otherwise lacking in authenticity; or

(d) submits or invites reliance on any sample, specimen, map, boundary mark, or other object which he knows to be false.

(2) A person convicted of an offense under this section shall be fined not to exceed $500 or be imprisoned in the county jail for any term not to exceed 6 months, or both.

History: **En. 94-7-204 by Sec. 1, Ch. 513, L. 1973; R.C.M. 1947, 94-7-204.**

Cross-References

Falsified petition for recall of state-district officer, 2-16-612.

False report by employer of lobbyist, 5-7-209.

False entry upon petition for ballot issue, 13-27-106.

Deceptive election practices, 13-35-207.

False statement to obtain unemployment benefits, 39-51-3202.

Definition of benefit, 45-2-101.

Definition of pecuniary benefit, 45-2-101.

Definition of public servant, 45-2-101.

Definition of purpose, 45-2-101.

45-7-204. False alarms to agencies of public safety. (1) A person commits an offense under this section if he knowingly causes a false alarm of fire or other emergency to be transmitted to or within any organization, official or volunteer, which deals with emergencies involving danger to life or property.

(2) A person convicted of an offense under this section shall be fined not to exceed $500 or be imprisoned in the county jail for any term not to exceed 6 months, or both.

History: **En. 94-7-205 by Sec. 1, Ch. 513, L. 1973; R.C.M. 1947, 94-7-205.**

Cross-References

Definition of knowingly, 45-2-101.

Intimidation, 45-5-203.

45-7-205. False reports to law enforcement authorities. (1) A person commits an offense under this section if he knowingly:

(a) gives false information to any law enforcement officer with the purpose to implicate another;

(b) reports to law enforcement authorities an offense or other incident within their concern knowing that it did not occur; or

(c) pretends to furnish such authorities with information relating to an offense or incident when he knows he has no information relating to such offense or incident.

(2) A person convicted under this section shall be fined not to exceed $500 or be imprisoned in the county jail for any term not to exceed 6 months, or both.

History: **En. 94-7-206 by Sec. 1, Ch. 513, L. 1973; R.C.M. 1947, 94-7-206.**

Cross-References

Definition of knowingly, 45-2-101.

Definition of offense, 45-2-101.

45-7-206. Tampering with witnesses and informants. (1) A person commits the offense of tampering with witnesses and informants if, believing that an official proceeding or investigation is pending or about to be instituted, he purposely or knowingly attempts to induce or otherwise cause a witness or informant to:

(a) testify or inform falsely;

(b) withhold any testimony, information, document, or thing;

(c) elude legal process summoning him to testify or supply evidence; or

(d) absent himself from any proceeding or investigation to which he has been summoned.

(2) A person convicted of tampering with witnesses or informants shall be imprisoned in the state prison for any term not to exceed 10 years or be fined an amount not to exceed $50,000, or both.

History: En. 94-7-207 by Sec. 1, Ch. 513, L. 1973; amd. Sec. 27, Ch. 359, L. 1977; R.C.M. 1947, 94-7-207; amd. Sec. 7, Ch. 198, L. 1981.

Cross-References

Definition of knowingly, 45-2-101.

Definition of official proceeding, 45-2-101.

Definition of purposely, 45-2-101.

Definition of witness, 45-2-101.

45-7-207. Tampering with or fabricating physical evidence. (1) A person commits the offense of tampering with or fabricating physical evidence if, believing that an official proceeding or investigation is pending or about to be instituted, he:

(a) alters, destroys, conceals, or removes any record, document, or thing with purpose to impair its verity or availability in such proceeding or investigation; or

(b) makes, presents, or uses any record, document, or thing knowing it to be false and with purpose to mislead any person who is or may be engaged in such proceeding or investigation.

(2) A person convicted of tampering with or fabricating physical evidence shall be imprisoned in the state prison for a term not to exceed 10 years or be fined an amount not to exceed $50,000, or both.

History: En. 94-7-208 by Sec. 1, Ch. 513, L. 1973; R.C.M. 1947, 94-7-208; amd. Sec. 7, Ch. 198, L. 1981.

Cross-References

Definition of knowingly, 45-2-101.

Definition of official proceeding, 45-2-101.

Definition of purposely, 45-2-101.

45-7-208. Tampering with public records or information. (1) A person commits the offense of tampering with public records or information if he:

(a) knowingly makes a false entry in or false alteration of any record, document, legislative bill or enactment, or thing belonging to or received, issued, or kept by the government for information or record or required by law to be kept by others for information of the government;

(b) makes, presents, or uses any record, document, or thing knowing it to be false and with purpose that it be taken as a genuine part of information or records referred to in subsection (1)(a); or

(c) purposely destroys, conceals, removes, or otherwise impairs the verity or availability of any such record, document, or thing.

(2) A person convicted of the offense of tampering with public records or information shall be imprisoned in the state prison for any term not to exceed 10 years or be fined an amount not to exceed $50,000, or both.

History: En. 94-7-209 by Sec. 1, Ch. 513, L. 1973; R.C.M. 1947, 94-7-209; amd. Sec. 7, Ch. 198, L. 1981.

Cross-References

Tampering with petition for recall of state-district officer, 2-16-612.

Tampering with petition for ballot issue, 13-27-106.

Tampering with election records and information, 13-35-205.

Tampering with election equipment, 13-35-206.

Deceptive election practices, 13-35-207.

Definition of knowingly, 45-2-101.
Definition of purposely, 45-2-101.

45-7-209. Impersonation of public servant. (1) A person commits the offense of impersonating a public servant if the person falsely pretends to hold a position in the public service with the purpose to induce another individual to submit to the pretended official authority or otherwise to act in reliance upon that pretense to the individual's prejudice.

(2) A person convicted of impersonating a public servant shall be fined not to exceed $5,000 or be imprisoned in the state prison for any term not to exceed 5 years, or both.

History: En. 94-7-210 by Sec. 1, Ch. 513, L. 1973; R.C.M. 1947, 94-7-210; amd. Sec. 2, Ch. 351, L. 1995.

Cross-References
Definition of acts, 45-2-101.
Definition of public servant, 45-2-101.
Definition of purposely, 45-2-101.

45-7-210. False claims to public agencies. (1) A person commits an offense under this section if the person purposely and knowingly presents for allowance or for payment any false or fraudulent claim, bill, account, voucher, or writing to any public agency, public servant, or contractor authorized to allow or pay claims presented to public agencies if genuine.

(2) (a) Except as provided in subsection (2)(b), a person convicted of an offense under this section shall be fined not to exceed $1,000 or imprisoned in the county jail for a term not to exceed 6 months, or both.

(b) If false or fraudulent claims are submitted purposely and knowingly as part of a common scheme or if the value of the claim or the aggregate value of all claims exceeds $1,000, a person convicted of an offense under this section shall be fined not to exceed $10,000 or imprisoned in the state prison for a term not to exceed 10 years, or both.

History: En. Sec. 1, Ch. 151, L. 1981; amd. Sec. 8, Ch. 581, L. 1983; amd. Sec. 10, Ch. 616, L. 1993; amd. Sec. 13, Ch. 397, L. 1999.

Compiler's Comments
1999 Amendment: Chapter 397 in (2)(a) increased maximum fine from $500 to $1,000; and in (2)(b) increased minimum value of claims from more than $500 to more than $1,000. Amendment effective October 1, 1999.

Cross-References
Civil penalty for filing false claim, 17-8-231.

Part 3
Obstructing Governmental Operations

45-7-301. Resisting arrest. (1) A person commits the offense of resisting arrest if he knowingly prevents or attempts to prevent a peace officer from effecting an arrest by:

(a) using or threatening to use physical force or violence against the peace officer or another; or

(b) using any other means which creates a risk of causing physical injury to the peace officer or another.

(2) It is no defense to a prosecution under this section that the arrest was unlawful, provided the peace officer was acting under color of his official authority.

(3) A person convicted of the offense of resisting arrest shall be fined not to exceed $500 or be imprisoned in the county jail for any term not to exceed 6 months, or both.

History: **En. 94-7-301 by Sec. 1, Ch. 513, L. 1973; R.C.M. 1947, 94-7-301.**

Cross-References

Definition of knowingly, 45-2-101.

Definition of peace officer, 45-2-101.

Definition of threat, 45-2-101.

Use of force in defense of person, 45-3-102.

Use of force in resisting arrest, 45-3-108.

Method of arrest, 46-6-104.

Manner of arrest without warrant, 46-6-312.

45-7-302. Obstructing peace officer or other public servant. (1) A person commits the offense of obstructing a peace officer or public servant if the person knowingly obstructs, impairs, or hinders the enforcement of the criminal law, the preservation of the peace, or the performance of a governmental function, including service of process.

(2) It is no defense to a prosecution under this section that the peace officer was acting in an illegal manner, provided that the peace officer was acting under the peace officer's official authority.

(3) A person convicted of the offense of obstructing a peace officer or other public servant, including a person serving process, shall be fined not to exceed $500 or be imprisoned in the county jail for a term not to exceed 6 months, or both.

History: **En. 94-7-302 by Sec. 1, Ch. 513, L. 1973; R.C.M. 1947, 94-7-302; amd. Sec. 2, Ch. 69, L. 1997.**

Cross-References

Definition of public servant, 7-1-4138, 45-2-101.

Interference with election officials, 13-35-203.

Offense of obstructing person serving process, 25-3-105.

Definition of knowingly, 45-2-101.

Definition of peace officer, 45-2-101.

Interference with commissioners of irrigation district, 85-7-1924.

45-7-303. Obstructing justice. (1) For the purpose of this section "an offender" means a person who has been or is liable to be arrested, charged, convicted, or punished for a public offense.

(2) A person commits the offense of obstructing justice if, knowing a person is an offender, he purposely:

(a) harbors or conceals an offender;

(b) warns an offender of impending discovery or apprehension, except this does not apply to a warning given in connection with an effort to bring an offender into compliance with the law;

(c) provides an offender with money, transportation, weapon, disguise, or other means of avoiding discovery or apprehension;

(d) prevents or obstructs by means of force, deception, or intimidation anyone from performing an act that might aid in the discovery or apprehension of an offender;

(e) suppresses by act of concealment, alteration, or destruction any physical evidence that might aid in the discovery or apprehension of an offender; or

(f) aids an offender who is subject to official detention to escape from such official detention.

(3) A person convicted of obstructing justice shall be:

(a) imprisoned in the state prison for a term not to exceed 10 years if the offender has been or is liable to be charged with a felony; or

(b) fined not to exceed $500 or be imprisoned in the county jail for a term not to exceed 6 months, or both, if the offender has been or is liable to be charged with a misdemeanor.

History: **En. 94-7-303 by Sec. 1, Ch. 513, L. 1973; R.C.M. 1947, 94-7-303.**

Cross-References

Definition of knowingly, 45-2-101.

Definition of offender, 45-2-101.

Definition of official detention, 45-2-101.

Definition of purposely, 45-2-101.

45-7-304. Failure to aid a peace officer. (1) A peace officer may order a person to cooperate where it is reasonable for the peace officer to enlist the cooperation of such person in:

(a) effectuating or securing an arrest of another pursuant to 46-6-402; or

(b) preventing the commission by another of an offense.

(2) A person commits the offense of failure to aid a peace officer if he knowingly refuses to obey such an order.

(3) A person convicted of the offense of failure to aid a peace officer shall be fined not to exceed $500 or be imprisoned in the county jail for a term not to exceed 6 months, or both.

History: **En. 94-7-304 by Sec. 1, Ch. 513, L. 1973; R.C.M. 1947, 94-7-304.**

Cross-References

Definition of another, 45-2-101.

Definition of offense, 45-2-101.

Definition of peace officer, 45-2-101.

Assisting peace officer making arrest, 46-6-402.

45-7-305. Compounding a felony. (1) A person commits the offense of compounding a felony if he knowingly accepts or agrees to accept any pecuniary benefit in consideration for:

(a) refraining from seeking prosecution of a felony; or

(b) refraining from reporting to law enforcement authorities the commission or suspected commission of any felony or information relating to a felony.

(2) A person convicted of compounding a felony shall be fined not to exceed $500 or be imprisoned in the county jail for a term not to exceed 6 months, or both.

History: **En. 94-7-305 by Sec. 1, Ch. 513, L. 1973; R.C.M. 1947, 94-7-305.**

Cross-References

Definition of felony, 45-2-101.

Definition of knowingly, 45-2-101.

Definition of misdemeanor, 45-2-101.

Bribery in official and political matters, 45-7-101.

Gifts to public servants by person subject to their jurisdiction, 45-7-104.

45-7-306. Escape. (1) (a) “Official detention” means placement of a person in the legal custody of a municipality, a county, or the state as a result of:

(i) a conviction for an offense or of having been charged with an offense;

(ii) the actual or constructive restraint or custody of a person by a peace officer pursuant to arrest, transport, or court order;

(iii) detention for extradition or deportation;

(iv) placement in a community corrections facility or program;

(v) supervision while under a supervised release program;

(vi) participation in a county jail work program under 7-32-2225 through 7-32-2227; or

(vii) any lawful detention for the purpose of the protection of the welfare of the person detained or for the protection of society.

(b) Official detention does not include supervision of a person on probation or parole, constraint incidental to release on bail, or an unlawful arrest unless the person arrested employed physical force, a threat of physical force, or a weapon to escape.

(2) A person subject to official detention commits the offense of escape if the person knowingly or purposely eludes official detention or fails to return to official detention following temporary leave granted for a specific purpose or limited time. A person also commits the offense of escape if the person is participating in a county jail work program under 7-32-2225 through 7-32-2227 and knowingly or purposely fails to appear for work at a time and place scheduled for participation in the program.

(3) A person convicted of the offense of escape shall be:

(a) imprisoned in the state prison for a term not to exceed 20 years if the person escapes by the use or threat of force, physical violence, a weapon, or a simulated weapon;

(b) imprisoned in the state prison for a term not to exceed 10 years if the person escapes after having been charged with or convicted of a felony; or

(c) fined an amount not to exceed $500 or imprisoned in the county jail for a term not to exceed 6 months, or both, if the person escapes under circumstances other than those described in subsections (3)(a) and (3)(b).

History: En. 94-7-306 by Sec. 1, Ch. 513, L. 1973; R.C.M. 1947, 94-7-306; amd. Sec. 1, Ch. 72, L. 1981; amd. Sec. 8, Ch. 583, L. 1981; amd. Sec. 5, Ch. 361, L. 1989; amd. Sec. 1, Ch. 114, L. 1991; amd. Sec. 16, Ch. 554, L. 1991; amd. Sec. 1, Ch. 26, L. 1997.

Cross-References

Definition of knowingly, 45-2-101.
Definition of offense, 45-2-101.
Definition of official detention, 45-2-101.
Definition of peace officer, 45-2-101.
Definition of purposely, 45-2-101.
Definition of threat, 45-2-101.
Definition of weapon, 45-2-101.
Resisting arrest, 45-7-301.
Place for filing charge of escape, 46-3-110.
Expense of trial for offenses committed in prison, 53-30-110.

45-7-307. Transferring illegal articles or unauthorized communication. (1) (a) A person commits the offense of transferring illegal articles if he knowingly or purposely transfers any illegal article or thing to a person subject to official detention or is transferred any illegal article or thing by a person subject to official detention.

(b) A person convicted of transferring illegal articles shall be:

(i) imprisoned in the state prison for a term not to exceed 20 years, if he conveys a weapon to a person subject to official detention;

(ii) imprisoned in the state prison for a term not to exceed 10 years, if he conveys a dangerous drug, as defined in 50-32-101, to a person subject to official detention; or

(iii) fined not to exceed $100 or imprisoned in the county jail for any term not to exceed 10 days, or both, if he conveys any other illegal article or thing to a person subject to official detention.

(c) Subsection (1)(b)(iii) does not apply unless the offender knew or was given sufficient notice so that he reasonably should have known that the article or thing he conveyed was an illegal article.

(2) (a) A person commits the offense of unauthorized communication if he knowingly or purposely communicates with a person subject to official detention without the consent of the person in charge of such official detention.

(b) A person convicted of the offense of unauthorized communication shall be fined not to exceed $100 or imprisoned in the county jail for any term not to exceed 10 days, or both.

History: En. 94-7-307 by Sec. 1, Ch. 513, L. 1973; amd. Sec. 28, Ch. 359, L. 1977; R.C.M. 1947, 94-7-307; amd. Sec. 1, Ch. 413, L. 1987.

Cross-References

Definition of knowingly, 45-2-101.
Definition of official detention, 45-2-101.
Definition of purposely, 45-2-101.
Definition of weapon, 45-2-101.

45-7-308. Bail-jumping. (1) A person commits the offense of bail-jumping if, having been set at liberty by court order, with or without security, upon condition that he will subsequently appear at a specified time and place, he purposely fails without lawful excuse to appear at that time and place.

(2) This section shall not interfere with the exercise by any court of its power to punish for contempt.

(3) This section shall not apply to a person set at liberty by court order upon condition that he will appear in connection with a charge of having committed a misdemeanor, except it shall apply where the judge has released the defendant on his own recognizance.

(4) A person convicted of bail-jumping in connection with a felony shall be imprisoned in the state prison for a term not to exceed 10 years. In all other cases he shall be fined not to exceed $500 or be imprisoned in the county jail for a term not to exceed 6 months, or both.

History: En. 94-7-308 by Sec. 1, Ch. 513, L. 1973; R.C.M. 1947, 94-7-308.

Cross-References

Definition of misdemeanor, 45-2-101.
Definition of purposely, 45-2-101.
Escape, 45-7-306.
Bail, Title 46, ch. 9.

45-7-309. Criminal contempt. (1) A person commits the offense of criminal contempt when he knowingly engages in any of the following conduct:

(a) disorderly, contemptuous, or insolent behavior committed during the sitting of a court in its immediate view and presence and directly tending to interrupt its proceedings or to impair the respect due to its authority;

(b) breach of the peace, noise, or other disturbance directly tending to interrupt a court's proceeding;

(c) purposely disobeying or refusing any lawful process or other mandate of a court;

(d) unlawfully refusing to be sworn as a witness in any court proceeding or, after being sworn, refusing to answer any legal and proper interrogatory;

(e) purposely publishing a false or grossly inaccurate report of a court's proceeding; or

(f) purposely failing to obey any mandate, process, or notice relative to juries issued pursuant to Title 3, chapter 15.

(2) A person convicted of the offense of criminal contempt shall be fined not to exceed $500 or be imprisoned in the county jail for a term not to exceed 6 months, or both.

History: En. 94-7-309 by Sec. 1, Ch. 513, L. 1973; R.C.M. 1947, 94-7-309.

Cross-References

Contempts, Title 3, ch. 1, part 5.

Definition of knowingly, 45-2-101.

Definition of purposely, 45-2-101.

Part 4
Official Misconduct

45-7-401. Official misconduct. (1) A public servant commits the offense of official misconduct when in his official capacity he commits any of the following acts:

(a) purposely or negligently fails to perform any mandatory duty as required by law or by a court of competent jurisdiction;

(b) knowingly performs an act in his official capacity which he knows is forbidden by law;

(c) with the purpose to obtain advantage for himself or another, performs an act in excess of his lawful authority;

(d) solicits or knowingly accepts for the performance of any act a fee or reward which he knows is not authorized by law; or

(e) knowingly conducts a meeting of a public agency in violation of 2-3-203.

(2) A public servant convicted of the offense of official misconduct shall be fined not to exceed $500 or be imprisoned in the county jail for a term not to exceed 6 months, or both.

(3) The district court shall have exclusive jurisdiction in prosecutions under this section. Any action for official misconduct must be commenced by an information filed after leave to file has been granted by the district court or after a grand jury indictment has been found.

(4) A public servant who has been charged as provided in subsection (3) may be suspended from his office without pay pending final judgment. Upon final judgment of conviction he shall permanently forfeit his office. Upon acquittal he shall be reinstated in his office and shall receive all backpay.

(5) This section does not affect any power conferred by law to impeach or remove any public servant or any proceeding authorized by law to carry into effect such impeachment or removal.

History: En. 94-7-401 by Sec. 1, Ch. 513, L. 1973; amd. Sec. 2, Ch. 474, L. 1975; R.C.M. 1947, 94-7-401.

Cross-References

Meetings of public agencies to be open to public — exceptions, 2-3-203.

Discharge of election law duties, 13-35-204.

Prosecution of Commissioner of Political Practices, 13-37-105.

Definition of knowingly, 45-2-101.

Definition of negligently, 45-2-101.

Definition of public servant, 45-2-101.

Definition of purposely, 45-2-101.

Bribery in official and political matters, 45-7-101.

Gifts to public servants by person subject to their jurisdiction, 45-7-104.

Employee disclosure of information that would identify patient, 50-5-106.

Removal of Public Service Commission member, 69-1-113.

Official misconduct of official grain inspector, sampler, or weigher, 80-4-703.

Violations by commissioner of irrigation district, 85-7-1507.

Part 5
Employer Misconduct

45-7-501. Employer misconduct. (1) A person who is an employer, as defined in 39-71-117, commits the offense of employer misconduct if he knowingly or purposely:

(a) avoids his responsibility to provide coverage for his employees as required by 39-71-401;

(b) misrepresents or falsifies employment records or information, including but not limited to understating the amount of payroll or the number of his employees; or

(c) refuses to pay premiums that he is obligated to pay under compensation plan No. 2, as provided in Title 39, chapter 71, part 22, or compensation plan No. 3, as provided in Title 39, chapter 71, part 23.

(2) A person convicted of the offense of employer misconduct shall be fined an amount not to exceed $50,000 or imprisoned in the state prison for any term not to exceed 10 years, or both.

History: En. Sec. 2, Ch. 586, L. 1987.

CHAPTER 8
OFFENSES AGAINST PUBLIC ORDER

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45-8-338 reserved.
45-8-339. Carrying firearms on train — penalty.
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45-8-402. Definitions.
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Part 1

Conduct Disruptive of Public Order

45-8-101. Disorderly conduct. (1) A person commits the offense of disorderly conduct if he knowingly disturbs the peace by:

(a) quarreling, challenging to fight, or fighting;

(b) making loud or unusual noises;

(c) using threatening, profane, or abusive language;

(d) discharging firearms, except at a shooting range during established hours of operation;

(e) rendering vehicular or pedestrian traffic impassable;

(f) rendering the free ingress or egress to public or private places impassable;

(g) disturbing or disrupting any lawful assembly or public meeting;

(h) transmitting a false report or warning of a fire or other catastrophe in such a place that its occurrence would endanger human life;

(i) creating a hazardous or physically offensive condition by any act that serves no legitimate purpose; or

(j) transmitting a false report or warning of an impending explosion in such a place that its occurrence would endanger human life.

(2) Except as provided in subsection (3), a person convicted of the offense of disorderly conduct shall be fined not to exceed $100 or be imprisoned in the county jail for a term not to exceed 10 days, or both.

(3) A person convicted of a violation of subsection (1)(j) shall be fined not to exceed $1,000 or be imprisoned in the county jail for a term not to exceed 1 year, or both.

History: En. 94-8-101 by Sec. 1, Ch. 513, L. 1973; R.C.M. 1947, 94-8-101; amd. Sec. 1, Ch. 508, L. 1989; amd. Sec. 8, Ch. 415, L. 1991.

Cross-References

Motorboat noise limitation — violation as disorderly conduct, 23-2-526, 87-1-506.

Knowingly defined, 45-2-101.

45-8-102. Failure of disorderly persons to disperse. (1) Where two or more persons are engaged in disorderly conduct, a peace officer, judge, or mayor may order the participants to disperse. A person who purposely refuses or knowingly fails to obey such an order commits the offense of failure to disperse.

(2) A person convicted of the offense of failure to disperse shall be fined not to exceed $100 or be imprisoned in the county jail for a term not to exceed 10 days, or both.

History: En. 94-8-102 by Sec. 1, Ch. 513, L. 1973; R.C.M. 1947, 94-8-102.

Cross-References

Knowingly defined, 45-2-101.
Offense defined, 45-2-101.
Purposely defined, 45-2-101.

45-8-103. Riot. (1) A person commits the offense of riot if he purposely and knowingly disturbs the peace by engaging in an act of violence or threat to commit an act of violence as part of an assemblage of five or more persons, which act or threat presents a clear and present danger of or results in damage to property or injury to persons.

(2) Except as provided in subsection (3), a person convicted of the offense of riot shall be fined not to exceed $500 or be imprisoned in the county jail for a term not to exceed 6 months, or both.

(3) A person who commits the offense of riot by engaging in an act of violence while incarcerated at any state adult correctional facility or city or county jail shall be imprisoned for not less than 1 year or more than 5 years.

History: En. 94-8-103 by Sec. 1, Ch. 513, L. 1973; R.C.M. 1947, 94-8-103; amd. Sec. 1, Ch. 54, L. 1983.

Cross-References

Act defined, 45-2-101.
Knowingly defined, 45-2-101.
Purposely defined, 45-2-101.
Threat defined, 45-2-101.
Failure of disorderly persons to disperse, 45-8-102.

45-8-104. Incitement to riot. (1) A person commits the offense of incitement to riot if he purposely and knowingly commits an act or engages in conduct that urges other persons to riot. Such act or conduct shall not include the mere oral or written advocacy of ideas or expression of belief which advocacy or expression does not urge the commission of an act of immediate violence.

(2) Except as provided in subsection (3), a person convicted of the offense of incitement to riot shall be fined not to exceed $500 or be imprisoned in the county jail for a term not to exceed 6 months, or both.

(3) A person who commits the offense of incitement to riot while incarcerated at any state adult correctional facility shall be imprisoned for not less than 1 year or more than 5 years.

History: En. 94-8-104 by Sec. 1, Ch. 513, L. 1973; R.C.M. 1947, 94-8-104; amd. Sec. 2, Ch. 54, L. 1983.

Cross-References

Act defined, 45-2-101.
Knowingly defined, 45-2-101.
Purposely defined, 45-2-101.
Solicitation, 45-4-101.
Riot, 45-8-103.

45-8-105. Criminal incitement. (1) "Criminal incitement" means the advocacy of crime, malicious damage or injury to property, or violence.

(2) A person commits the offense of criminal incitement if the person purposely or knowingly advocates the commission of a criminal offense and the advocacy is:

(a) directed to inciting or producing that imminent unlawful, criminal action; and

(b) likely to incite or produce that unlawful, criminal action.

(3) For purposes of this section, "imminent" means immediate in time, impending, or on the verge of happening.

(4) A person convicted of the offense of criminal incitement shall be imprisoned in the state prison for a term not to exceed 10 years.

History: En. 94-7-503 by Sec. 1, Ch. 513, L. 1973; amd. Sec. 29, Ch. 359, L. 1977; R.C.M. 1947, 94-7-503; amd. Sec. 1, Ch. 350, L. 1999.

Compiler's Comments

1999 Amendment: Chapter 350 substituted definition of criminal incitement for definition of criminal syndicalism that read: ""Criminal syndicalism" means the advocacy of crime, malicious damage or injury to property, violence, or other unlawful methods of terrorism as a means of accomplishing industrial or political ends"; in (2) substituted "incitement" for "syndicalism"; substituted (2)(a) and (2)(b) concerning advocacy for former (2)(a), (2)(b), and (2)(c) that read: "(a) orally or by means of writing, advocates or promotes the doctrine of criminal syndicalism;

(b) organizes or becomes a member of any assembly, group, or organization which he knows is advocating or promoting the doctrine of criminal syndicalism; or

(c) for or on behalf of another whose purpose is to advocate or promote the doctrine of criminal syndicalism, distributes, sells, publishes, or publicly displays any writing advocating or advertising such doctrine"; inserted (3) containing definition of imminent; in (4) substituted "incitement" for "syndicalism"; deleted former (4) that read: "(4) Whoever, being the owner or in possession or control of any premises, knowingly permits any assemblage of persons to use such premises for the purpose of advocating or promoting the doctrine of criminal syndicalism shall be fined not to exceed $500 or imprisoned in the county jail for a term not to exceed 6 months, or both"; and made minor changes in style. Amendment effective April 19, 1999.

Applicability: Section 3, Ch. 350, L. 1999, provided: "[This act] applies to offenses committed on or after [the effective date of this act]." Effective April 19, 1999.

Cross-References

Knowingly defined, 45-2-101.
Offense defined, 45-2-101.
Possession defined, 45-2-101.
Purposely defined, 45-2-101.

45-8-106. Bringing armed men into the state. (1) A person commits the offense of bringing armed men into the state when he knowingly brings or aids in bringing into this state an armed person or armed body of men for the purpose of engaging in criminal or socially disruptive activities or to usurp the powers of law enforcement authorities.

(2) A person convicted of the offense of bringing armed men into the state shall be imprisoned in the state prison for a term not to exceed 10 years or be fined an amount not to exceed $50,000, or both.

History: En. 94-7-504 by Sec. 1, Ch. 513, L. 1973; R.C.M. 1947, 94-7-504; amd. Sec. 7, Ch. 198, L. 1981.

Cross-References

Right to bear arms, Art. II, sec. 12, Mont. Const.
Treason, Art. II, sec. 30, Mont. Const.
Civilian control of military, Art. II, sec. 32, Mont. Const.
Importation of armed persons, Art. II, sec. 33, Mont. Const.
Militia, Title 10, ch. 1.
Knowingly defined, 45-2-101.
Offense defined, 45-2-101.

45-8-107. Purpose. The legislature recognizes every citizen's constitutional right to express beliefs on any subject, to associate with others who share similar beliefs, and to keep or bear arms in defense of home, person, or property. Sections 45-8-107 through 45-8-109 are not intended to interfere with the exercise of rights protected by the United States constitution or the state constitution. The legislature finds that conspiracies and training activities in the furtherance of unlawful acts of violence against persons or property are not constitutionally protected, pose a threat to public order and safety, and are subject to criminal penalties.

History: En. Sec. 1, Ch. 492, L. 1991.

45-8-108. Definitions. As used in 45-8-107 through 45-8-109, unless the context requires otherwise, the following definitions apply:

(1) "Civil disorder" means a public disturbance involving unlawful acts of violence by a group of two or more persons that causes an immediate danger of or results in injury to the property or person of any other individual.

(2) "Governmental military force" means:

(a) the national guard as defined in 10 U.S.C. 101;

(b) the organized militia of a state or territory of the United States, the Commonwealth of Puerto Rico, or the District of Columbia not included in the definition of the national guard; and

(c) the armed forces of the United States.

(3) "Law enforcement agency" means a department of public safety, a police department, a sheriff's department, the highway patrol, or a governmental unit of one or more persons employed by the state or federal government or a political subdivision of the state or federal government, for the purpose of detecting and preventing crime and enforcing laws or ordinances, whose employees are authorized to make arrests for crimes while acting in the scope of their authority.

(4) "Peace officer" has the meaning given in 45-2-101.

History: En. Sec. 2, Ch. 492, L. 1991.

45-8-109. Civil disorder — prohibited activities — penalties — exceptions. (1) A person is guilty of a crime if, with one or more other persons, the person purposely or knowingly assembles for the purpose of training in, instructing in the use of, or practicing with any technique or means capable of causing property damage, bodily injury, or death, with the purpose of employing the training, instruction, or practice in a civil disorder.

(2) A person convicted of violating the provisions of subsection (1) is guilty of a felony and shall be imprisoned in the state prison for a period not to exceed 10 years or be fined not to exceed $50,000, or both.

(3) Subsection (1) does not prohibit:

(a) an act protected pursuant to Article II of the Montana constitution;

(b) an act of a governmental military force;

(c) an act of a peace officer performed in the lawful performance of the officer's duties;

(d) an authorized activity of the department of fish, wildlife, and parks; the department of corrections; a law enforcement agency; or the law enforcement academy;

(e) training in nonviolent civil disobedience techniques;

(f) lawful self-defense or defense of others or an activity intended to teach or practice self-defense or self-defense techniques; or

(g) a facility, program, or lawful activity related to firearms instruction or training intended to teach the safe handling and use of firearms or activities or sports related to recreational use or possession of firearms.

(4) Sections 45-8-107 through 45-8-109 do not apply to an employer or employees involved in a labor dispute.

History: En. Sec. 3, Ch. 492, L. 1991; amd. Sec. 1, Ch. 262, L. 1991; amd. Sec. 201, Ch. 546, L. 1995.

45-8-110 reserved.

45-8-111. Public nuisance. (1) "Public nuisance" means:

(a) a condition which endangers safety or health, is offensive to the senses, or obstructs the free use of property so as to interfere with the comfortable enjoyment of life or property by an entire community or neighborhood or by any considerable number of persons;

(b) any premises where persons gather for the purpose of engaging in unlawful conduct; or

(c) a condition which renders dangerous for passage any public highway or right-of-way or waters used by the public.

(2) A person commits the offense of maintaining a public nuisance if he knowingly creates, conducts, or maintains a public nuisance.

(3) Any act which affects an entire community or neighborhood or any considerable number of persons (as specified in subsection (1)(a)) is no less a nuisance because the extent of the annoyance or damage inflicted upon individuals is unequal.

(4) No agricultural or farming operation, place, establishment, or facility or any of its appurtenances or the operation thereof is or becomes a public nuisance because of the normal operation thereof as a result of changed residential or commercial conditions in or around its locality if the agricultural or farming operation, place, establishment, or facility has been in operation longer than the complaining resident has been in possession or commercial establishment has been in operation.

(5) Noises resulting from the shooting activities at a shooting range during established hours of operation are not considered a public nuisance.

(6) A person convicted of maintaining a public nuisance shall be fined not to exceed $500 or imprisoned in the county jail for a term not to exceed 6 months, or both. Each day of such conduct constitutes a separate offense.

History: En. 94-8-107 by Sec. 1, Ch. 513, L. 1973; amd. Sec. 30, Ch. 359, L. 1977; R.C.M. 1947, 94-8-107(1) thru (4); amd. Sec. 2, Ch. 123, L. 1981; amd. Sec. 9, Ch. 415, L. 1991.

Cross-References

Liability for permitting irrigation water to overflow, 7-14-2141.

Selling liquor illegally on premises, 16-6-312.

Motorboat noise limitation — violation as public nuisance, 23-2-526, 87-1-506.

Nuisances, Title 27, ch. 30.

Knowingly defined, 45-2-101.

Property defined, 45-2-101.

45-8-112. Action to abate a public nuisance. (1) Every public nuisance may be abated and the persons maintaining such nuisance and the possessor of the premises who permits the same to be maintained may be enjoined from such conduct by an action in equity in the name of the state of Montana by the county attorney or any resident of the state.

(2) Upon the filing of the complaint in such action, the judge may issue a temporary injunction.

(3) In such action evidence of the general reputation of the premises is admissible for the purpose of proving the existence of the nuisance.

(4) If the existence of the nuisance is established, an order of abatement shall be entered as part of the judgment in the case. The judge issuing the order may, in his discretion:

(a) confiscate all fixtures used on the premises to maintain the nuisance and either sell them and transmit the proceeds to the county general fund, destroy them, or return them to their rightful ownership;

(b) close the premises for any period not to exceed 1 year, during which period the premises shall remain in the custody of the court;

(c) allow the premises to be opened upon posting bond sufficient in amount to assure compliance with the order of abatement. The bond shall be forfeited if the nuisance is continued or resumed. The procedure for forfeiture or discharge of the bond shall be as provided in 46-9-502 and 46-9-503; or

(d) any combination of the above.

History: En. 94-8-107 by Sec. 1, Ch. 513, L. 1973; amd. Sec. 30, Ch. 359, L. 1977; R.C.M. 1947, 94-8-107(5).

Cross-References

Nuisance, Title 27, ch. 30.

Premises defined, 45-2-101.

Public nuisance, 45-8-111.

Conditions of bail — violation of conditions, 46-9-503.

45-8-113. Creating a hazard. (1) A person commits the offense of creating a hazard if he knowingly:

(a) discards in any place where it might attract children a container having a compartment of more than 1 ½ cubic feet capacity and a door or lid that locks or fastens automatically when closed and cannot easily be opened from the inside and fails to remove the door, lid, or locking or fastening device;

(b) being the owner or otherwise having possession of property upon which there is a well, cistern, cesspool, mine shaft, or other hole of a depth of 4 feet or more and a top width of 12 inches or more, fails to cover or fence it with a suitable protective construction;

(c) tampers with an aircraft without the consent of the owner;

(d) being the owner or otherwise having possession of property upon which there is a steam engine or steam boiler, continues to use a steam engine or steam boiler which is in an unsafe condition;

(e) being a person in the act of game hunting, acts in a negligent manner or knowingly fails to give all reasonable assistance to any person whom he has injured; or

(f) deposits any hard substance upon or between any railroad tracks which will tend to derail railroad cars or other vehicles.

(2) A person convicted of the offense of creating a hazard shall be fined not to exceed $500 or imprisoned in the county jail for a term not to exceed 6 months, or both.

History: En. 94-8-108 by Sec. 1, Ch. 513, L. 1973; amd. Sec. 31, Ch. 359, L. 1977; R.C.M. 1947, 94-8-108.

Cross-References

Knowingly defined, 45-2-101.

Negligently defined, 45-2-101.

Possession defined, 45-2-101.

Tamper defined, 45-2-101.

Criminal responsibility of corporations, 45-2-311.

Assault — negligently causing bodily injury to another, 45-5-201.

45-8-114. Failure to yield party line. (1) Any person who fails to relinquish a telephone party line or public pay telephone after he has been requested to do so to permit another to place an emergency call to a fire department or police department or for medical aid or ambulance service shall be imprisoned for a term not to exceed 10 days or fined not to exceed $25, or both.

(2) It is a defense to prosecution under subsection (1) that the accused did not know or did not have reason to know of the emergency in question or that the accused was himself using the telephone party line or public pay telephone for such an emergency call.

(3) Any person who requests another to relinquish a telephone party line or public pay telephone on the pretext that he must place an emergency call, knowing such pretext to be false, shall be imprisoned for a term not to exceed 10 days or fined not to exceed $25, or both.

(4) Every telephone company doing business in this state shall print a copy of subsections (1), (2), and (3) of this section in each telephone directory published by it after January 1, 1974.

History: En. 94-8-109 by Sec. 1, Ch. 513, L. 1973; R.C.M. 1947, 94-8-109.

Cross-References

Knowingly defined, 45-2-101.

Criminal responsibility of corporations, 45-2-311.

45-8-115. Illegal posting of state and federal land. (1) A person commits the offense of illegal posting of state or federal land if, without authorization, he knowingly posts land that is under the ownership or control of the state or federal government to restrict access or use of state or federal land.

(2) A person convicted of illegal posting of state or federal land shall be fined an amount not to exceed $500 or be imprisoned in the county jail for a term not to exceed 6 months, or both.

History: En. Sec. 1, Ch. 743, L. 1991.

Part 2

Offensive, Indecent, and Inhumane Conduct

45-8-201. Obscenity. (1) A person commits the offense of obscenity when, with knowledge of the obscene nature thereof, he purposely or knowingly:

(a) sells, delivers, or provides or offers or agrees to sell, deliver, or provide any obscene writing, picture, record, or other representation or embodiment of the obscene to anyone under the age of 18;

(b) presents or directs an obscene play, dance, or other performance, or participates in that portion thereof which makes it obscene, to anyone under the age of 18;

(c) publishes, exhibits, or otherwise makes available anything obscene to anyone under the age of 18;

(d) performs an obscene act or otherwise presents an obscene exhibition of his body to anyone under the age of 18;

(e) creates, buys, procures, or possesses obscene matter or material with the purpose to disseminate it to anyone under the age of 18; or

(f) advertises or otherwise promotes the sale of obscene material or materials represented or held out by him to be obscene.

(2) A thing is obscene if:

(a) (i) it is a representation or description of perverted ultimate sexual acts, actual or simulated;

(ii) it is a patently offensive representation or description of normal ultimate sexual acts, actual or simulated; or

(iii) it is a patently offensive representation or description of masturbation, excretory functions, or lewd exhibition of the genitals; and

(b) taken as a whole the material:

(i) applying contemporary community standards, appeals to the prurient interest in sex;

(ii) portrays conduct described in subsection (2)(a)(i), (2)(a)(ii), or (2)(a)(iii) in a patently offensive way; and

(iii) lacks serious literary, artistic, political, or scientific value.

(3) In any prosecution for an offense under this section, evidence shall be admissible to show:

(a) the predominant appeal of the material and what effect, if any, it would probably have on the behavior of people;

(b) the artistic, literary, scientific, educational, or other merits of the material;

(c) the degree of public acceptance of the material in the community;

(d) appeal to prurient interest or absence thereof in advertising or other promotion of the material; or

(e) purpose of the author, creator, publisher, or disseminator.

(4) A person convicted of obscenity shall be fined at least $500 but not more than $1,000 or imprisoned in the county jail for a term not to exceed 6 months, or both.

(5) Cities, towns, or counties may adopt ordinances or resolutions which are more restrictive as to obscenity than the provisions of 45-8-206 and this section.

History: En. 94-8-110 by Sec. 1, Ch. 513, L. 1973; amd. Sec. 1, Ch. 407, L. 1975; R.C.M. 1947, 94-8-110; amd. Sec. 1, I.M. 79, app. Nov. 7, 1978; amd. Sec. 5, Ch. 571, L. 1989.

Cross-References

Knowingly defined, 45-2-101.
Purposely defined, 45-2-101.
Indecent exposure, 45-5-504.
Sexual abuse of children, 45-5-625.

45-8-202. Repealed. Sec. 7, Ch. 571, L. 1989.

History: En. Secs. 1 to 3, Ch. 463, L. 1973; amd. Sec. 2, Ch. 407, L. 1975; amd. Sec. 1, Ch. 391, L. 1977; R.C.M. 1947, 94-8-110.1.

45-8-203. Certain motion picture theater employees not liable for prosecution. (1) As used in this section, "employee" means any person regularly employed by the owner or operator of a motion picture theater if he has no financial interest other than salary or wages in the ownership or operation of the motion picture theater, has no financial interest in or control over the selection of the motion pictures shown in the theater, and is working within the motion picture theater where he is regularly employed. "Employee" does not include a manager of the motion picture theater.

(2) No employee is liable to prosecution under 45-8-201 and 45-8-206 or under any city or county ordinance for exhibiting or possessing with intent to exhibit any obscene motion picture provided the employee is acting within the scope of his regular employment at a showing open to the public.

History: En. 94-8-110.3 by Sec. 1, Ch. 76, L. 1974; R.C.M. 1947, 94-8-110.3; amd. Sec. 6, Ch. 571, L. 1989.

45-8-204. Repealed. Sec. 18, Ch. 440, L. 1989.

History: En. Secs. 1 to 4, Ch. 430, L. 1973; amd. Sec. 32, Ch. 359, L. 1977; R.C.M. 1947, 94-8-110.2.

45-8-205. Definitions. As used in 45-8-205 through 45-8-208, the following definitions apply:

(1) "Display or dissemination of obscene material to minors" means that quality of a description, exhibition, presentation, or representation, in whatever form, of sexual conduct or sadomasochistic abuse when the material or performance, taken as a whole, has the following characteristics:

(a) its dominant theme appeals to a minor's prurient interest in sex;

(b) it depicts or describes sexual conduct or sadomasochistic abuse in a manner that is patently offensive to contemporary standards in the adult community with respect to what is suitable for minors; and

(c) it lacks serious literary, scientific, artistic, or political value for minors. If the court finds that the material or performance has serious literary, scientific, artistic, or political value for a significant percentage of normal older minors, the material or performance may not be found to lack such value for the entire class of minors.

(2) "Material" means a book, magazine, newspaper, pamphlet, poster, print, picture, figure, image, description, motion picture film, record, recording tape, or videotape (except a motion picture or videotape rated G, PG, PG-13, or R by the motion picture association of America).

(3) "Minor" means a person under 18 years of age.

(4) "Newsstand" means a stand that distributes or sells newspapers or magazines.

(5) "Performance" means any motion picture, film, or videotape (except a motion picture or videotape rated G, PG, PG-13, or R by the motion picture association of America); phonograph record; compact disk; tape recording; preview; trailer; play; show; skit; dance; or other exhibition played or performed before an audience of one or more, with or without consideration.

(6) "Person" means any individual, partnership, association, corporation, or other legal entity of any kind.

(7) "Prurient interest in sex" means a shameful or morbid interest in sex or excretion.

(8) "Sexual conduct" includes:

(a) vaginal, anal, or oral intercourse, whether actual or simulated, normal or perverted. A sexual act is simulated when it gives the appearance of depicting actual sexual activity or the consummation of an ultimate sexual act.

(b) masturbation, excretory functions, or lewd exhibition of uncovered genitals or female breasts;

(c) sadomasochistic abuse, meaning an act or condition that depicts torture, physical restraint by being fettered or bound, or flagellation of or by a nude person or a person clad in undergarments or in a revealing or bizarre costume.

(9) "Ultimate sexual act" means vaginal or anal sexual intercourse, fellatio, cunnilingus, or bestiality.

History: En. Sec. 1, Ch. 571, L. 1989.

45-8-206. Public display or dissemination of obscene material to minors. (1) A person having custody, control, or supervision of any commercial establishment or newsstand may not knowingly or purposely:

(a) display obscene material to minors in such a way that minors, as a part of the invited public, will be able to view the material; provided, however, that a person is considered not to have displayed obscene material to minors if the material is kept behind devices commonly known as blinder racks so that the lower two-thirds of the material is not exposed to view or other reasonable efforts were made to prevent view of the material by a minor;

(b) sell, furnish, present, distribute, or otherwise disseminate to a minor or allow a minor to view, with or without consideration, any obscene material; or

(c) present to a minor or participate in presenting to a minor, with or without consideration, any performance that is obscene to minors.

(2) A person does not violate this section if:

(a) he had reasonable cause to believe the minor was 18 years of age. "Reasonable cause" includes but is not limited to being shown a draft card, driver's license, marriage license, birth certificate, educational identification card, governmental identification card, or other official or apparently official card or document purporting to establish that the person is 18 years of age;

(b) the person is, or is acting as, an employee of a bona fide public school, college, or university or a retail outlet affiliated with and serving the educational purposes of a school, college, or university and the material or performance was disseminated in accordance with policies approved by the governing body of the institution;

(c) the person is an officer, director, trustee, or employee of a public library or museum and the material or performance was acquired by the library or museum and disseminated in accordance with policies approved by the governing body of the library or museum;

(d) an exhibition in a state of nudity is for a bona fide scientific or medical purpose for a bona fide school, library, or museum; or

(e) the person is a retail sales clerk with no financial interest in the material or performance or in the establishment displaying or selling the material or performance.

History: En. Sec. 2, Ch. 571, L. 1989.

Cross-References

Sexual abuse of children, 45-5-625.

45-8-207. Notice of violation. Before a county attorney may prosecute a person for a continuing violation of 45-8-206, he shall determine that the material or performance is obscene to minors, give the alleged violator actual notice of the determination and notice that he will be prosecuted if he does not desist, and determine that the violation continued for at least 3 days after notice was received. The person may seek a declaratory judgment on the question whether the material or performance is obscene to minors. The statute of limitations for the offense is tolled while the declaratory judgment or an appeal from it is pending.

History: En. Sec. 3, Ch. 571, L. 1989.

45-8-208. Penalties. (1) A person who is convicted of violating 45-8-206 is guilty of a misdemeanor and may be fined an amount not to exceed $500 or be imprisoned for a term not to exceed 6 months, or both.

(2) For purposes of 45-8-206, multiple copies of the same title, monthly issue, volume and number issue, or other identical material constitutes a single offense.

History: En. Sec. 4, Ch. 571, L. 1989.

45-8-209. Harming a police dog — penalty — definition. (1) A person commits the offense of harming a police dog if the person purposely or knowingly shoots, kills, or otherwise injures a police dog being used by a:

(a) law enforcement officer in discharging or attempting to discharge a legal duty in a reasonable and proper manner; or

(b) person while the person is under the control of and acting under the direction of an officer of an official law enforcement agency during the performance of the agency's law enforcement or search and rescue duties.

(2) A person convicted of the offense of harming a police dog may be fined an amount not to exceed $5,000 or be imprisoned in the state prison for a term not to exceed 1 year, or both.

(3) As used in this section, the following definitions apply:

(a) "Law enforcement officer" means a person who is a peace officer, as defined in 46-1-202, or any other agent of a criminal justice agency.

(b) "Police dog" means a dog that is:

(i) used by a law enforcement agency, as defined in 44-11-303, in the exercise of its authority;

(ii) specifically trained for law enforcement or search and rescue work; and

(iii) under the control of a law enforcement officer.

History: En. Secs. 1, 2, Ch. 536, L. 1985; amd. Sec. 1, Ch. 258, L. 1989; amd. Sec. 258, Ch. 800, L. 1991; amd. Sec. 1, Ch. 63, L. 1997.

45-8-210. Causing animals to fight — owners, trainers, and spectators — penalties — exception — definition. (1) A person commits the offense of causing animals to fight if he:

(a) owns, possesses, keeps, or trains any animal with the intent that such animal fight or be engaged in an exhibition of fighting with another animal;

(b) allows or causes any animal to fight with another animal or causes any animal to menace or injure another animal for the purpose of sport, amusement, or gain;

(c) knowingly permits any act in violation of subsection (1)(a) or (1)(b) to take place on any premises under his charge or control, or aids or abets any such act;

(d) participates in any exhibition in which animals are fighting for the purpose of sport, amusement, or gain.

(2) A person convicted of violating this section is guilty of a felony and shall be fined an amount not to exceed $5,000 or imprisoned in the state prison for a term of not less than 1 year or more than 5 years, or both such fine and imprisonment.

(3) Nothing in this section prohibits the following:

(a) accepted husbandry practices used in the raising of livestock or poultry;

(b) the use of animals in the normal and usual course of rodeo events; or

(c) the use of animals in hunting and training as permitted by law.

(4) For purposes of this section, "animal" means any cock, bird, dog, or mammal except man.

History: En. Secs. 2, 3, Ch. 410, L. 1985.

45-8-211. Cruelty to animals — exception. (1) A person commits the offense of cruelty to animals if without justification the person knowingly or negligently subjects an animal to mistreatment or neglect by:

(a) overworking, beating, tormenting, injuring, or killing any animal;

(b) carrying or confining any animal in a cruel manner;

(c) failing to provide an animal in the person's custody with:

(i) proper food, drink, or shelter; or

(ii) in cases of immediate, obvious, serious illness or injury, licensed veterinary or other appropriate medical care;

(d) abandoning any helpless animal or abandoning any animal on any highway, railroad, or in any other place where it may suffer injury, hunger, or exposure or become a public charge; or

(e) promoting, sponsoring, conducting, or participating in an animal race of more than 2 miles, except a sanctioned endurance race.

(2) (a) A person convicted of the offense of cruelty to animals shall be fined not to exceed $500 or be imprisoned in the county jail for a term not to exceed 6 months, or both. A person convicted of a second or subsequent offense of cruelty to animals shall be fined not to exceed $1,000 or be imprisoned in the state prison for a term not to exceed 2 years, or both.

(b) If the convicted person is the owner, the person may be required to forfeit to the county in which the person is convicted any animal affected. This provision does not affect the interest of any secured party or other person who has not participated in the offense.

(3) In addition to the sentence provided in subsection (2), the court may:

(a) require the defendant to pay all reasonable costs incurred in providing necessary veterinary attention and treatment for any animal affected; and

(b) prohibit or limit the defendant's ownership, possession, or custody of animals, as the court believes appropriate during the term of the sentence.

(4) Nothing in this section prohibits:

(a) a person from humanely destroying an animal for just cause; or

(b) the use of commonly accepted agricultural and livestock practices on livestock.

History: En. 94-8-106 by Sec. 1, Ch. 513, L. 1973; R.C.M. 1947, 94-8-106; amd. Sec. 1, Ch. 148, L. 1985; amd. Sec. 1, Ch. 410, L. 1985; amd. Sec. 1, Ch. 424, L. 1991; amd. Sec. 1, Ch. 556, L. 1993.

Cross-References

Knowingly defined, 45-2-101.
Negligently defined, 45-2-101.
Farm animal and research facility protection — exemptions, 81-30-103.

45-8-212. Criminal defamation. (1) Defamatory matter is anything that exposes a person or a group, class, or association to hatred, contempt, ridicule, degradation, or disgrace in society or injury to the person's or its business or occupation.

(2) Whoever, with knowledge of its defamatory character, orally, in writing, or by any other means communicates any defamatory matter to a third person without the consent of the person defamed commits the offense of

criminal defamation and may be sentenced to imprisonment for not more than 6 months in the county jail or a fine of not more than $500, or both.

(3) Violation of subsection (2) is justified if:

(a) the defamatory matter is true;

(b) the communication is absolutely privileged;

(c) the communication consists of fair comment made in good faith with respect to persons participating in matters of public concern;

(d) the communication consists of a fair and true report or a fair summary of any judicial, legislative, or other public or official proceedings; or

(e) the communication is between persons each having an interest or duty with respect to the subject matter of the communication and is made with the purpose to further the interest or duty.

(4) A person may not be convicted on the basis of an oral communication of defamatory matter except upon the testimony of at least two other persons that they heard and understood the oral statement as defamatory or upon a plea of guilty or nolo contendere.

History: En. 94-8-111 by Sec. 1, Ch. 513, L. 1973; R.C.M. 1947, 94-8-111; amd. Sec. 1, Ch. 230, L. 1997; amd. Sec. 5, Ch. 395, L. 1999.

Compiler's Comments

1999 Amendment: Chapter 395 in (4) at end inserted "or nolo contendere". Amendment effective October 1, 1999.

Cross-References

Defamatory matter defined, 45-2-101.

Knowledge defined, 45-2-101.

Official proceeding defined, 45-2-101.

Person defined, 45-2-101.

Criminal responsibility of corporations, 45-2-311.

45-8-213. Privacy in communications. (1) Except as provided in 69-6-104, a person commits the offense of violating privacy in communications if the person knowingly or purposely:

(a) with the purpose to terrify, intimidate, threaten, harass, annoy, or offend, communicates with a person by telephone and uses obscene, lewd, or profane language, suggests a lewd or lascivious act, or threatens to inflict injury or physical harm to the person or property of the person. The use of obscene, lewd, or profane language or the making of a threat or lewd or lascivious suggestions is prima facie evidence of an intent to terrify, intimidate, threaten, harass, annoy, or offend.

(b) uses a telephone to attempt to extort money or any other thing of value from a person or to disturb by repeated telephone calls the peace, quiet, or right of privacy of a person at the place where the telephone call or calls are received;

(c) records or causes to be recorded a conversation by use of a hidden electronic or mechanical device that reproduces a human conversation without the knowledge of all parties to the conversation. This subsection (1)(c) does not apply to elected or appointed public officials or employees when the transcription or recording is done in the performance of official duty, to persons speaking at public meetings, or to persons given warning of the transcription or recording.

(d) by means of any machine, instrument, or contrivance or in any other manner:

(i) reads or attempts to read a message or learn the contents of a message while it is being sent over a telegraph line;

(ii) learns or attempts to learn the contents of a message while it is in a telegraph office or is being received at or sent from a telegraph office; or

(iii) uses, attempts to use, or communicates to others any information obtained as provided in this subsection (1)(d);

(e) discloses the contents of a telegraphic message or any part of a telegraphic message addressed to another person without the permission of the person, unless directed to do so by the lawful order of a court; or

(f) opens or reads or causes to be read any sealed letter not addressed to the person opening the letter without being authorized to do so by either the writer of the letter or the person to whom it is addressed or, without the like authority, publishes any of the contents of the letter knowing the letter to have been unlawfully opened.

(2) Except as provided in 69-6-104, a person commits the offense of violating privacy in communications if the person purposely intercepts a telephonic voice or data communication. This subsection does not apply to elected or appointed public officials or employees when the interception is done in the performance of official duty or to persons given warning of the interception.

(3) (a) A person convicted of the offense of violating privacy in communications shall be fined not to exceed $500 or imprisoned in the county jail for a term not to exceed 6 months, or both.

(b) On a second conviction of subsection (1)(a) or (1)(b), a person shall be imprisoned in the county jail for a term not to exceed 1 year or be fined an amount not to exceed $1,000, or both.

(c) On a third or subsequent conviction of subsection (1)(a) or (1)(b), a person shall be imprisoned in the state prison for a term not to exceed 5 years or be fined an amount not to exceed $10,000, or both.

History: En. 94-8-114 by Sec. 1, Ch. 513, L. 1973; amd. Sec. 33, Ch. 359, L. 1977; R.C.M. 1947, 94-8-114; amd. Sec. 1, Ch. 356, L. 1979; amd. Sec. 1, Ch. 177, L. 1991; amd. Sec. 3, Ch. 354, L. 1999.

Compiler's Comments

1999 Amendment: Chapter 354 in (1)(c) at end before "recording" inserted "transcription or"; inserted (2) establishing that, with certain exceptions, purposeful interception of a telephonic voice or data communication constitutes the offense of violating privacy in communications; and made minor changes in style. Amendment effective October 1, 1999.

Cross-References

Right of privacy, Art. II, sec. 10, Mont. Const.

Knowingly defined, 45-2-101.

Purposely defined, 45-2-101.

Threat defined, 45-2-101.

Control of telephone communication to and from person holding hostages — nonliability of telephone company officials, 69-6-104.

45-8-214. Bribery in contests. (1) A person commits the offense of bribery in contests if he purposely or knowingly offers, confers, or agrees to confer upon another or solicits, accepts, or agrees to accept from another:

(a) any pecuniary benefit as a consideration for the recipient's failure to use his best efforts in connection with any professional or amateur athletic contest, sporting event, or exhibition; or

(b) any benefit as consideration for a violation of a known duty as a person participating in, officiating, or connected with any professional or amateur athletic contest, sporting event, or exhibition.

(2) A person convicted of the offense of bribery in contests shall be fined not to exceed $5,000 or be imprisoned in the state prison for a term not to exceed 10 years, or both.

History: En. 94-8-112 by Sec. 1, Ch. 513, L. 1973; R.C.M. 1947, 94-8-112.

Cross-References

Benefit defined, 45-2-101.
Knowingly defined, 45-2-101.
Pecuniary defined, 45-2-101.
Purposely defined, 45-2-101.
Criminal responsibility of corporations, 45-2-311.

45-8-215. Desecration of flags. (1) In this section "flag" means anything which is or purports to be the official flag of the United States, the United States shield, the United States coat of arms, the Montana state flag, or a copy, picture, or representation of any of them.

(2) A person commits the offense of desecration of flags if he purposely or knowingly:

(a) publicly mutilates, defiles, or casts contempt upon the flag;

(b) places on or attaches to the flag any work, mark, design, or advertisement not properly a part of such flag or exposes to public view a flag so altered;

(c) manufactures or exposes to public view an article of merchandise or a wrapper or receptacle for merchandise upon which the flag is depicted; or

(d) uses the flag for commercial advertising purposes.

(3) A person convicted of the offense of desecration of flags shall be imprisoned in the state prison for any term not to exceed 10 years or be fined an amount not to exceed $50,000, or both.

(4) This section does not apply to flags depicted on written or printed documents or periodicals or on stationery, ornaments, pictures, or jewelry, provided there are not unauthorized words or designs on such flags and provided the flag is not connected with any advertisement.

History: En. 94-7-502 by Sec. 1, Ch. 513, L. 1973; R.C.M. 1947, 94-7-502; amd. Sec. 7, Ch. 198, L. 1981.

Cross-References

Knowingly defined, 45-2-101.
Purposely defined, 45-2-101.

45-8-216. Unlawful automated telephone solicitation — exceptions — penalties. (1) A person may not use an automated telephone system, device, or facsimile machine for the selection and dialing of telephone numbers and playing of recorded messages if a message is completed to the dialed number for the purpose of:

(a) offering goods or services for sale;

(b) conveying information on goods or services in soliciting sales or purchases;

(c) soliciting information;

(d) gathering data or statistics; or

(e) promoting a political campaign or any use related to a political campaign.

(2) This section does not prohibit the use of an automated telephone system, device, or facsimile machine described under subsection (1) for purposes of informing purchasers of the receipt, availability for delivery, delay in delivery, or other pertinent information on the status of any purchased goods or services, of responding to an inquiry initiated by any person, or of providing

any other pertinent information when there is a preexisting business relationship. This section does not prohibit the use of an automated telephone system or device if the permission of the called party is obtained by a live operator before the recorded message is delivered.

(3) A person violating subsection (1) is subject to a fine of not more than $2,500.

History: En. Sec. 1, Ch. 230, L. 1991.

Cross-References

Unfair trade practices and consumer protection, Title 30, ch. 14.

Part 3
Weapons

45-8-301. Uniformity of interpretation. Sections 45-8-302 through 45-8-305 and 45-8-307 must be interpreted and construed to effectuate their general purpose to make uniform the law of those states that enact them.

History: En. Sec. 11, Ch. 43, L. 1935; re-en. Sec. 11317.10, R.C.M. 1935; Sec. 94-3110, R.C.M. 1947; redes. 94-8-209 by Sec. 29, Ch. 513, L. 1973; R.C.M. 1947, 94-8-209; amd. Sec. 1, Ch. 466, L. 1999.

Compiler's Comments

1999 Amendment: Chapter 466 deleted reference to 45-8-306, 45-8-308, and 45-8-309; and made minor changes in style. Amendment effective October 1, 1999.

45-8-302. Definitions. In 45-8-303 through 45-8-305 and 45-8-307, the following definitions apply:

(1) "Crime of violence" means any of the following crimes or an attempt to commit any of the crimes: any forcible felony, robbery, burglary, and criminal trespass.

(2) "Machine gun" means a firearm designed to discharge more than one shot by a single function of the trigger.

(3) "Person" includes a firm, partnership, association, or corporation.

History: En. Sec. 1, Ch. 43, L. 1935; re-en. Sec. 11317.1, R.C.M. 1935; Sec. 94-3101, R.C.M. 1947; redes. 94-8-201 by Sec. 29, Ch. 513, L. 1973; amd. Sec. 34, Ch. 359, L. 1977; R.C.M. 1947, 94-8-201; amd. Sec. 2, Ch. 466, L. 1999.

Compiler's Comments

1999 Amendment: Chapter 466 in introductory clause deleted reference to 45-8-306, 45-8-308, and 45-8-309; in definition of machine gun substituted "firearm designed to discharge more than one shot by a single function of the trigger" for "weapon of any description by whatever name known, loaded or unloaded, from which more than six shots or bullets may be rapidly, automatically, or semiautomatically discharged from a magazine by a single function of the firing device"; and made minor changes in style. Amendment effective October 1, 1999.

Cross-References

Forcible felony defined, 45-2-101.
Person defined, 45-2-101.
Weapon defined, 45-2-101.
Robbery, 45-5-401.
Criminal trespass, 45-6-202, 45-6-203.
Burglary, 45-6-204.

45-8-303. Possession or use of machine gun in connection with a crime. Possession or use of a machine gun in the perpetration or attempted perpetration of a crime of violence is hereby declared to be a crime punishable by imprisonment in the state penitentiary for a term of not less than 20 years.

History: En. Sec. 2, Ch. 43, L. 1935; re-en. 11317.2, R.C.M. 1935; Sec. 94-3102, R.C.M. 1947; redes. 94-8-202 by Sec. 29, Ch. 513, L. 1973; R.C.M. 1947, 94-8-202.

Cross-References

Possession defined, 45-2-101.

Attempt, 45-4-103.

Aggravated assault, 45-5-202.

45-8-304. Possession or use of machine gun for offensive purpose. Possession or use of a machine gun for offensive or aggressive purpose is hereby declared to be a crime punishable by imprisonment in the state penitentiary for a term of not less than 10 years.

History: En. Sec. 3, Ch. 43, L. 1935; re-en. Sec. 11317.3, R.C.M. 1935; Sec. 94-3103, R.C.M. 1947; redes. 94-8-203 by Sec. 29, Ch. 513, L. 1973; R.C.M. 1947, 94-8-203.

Cross-References

Possession defined, 45-2-101.

45-8-305. Presumption of offensive or aggressive purpose. Possession or use of a machine gun must be presumed to be for an offensive or aggressive purpose when the machine gun is in the possession of or used by a person who has been convicted of a crime of violence in any court of record, state or federal, in the United States of America or its territories or insular possessions.

History: En. Sec. 4, Ch. 43, L. 1935; re-en. Sec. 11317.4, R.C.M. 1935; Sec. 94-3104, R.C.M. 1947; amd. and redes. 94-8-204 by Sec. 26, Ch. 513, L. 1973; amd. Sec. 35, Ch. 359, L. 1977; R.C.M. 1947, 94-8-204; amd. Sec. 3, Ch. 466, L. 1999.

Compiler's Comments

1999 Amendment: Chapter 466 deleted former subsections (1), (3), and (4) providing that possession or use of a machine gun was presumed to be for an offensive or aggressive purpose "when the machine gun is on premises not owned or rented for bona fide permanent residence or business occupancy by the person in whose possession the machine gun may be found", "when the machine gun is of the kind described in 45-8-309 and has not been registered as required in that section", and "when empty or loaded pistol shells of 30 (.30 in. or 7.63 mm.) or larger caliber which have been or are susceptible of being used in the machine gun are found in the immediate vicinity thereof"; and made minor changes in style. Amendment effective October 1, 1999.

Cross-References

Conviction defined, 45-2-101.

Possession defined, 45-2-101.

Premises defined, 45-2-101.

Possession or use of machine gun for offensive or aggressive purpose, 45-8-304.

45-8-306. Repealed. Sec. 6, Ch. 466, L. 1999.

History: En. Sec. 5, Ch. 43, L. 1935; re-en. Sec. 11317.5, R.C.M. 1935; Sec. 94-3105, R.C.M. 1947; redes. 94-8-205 by Sec. 29, Ch. 513, L. 1973; R.C.M. 1947, 94-8-205.

45-8-307. Exceptions. Sections 45-8-301 through 45-8-305 and this section do not prohibit or interfere with:

(1) the manufacture of machine guns for and sale of machine guns to the military forces or the peace officers of the United States or of any political subdivision of the United States or transportation required for that purpose;

(2) the possession of a machine gun for a scientific purpose or the possession of a machine gun not usable as a weapon and possessed as a curiosity, ornament, or keepsake;

(3) the possession of a machine gun for a purpose manifestly not aggressive or offensive.

History: En. Sec. 6, Ch. 43, L. 1935; re-en. Sec. 11317.6, R.C.M. 1935; Sec. 94-3106, R.C.M. 1947; redes. 94-8-206 by Sec. 29, Ch. 513, L. 1973; R.C.M. 1947, 94-8-206; amd. Sec. 4, Ch. 466, L. 1999.

Compiler's Comments

1999 Amendment: Chapter 466 in introductory clause deleted reference to 45-8-306, 45-8-308, and 45-8-309; in (3) after "machine gun" deleted "other than one adapted to use pistol cartridges of 30 (.30 in. or

7.63 mm.) or larger caliber"; and made minor changes in style. Amendment effective October 1, 1999.

Cross-References

Possession defined, 45-2-101.

45-8-308. Repealed. Sec. 6, Ch. 466, L. 1999.

History: En. Sec. 7, Ch. 43, L. 1935; re-en. Sec. 11317.7, R.C.M. 1935; Sec. 94-3107, R.C.M. 1947; redes. 94-8-207 by Sec. 29, Ch. 513, L. 1973; R.C.M. 1947, 94-8-207.

45-8-309. Repealed. Sec. 6, Ch. 466, L. 1999.

History: En. Sec. 8, Ch. 43, L. 1935; re-en. Sec. 11317.8, R.C.M. 1935; Sec. 94-3108, R.C.M. 1947; redes. 94-8-208 by Sec. 29, Ch. 513, L. 1973; R.C.M. 1947, 94-8-208.

45-8-310 through 45-8-312 reserved.

45-8-313. Unlawful possession of firearm by convicted person. (1) A person commits the offense of unlawful possession of a firearm by a convicted person if the person purposely or knowingly purchases or possesses a firearm after the person has been convicted of:

(a) a felony for which the person received an additional sentence under 46-18-221; or

(b) an offense under the law of another state or of the United States that is equivalent to an offense that when committed in Montana is subject to an additional sentence under 46-18-221.

(2) A person convicted of unlawful possession of a firearm by a convicted person shall be imprisoned in a state prison for not less than 2 years or more than 10 years.

(3) A person who has been issued a permit under 45-8-314 may not be convicted of a violation of this section.

History: En. Sec. 2, Ch. 555, L. 1995.

Cross-References

Effect of conviction on civil and constitutional rights, 46-18-801.

45-8-314. Lifetime firearms supervision of certain convicted persons. (1) For the purposes of rehabilitation and public protection, a person convicted of an offense referred to in 45-8-313 shall, as part of the sentence imposed, be sentenced to life supervision by the state for the purpose of restricting the person's right to purchase and possess firearms. Active supervision by a probation or parole officer is not required but may be imposed by the court. "Supervision" means that the person may not violate 45-8-313 and must comply with other state and federal law restrictions on the purchase and possession of firearms.

(2) (a) A person subject to subsection (1) may apply to the district court for the county in which the person resides for a permit to purchase and possess one or more firearms. The person shall show good cause for the possession of each firearm sought to be purchased and possessed. The grant or denial of the application does not prevent the person from making another application, except that if an application is denied, another application may not be made for the next 12 months.

(b) The application must contain the following information:

(i) the person's full name and any past or present aliases;

(ii) the person's date and place of birth;

(iii) the person's address;

(iv) the person's occupation;

(v) the make and model of each firearm sought to be purchased and possessed;

(vi) the date and place of each conviction of an offense referred to in 45-8-313, the name of the offense, the state and county in which the offense occurred, the sentence imposed, the place or places of incarceration, and the date of discharge from supervision for the last offense;

(vii) the name and business address of the person's last probation or parole officer; and

(viii) any other information considered necessary by the court.

(c) The person shall, at the time of filing the application with the court, mail a copy to the county attorney and county sheriff.

(d) The county attorney or county sheriff may file a written objection with the court. If no objection is filed, the court may grant the permit if it finds that the person has shown good cause to purchase and possess the firearm or firearms listed in the application. If an objection is filed, a hearing must be held within 60 days after the filing of the objection. If the court first finds that the person has shown good cause to purchase and possess the firearm or firearms listed in the application and that, but for the objection, the court would have granted a permit, the court shall decide whether the objection is valid and overrides the good cause showing and requires denial of the permit.

History: En. Sec. 3, Ch. 555, L. 1995.

45-8-315. Definition. "Concealed weapon" means any weapon mentioned in 45-8-316 through 45-8-318 and 45-8-321 through 45-8-328 that is wholly or partially covered by the clothing or wearing apparel of the person carrying or bearing the weapon, except that for purposes of 45-8-321 through 45-8-328, concealed weapon means a handgun or a knife with a blade 4 or more inches in length that is wholly or partially covered by the clothing or wearing apparel of the person carrying or bearing the weapon.

History: En. Sec. 6, Ch. 74, L. 1919; re-en. Sec. 11307, R.C.M. 1921; re-en. Sec. 11307, R.C.M. 1935; Sec. 94-3530, R.C.M. 1947; redes. 94-8-215 by Sec. 29, Ch. 513, L. 1973; R.C.M. 1947, 94-8-215; amd. Sec. 9, Ch. 759, L. 1991.

Cross-References

Weapon defined, 45-2-101.

45-8-316. Carrying concealed weapons. (1) Every person who carries or bears concealed upon his person a dirk, dagger, pistol, revolver, slingshot, sword cane, billy, knuckles made of any metal or hard substance, knife having a blade 4 inches long or longer, razor, not including a safety razor, or other deadly weapon shall be punished by a fine not exceeding $500 or imprisonment in the county jail for a period not exceeding 6 months, or both.

(2) A person who has previously been convicted of an offense, committed on a different occasion than the offense under this section, in this state or any other jurisdiction for which a sentence to a term of imprisonment in excess of 1 year could have been imposed and who carries or bears concealed upon his person any of the weapons described in subsection (1) shall be punished by a fine not exceeding $1,000 or imprisoned in the state prison for a period not exceeding 5 years, or both.

History: En. Sec. 1, Ch. 74, L. 1919; re-en. Sec. 11302, R.C.M. 1921; re-en. Sec. 11302, R.C.M. 1935; Sec. 94-3525, R.C.M. 1947; redes. 94-8-210 by Sec. 29, Ch. 513, L. 1973; amd. Sec. 36, Ch. 359, L. 1977; amd. Sec. 1, Ch. 411, L. 1977; R.C.M. 1947, 94-8-210.

Cross-References
Offense defined, 45-2-101.
Concealed weapon defined, 45-8-315.

45-8-317. Exceptions. (1) Section 45-8-316 does not apply to:

(a) any peace officer of the state of Montana or of another state who has the power to make arrests;

(b) any officer of the United States government authorized to carry a concealed weapon;

(c) a person in actual service as a member of the national guard;

(d) a person summoned to the aid of any of the persons named in subsections (1)(a) through (1)(c);

(e) a civil officer or the officer's deputy engaged in the discharge of official business;

(f) a probation and parole officer authorized to carry a firearm under 46-23-1002;

(g) a person issued a permit under 45-8-321 or a person with a permit recognized under 45-8-329;

(h) an agent of the department of justice or a criminal investigator in a county attorney's office;

(i) a person who is outside the official boundaries of a city or town or the confines of a logging, lumbering, mining, or railroad camp or who is lawfully engaged in hunting, fishing, trapping, camping, hiking, backpacking, farming, ranching, or other outdoor activity in which weapons are often carried for recreation or protection; or

(j) the carrying of arms on one's own premises or at one's home or place of business.

(2) With regard to a person issued a permit under 45-8-321, the provisions of 45-8-328 do not apply to this section.

History: En. Sec. 3, Ch. 74, L. 1919; re-en. Sec. 11304, R.C.M. 1921; re-en. Sec. 11304, R.C.M. 1935; Sec. 94-3527, R.C.M. 1947; amd. Sec. 1, Ch. 63, L. 1969; amd. Sec. 1, Ch. 54, L. 1971; redes. 94-8-212 by Sec. 29, Ch. 513, L. 1973; amd. Sec. 37, Ch. 359, L. 1977; R.C.M. 1947, 94-8-212; amd. Sec. 2, Ch. 639, L. 1989; amd. Sec. 10, Ch. 759, L. 1991; amd. Sec. 195, Ch. 42, L. 1997; amd. Sec. 1, Ch. 476, L. 1999.

Compiler's Comments
1999 Amendment: Chapter 476 in (1)(a) at end inserted "or of another state who has the power to make arrests"; in (1)(g) at end inserted "or a person with a permit recognized under 45-8-329"; and made minor changes in style. Amendment effective October 1, 1999.

45-8-318. Possession of deadly weapon by prisoner or youth in facility. (1) A person commits the offense of possession of a deadly weapon by a prisoner if the person purposely or knowingly possesses or carries or has under the person's custody or control without lawful authority a dirk, dagger, pistol, revolver, slingshot, sword cane, billy, knuckles made of any metal or hard substance, knife, razor not including a safety razor, or other deadly weapon while the person is:

(a) a person committed to a state prison or incarcerated in a county jail, city jail, or regional jail and is:

(i) at a state prison, a state prison farm or ranch, or jail;

(ii) being conveyed to or from a place listed in this subsection (1)(a); or

(iii) under the custody of prison or jail officials, officers, or employees; or

(b) a person in a youth detention facility, secure detention facility, regional detention facility, short-term detention center, state youth correctional facility, or shelter care facility, as those terms are defined in 41-5-103, and is at the facility, being conveyed to or from the facility, or under the custody of the facility officials, officers, or employees.

(2) A person convicted of the offense of possession of a deadly weapon by a prisoner shall be punished by imprisonment in the state prison for a term not less than 5 years or more than 15 years, by a fine of not more than $50,000, or by both fine and imprisonment.

(3) The youth court has jurisdiction of any violation of subsection (1)(b) unless the charge is filed in district court, in which case the district court has jurisdiction.

History: En. Sec. 1, Ch. 131, L. 1961; Sec. 94-3527.1, R.C.M. 1947; redes. 94-8-213 by Sec. 29, Ch. 513, L. 1973; R.C.M. 1947, 94-8-213; amd. Sec. 7, Ch. 198, L. 1981; amd. Sec. 1, Ch. 424, L. 1987; amd. Sec. 1, Ch. 168, L. 1997; amd. Sec. 78, Ch. 550, L. 1997; amd. Sec. 3, Ch. 491, L. 1999.

Compiler's Comments

1999 Amendment: Chapter 491 in (1)(a) after "person committed to" substituted "a state prison" for "the Montana state prison"; and in (1)(a)(i) substituted "a state prison" for "the state prison". Amendment effective April 27, 1999.

Cross-References

Felony defined, 45-2-101.

Aggravated kidnapping, 45-5-303.

Transferring illegal or unauthorized communication, 45-7-307.

45-8-319. Repealed. Sec. 14, Ch. 759, L. 1991.

History: En. Sec. 5, Ch. 74, L. 1919; re-en. Sec. 11306, R.C.M. 1921; re-en. Sec. 11306, R.C.M. 1935; Sec. 94-3529, R.C.M. 1947; redes. 94-8-214 by Sec. 29, Ch. 513, L. 1973; amd. Sec. 38, Ch. 359, L. 1977; R.C.M. 1947, 94-8-214; amd. Sec. 3, Ch. 221, L. 1989.

45-8-320. Repealed. Sec. 1, Ch. 312, L. 1979.

History: En. Sec. 8, Ch. 74, L. 1919; re-en. Sec. 11309, R.C.M. 1921; re-en. Sec. 11309, R.C.M. 1935; Sec. 94-3532, R.C.M. 1947; redes. 94-8-217 by Sec. 29, Ch. 513, L. 1973; R.C.M. 1947, 94-8-217.

45-8-321. Permit to carry concealed weapon. (1) A county sheriff shall, within 60 days after the filing of an application, issue a permit to carry a concealed weapon to the applicant. The permit is valid for 4 years from the date of issuance. An applicant must be a United States citizen who is 18 years of age or older and who holds a valid Montana driver's license or other form of identification issued by the state that has a picture of the person identified. An applicant must have been a resident of the state for at least 6 months. Except as provided in subsection (2), this privilege may not be denied an applicant unless the applicant:

(a) is ineligible under Montana or federal law to own, possess, or receive a firearm;

(b) has been charged and is awaiting judgment in any state of a state or federal crime that is punishable by incarceration for 1 year or more;

(c) has been convicted in any state or federal court of a crime punishable by more than 1 year of incarceration or, regardless of the sentence that may be imposed, a crime that includes as an element of the crime an act, attempted act, or threat of intentional homicide, violence, bodily or serious bodily harm, unlawful restraint, sexual abuse, or sexual intercourse or contact without consent;

(d) has been convicted under 45-8-327 or 45-8-328, unless the applicant has been pardoned or 5 years have elapsed since the date of the conviction;

(e) has a warrant of any state or the federal government out for the applicant's arrest;

(f) has been adjudicated in a criminal or civil proceeding in any state or federal court to be an unlawful user of an intoxicating substance and is under a court order of imprisonment or other incarceration, probation, suspended or deferred imposition of sentence, treatment or education, or other conditions of release or is otherwise under state supervision;

(g) has been adjudicated in a criminal or civil proceeding in any state or federal court to be mentally ill, mentally defective, or mentally disabled and is still subject to a disposition order of that court; or

(h) was dishonorably discharged from the United States armed forces.

(2) The sheriff may deny an applicant a permit to carry a concealed weapon if the sheriff has reasonable cause to believe that the applicant is mentally ill, mentally defective, or mentally disabled or otherwise may be a threat to the peace and good order of the community to the extent that the applicant should not be allowed to carry a concealed weapon. At the time an application is denied, the sheriff shall, unless the applicant is the subject of an active criminal investigation, give the applicant a written statement of the reasonable cause upon which the denial is based.

(3) An applicant for a permit under this section must, as a condition to issuance of the permit, be required by the sheriff to demonstrate familiarity with a firearm by:

(a) completion of a hunter education or safety course approved or conducted by the department of fish, wildlife, and parks or a similar agency of another state;

(b) completion of a firearms safety or training course approved or conducted by the department of fish, wildlife, and parks, a similar agency of another state, a national firearms association, a law enforcement agency, an institution of higher education, or an organization that uses instructors certified by a national firearms association;

(c) completion of a law enforcement firearms safety or training course offered to or required of public or private law enforcement personnel and conducted or approved by a law enforcement agency;

(d) possession of a license from another state to carry a firearm, concealed or otherwise, that is granted by that state upon completion of a course described in subsections (3)(a) through (3)(c); or

(e) evidence that the applicant, during military service, was found to be qualified to operate firearms, including handguns.

(4) A photocopy of a certificate of completion of a course described in subsection (3), an affidavit from the entity or instructor that conducted the course attesting to completion of the course, or a copy of any other document that attests to completion of the course and can be verified through contact with the entity or instructor that conducted the course creates a presumption that the applicant has completed a course described in subsection (3).

(5) If the sheriff and applicant agree, the requirement in subsection (3) of demonstrating familiarity with a firearm may be satisfied by the applicant's passing, to the satisfaction of the sheriff or of any person or entity to which the sheriff delegates authority to give the test, a physical test in which the applicant demonstrates the applicant's familiarity with a firearm.

History: En. Sec. 1, Ch. 759, L. 1991; amd. Sec. 1, Ch. 408, L. 1995; amd. Sec. 3, Ch. 581, L. 1999.

Compiler's Comments

1999 Amendment: Chapter 581 in (3)(e) after "evidence" deleted "that the sheriff may or may not accept" and at end substituted "firearms, including handguns" for "handguns". Amendment effective October 1, 1999.

45-8-322. Application, renewal, permit, and fees. (1) The application form must be readily available at the sheriff's office and must read as follows:

CONCEALED WEAPON PERMIT APPLICATION

To be completed by each person making application:

RESIDENT OF MONTANA AT LEAST 6 MONTHS ( ) Yes ( ) No
CITIZEN OF THE UNITED STATES ( ) Yes ( ) No
18 YEARS OF AGE OR OLDER ( ) Yes ( ) No

PLEASE TYPE OR PRINT

Full name: ....
Last First Middle
Alias/Maiden/Nickname: ....
Address: Home: .... Zip ....
Employer: .... Zip ....
Phone:................../................../..................
Home Employer Message
Place of birth:.. Date of birth: ....
Driver's license #: .... Issuing state: ....
Social Security #:...
Sex .... Ht. .... Wt. .... Eyes .... Hair ....

LIST EACH FORMER EMPLOYER OR BUSINESS ENGAGED IN FOR THE LAST 5 YEARS:

	Employer or business name	Address	Dates of employment
1.	....	....	....
2.	....	....	....
3.	....	....	....
4.	....	....	....
5.	....	....	....
6.	....	....	....

LIST EACH PLACE IN WHICH YOU HAVE LIVED FOR THE LAST 5 YEARS:

	City	State	Dates of residence
1.	....	....	....
2.	....	....	....
3.	....	....	....
4.	....	....	....
5.	....	....	....
6.	....	....	....

MILITARY SERVICE, BRANCH .... FROM .... TO ....

TYPE OF DISCHARGE .... RANK UPON DISCHARGE ....

HAVE YOU EVER BEEN ARRESTED FOR OR CONVICTED OF A CRIME OR FOUND GUILTY IN A COURT-MARTIAL PROCEEDING?

( ) YES ( ) NO

IF YES, COMPLETE THE FOLLOWING (Exceptions: minor traffic violations) (Attach additional sheet if necessary):

	City	State	Charge	Date
1.	....	....	....	....
2.	....	....	....	....
3.	....	....	....	....
4.	....	....	....	....
5.	....	....	....	....

LIST THREE PERSONS WHOM YOU HAVE KNOWN FOR AT LEAST 5 YEARS THAT WILL BE CREDIBLE WITNESSES TO YOUR GOOD MORAL CHARACTER AND PEACEABLE DISPOSITION (DO NOT include relatives or present/past employers):

	Name	Address	Phone
1.	....	....	....
2.	....	....	....
3.	....	....	....

PLEASE EXPLAIN YOUR REASONS FOR REQUESTING THIS PERMIT (Attach additional sheet if necessary):

....
....
....
....
....
....

I, the undersigned applicant, swear that the foregoing information is true and correct to the best of my knowledge and belief and is given with the full knowledge that any misstatement may be sufficient cause for denial or revocation of a permit to carry a concealed weapon. I authorize any person having information concerning me that relates to the information requested by this application and the requirements for a concealed weapon permit, either public record or otherwise, to furnish it to the sheriff to whom this application is made.

....
Signature

....
Date of application

This application must be signed in the presence of the sheriff or a designee.

(2) The application must be in triplicate. The applicant must be given the original at the time the completed application is filed with the sheriff, the sheriff shall keep a copy for at least 4 years, and a copy must, within 7 days of the sheriff's receipt of the application, be mailed to the chief of police if the applicant resides in a city or town with a police force.

(3) The fee for issuance of a permit is $50. The permit must be renewed for additional 4-year periods upon payment of a $25 fee per renewal and upon request for renewal made within 90 days before expiration of the permit. The permit and each renewal must be in triplicate, in a form prescribed by the department of justice, and must at a minimum include the name, address, physical description, signature, driver's license or state identification card number, and a picture of the permittee. A person in the United States armed forces satisfies the requirement of submitting a picture if the person submits pictures of the front of the person's military identification card and the person's Montana driver's license. The permit must state that federal and state laws on possession of firearms and other weapons differ and that a person who violates the federal law may be prosecuted in federal court and the Montana permit will not be a defense. The permittee must be given the original, and the sheriff shall keep a copy and send a copy to the department of justice, which shall keep a central repository record of all permits. Replacement of a lost permit must be treated as a renewal under this subsection.

(4) The sheriff shall conduct a background check of an applicant to determine whether the applicant is eligible for a permit under 45-8-321, may require an applicant to submit the applicant's fingerprints, and may charge the applicant $5 for fingerprinting.

(5) Permit, background, and fingerprinting fees may be retained by the sheriff and used to implement 45-8-321 through 45-8-325.

(6) A state or local government law enforcement agency or other agency or any of its officers or employees may not request a permittee to voluntarily submit information in addition to that required on an application and permit.

History: En. Sec. 2, Ch. 759, L. 1991; amd. Sec. 4, Ch. 581, L. 1999.

Compiler's Comments

1999 Amendment: Chapter 581 in (1) in form in section requiring reasons for requesting permit at beginning of caption deleted "IN COMPLETE DETAIL"; inserted fourth sentence in (3) providing that submitting pictures of front of military identification card and driver's license by member of armed forces satisfies requirement to submit picture; in (4) before "background" deleted "criminal record and" and after "applicant" inserted "to determine whether the applicant is eligible for a permit under 45-8-321"; and made minor changes in style. Amendment effective October 1, 1999.

45-8-323. Denial of renewal — revocation of permit. A permit to carry a concealed weapon may be revoked or its renewal denied by the sheriff of the county in which the permittee resides if circumstances arise that would require the sheriff to refuse to grant the permittee an original license.

History: En. Sec. 3, Ch. 759, L. 1991.

45-8-324. Appeal. The denial or revocation of a permit to carry a concealed weapon or refusal of a renewal is subject to appeal to the district court, which may consider and determine facts as well as law and which is not bound by any factual, legal, or other determination of the sheriff, and from that court to the Montana supreme court. To the extent applicable, Title 25, chapter 33, governs the appeal.

History: En. Sec. 4, Ch. 759, L. 1991; amd. Sec. 2, Ch. 408, L. 1995.

45-8-325. Permittee change of county of residence — notification to sheriffs and chief of police. A person with a permit to carry a concealed weapon who changes his county of residence shall within 10 days of the change inform the sheriffs of both the old and new counties of residence of his change of residence and that he holds the permit. If his residence changes either from or to a city or town with a police force, he shall also inform the chief of police in each of those cities or towns that has a police force.

History: En. Sec. 5, Ch. 759, L. 1991.

45-8-326. Immunity from liability. A sheriff, employee of a sheriff's office, or county is not liable for damages in a civil action by a person or entity claiming death, personal injury, or property damage arising from alleged wrongful or improper grant of, renewal of, or failure to revoke a permit to carry a concealed weapon, except for actions that constitute willful misconduct or gross negligence.

History: En. Sec. 6, Ch. 759, L. 1991.

45-8-327. Carrying a concealed weapon while under the influence. A person commits the offense of carrying a concealed weapon while under the influence if he purposely or knowingly carries a concealed weapon while under the influence of an intoxicating substance. It is not a defense that the person had a valid permit to carry a concealed weapon. A person convicted of the offense shall be imprisoned in the county jail for a term not to exceed 6 months or fined an amount not to exceed $500, or both.

History: En. Sec. 7, Ch. 759, L. 1991.

45-8-328. Carrying concealed weapon in prohibited place — penalty. (1) A person commits the offense of carrying a concealed weapon in a prohibited place if the person purposely or knowingly carries a concealed weapon in:

(a) portions of a building used for state or local government offices and related areas in the building that have been restricted;

(b) a bank, credit union, savings and loan institution, or similar institution during the institution's normal business hours. It is not an offense under this section to carry a concealed weapon while:

(i) using an institution's drive-up window, automatic teller machine, or unstaffed night depository; or

(ii) at or near a branch office of an institution in a mall, grocery store, or other place unless the person is inside the enclosure used for the institution's financial services or is using the institution's financial services.

(c) a room in which alcoholic beverages are sold, dispensed, and consumed under a license issued under Title 16 for the sale of alcoholic beverages for consumption on the premises.

(2) It is not a defense that the person had a valid permit to carry a concealed weapon. A person convicted of the offense shall be imprisoned in the county jail for a term not to exceed 6 months or fined an amount not to exceed $500, or both.

History: En. Sec. 8, Ch. 759, L. 1991; amd. Sec. 1, Ch. 572, L. 1999.

Compiler's Comments

1999 Amendment: Chapter 572 in (1)(a) substituted "portions of a building used for state or local government offices and related areas in the building that have been restricted" for former text that read: "a building owned or leased by the federal, state, or local government"; in (1)(b) near beginning of introductory clause after "similar institution" inserted "during the institution's normal business hours. It is not an offense under this section to carry a concealed weapon while:

(i) using an institution's drive-up window, automatic teller machine, or unstaffed night depository; or

(ii) at or near a branch office of an institution in a mall, grocery store, or other place unless the person is inside the enclosure used for the institution's financial services or is using the institution's financial services"; and made minor changes in style. Amendment effective October 1, 1999.

Cross-References

Offense defined, 45-2-101.

45-8-329. Concealed weapon permits from other states recognized — advisory council. (1) A concealed weapon permit from another state is valid in this state if:

(a) the person issued the permit has the permit in the person's immediate possession;

(b) the person bearing the permit is also in possession of an official photo identification of the person, whether on the permit or on other identification; and

(c) the state that issued the permit requires a criminal records background check of permit applicants prior to issuance of a permit.

(2) The attorney general shall develop and maintain a list of states from which permits are recognized under this section for the use by law enforcement agencies in this state.

(3) A determination or declaration of a Montana government entity, official, or employee is not necessary to the existence and exercise of the privilege granted by this section.

(4) The governor shall establish a council, composed of interested persons, including law enforcement personnel and gun owners, to advise the governor on and pursue concealed weapon permit issues.

History: En. Sec. 3, Ch. 408, L. 1995; amd. Sec. 2, Ch. 476, L. 1999.

Compiler's Comments

1999 Amendment: Chapter 476 substituted (1) through (3) regarding validity of concealed weapon permit from another state for former text that read: "The governor may negotiate concealed weapon permit reciprocity agreements with other states that have concealed weapon permit laws similar to those of Montana"; in (4) at end after "pursue" substituted "concealed weapon permit issues" for "reciprocity issues and agreements"; and made minor changes in style. Amendment effective October 1, 1999.

45-8-330. *(Temporary)* **Exemption of concealed weapon permittee from federal handgun purchase background check and waiting period.** A person possessing a concealed weapon permit is:

(1) considered to have a permit constituting completion of the background check required by 18 U.S.C. 921 through 925A; and

(2) exempt from that act's 5-day waiting period for the purchase of a handgun. *(Subsections (1) and (2) terminate on the elimination of federal statutory or case law requirements.)*

History: En. Sec. 4, Ch. 408, L. 1995.

Compiler's Comments

Contingent Termination: Section 5, Ch. 408, L. 1995, provided that subsection (1) terminates on the date on which the Governor certifies that the federal background check referred to in subsection (1) is no longer required by federal statutory or case law and that subsection (2) terminates on the date on which the Governor certifies that the federal 5-day waiting period referred to in subsection (2) is no longer required by federal statutory or case law.

45-8-331. Switchblade knives. (1) Every person who carries or bears upon his person, who carries or bears within or on any motor vehicle or other means of conveyance owned or operated by him, or who owns, possesses, uses, stores, gives away, sells, or offers for sale a switchblade knife shall be punished by a fine not exceeding $500 or by imprisonment in the county jail for a period not exceeding 6 months or by both such fine and imprisonment.

(2) A bona fide collector whose collection is registered with the sheriff of the county in which said collection is located is hereby exempted from the provisions of this section.

(3) For the purpose of this section a switchblade knife is defined as any knife which has a blade 1 ½ inches long or longer which opens automatically by hand pressure applied to a button, spring, or other device in the handle of the knife.

History: En. Sec. 1, Ch. 243, L. 1957; Sec. 94-35-273, R.C.M. 1947; redes. 94-8-226 by Sec. 29, Ch. 513, L. 1973; R.C.M. 1947, 94-8-226.

Cross-References

Person defined, 45-2-101.

Vehicle defined, 45-2-101.

45-8-332. Definitions. (1) "Destructive device", as used in this chapter, includes but is not limited to the following weapons:

(a) a projectile containing an explosive or incendiary material or any other similar chemical substance, including but not limited to that which is commonly known as tracer or incendiary ammunition, except tracer ammunition manufactured for use in shotguns;

(b) a bomb, grenade, explosive missile, or similar device or a launching device therefor;

(c) a weapon of a caliber greater than .60 caliber which fires fixed ammunition or any ammunition therefor, other than a shotgun or shotgun ammunition;

(d) a rocket, rocket-propelled projectile, or similar device of a diameter greater than 0.60 inch or a launching device therefor and a rocket, rocket-propelled projectile, or similar device containing an explosive or incendiary material or any other similar chemical substance other than the propellant for the device, except devices designed primarily for emergency or distress signaling purposes;

(e) a breakable container which contains a flammable liquid with a flashpoint of 150 degrees Fahrenheit or less and which has a wick or similar device capable of being ignited, other than a device which is commercially manufactured primarily for the purpose of illumination.

(2) "Explosive", as used in this chapter, means any explosive defined in rules adopted by the department of justice pursuant to 50-3-102(3).

History: En. Sec. 1, Ch. 304, L. 1971; Sec. 69-1931, R.C.M. 1947; amd. and redes. 94-8-209.1 by Sec. 72, Ch. 359, L. 1977; R.C.M. 1947, 94-8-209.1; amd. Sec. 1, Ch. 187, L. 1985; amd. Sec. 1, Ch. 706, L. 1991.

Cross-References

Weapon defined, 45-2-101.

Reckless or malicious use of explosives, 45-8-333.

Possession of destructive device, 45-8-334.

Possession of explosives, 45-8-335.

Additional sentence for use of destructive device, 46-18-221.

45-8-333. Reckless or malicious use of explosives. Every person who shall recklessly or maliciously use, handle, or have in his or her possession any blasting powder, giant or Hercules powder, giant caps, or other highly explosive substance whereby any human being is intimidated, terrified, or endangered shall be guilty of a misdemeanor.

History: En. Sec. 713, Pen. C. 1895; re-en. Sec. 8551, Rev. C. 1907; re-en. Sec. 2812, R.C.M. 1921; re-en. Sec. 2812, R.C.M. 1935; R.C.M. 1947, 69-1927.

Cross-References

Regulation of construction blasting, Title 37, ch. 72.

Misdemeanor defined, 45-2-101.

Person defined, 45-2-101.

Possession defined, 45-2-101.

Definitions, 45-8-332.

Possession of destructive device, 45-8-334.

Possession of explosives, 45-8-335.

When no penalty specified, 46-18-212.

Action in response to complaints related to use of explosives in mining, 82-4-356.

45-8-334. Possession of a destructive device. (1) A person who, with the purpose to commit a felony, has in his possession any destructive device on a public street or highway, in or near any theater, hall, school, college, church, hotel, other public building, or private habitation, in, on, or near any aircraft, railway passenger train, car, vessel engaged in carrying passengers for hire, or other public place ordinarily passed by human beings is guilty of the offense of possession of a destructive device.

(2) A person convicted of the offense of possession of a destructive device shall be imprisoned in the state prison for a period of not more than 10 years or be fined an amount of not more than $50,000, or both.

History: En. Sec. 2, Ch. 304, L. 1971; Sec. 69-1932, R.C.M. 1947; amd. and redes. 94-8-209.2 by Sec. 73, Ch. 359, L. 1977; R.C.M 1947, 94-8-209.2; amd. Sec. 7, Ch. 198, L. 1981.

Cross-References

Regulation of construction blasting, Title 37, ch. 72.

Felony defined, 45-2-101.

Person defined, 45-2-101.

Possession defined, 45-2-101.

Purpose defined, 45-2-101.

Destructive device defined, 45-8-332.

Reckless or malicious use of explosives, 45-8-333.

Possession of explosives, 45-8-335.

Possession prima facie evidence of unlawful purpose, 45-8-337.

Administrative rules governing use of explosives — Department of Justice, 50-3-102.

45-8-335. Possession of explosives. (1) A person commits the offense of possession of explosives if he possesses, manufactures, transports, buys, or sells an explosive compound, flammable material, or timing, detonating, or similar device for use with an explosive compound or incendiary device and:

(a) has the purpose to use such explosive, material, or device to commit an offense; or

(b) knows that another has the purpose to use such explosive, material, or device to commit an offense.

(2) A person convicted of the offense of possession of explosives shall be imprisoned in the state prison for any term not to exceed 20 years or be fined an amount not to exceed $50,000, or both.

History: En. 94-6-105 by Sec. 1, Ch. 513, L. 1973; Sec. 94-6-105, R.C.M. 1947; amd. and redes. 94-8-209.3 by Sec. 74, Ch. 359, L. 1977; R.C.M. 1947, 94-8-209.3; amd. Sec. 7, Ch. 198, L. 1981.

Cross-References

Regulation of construction blasting, Title 37, ch. 72.

Knowingly defined, 45-2-101.

Offense defined, 45-2-101.

Person defined, 45-2-101.

Possession defined, 45-2-101.
Purposely defined, 45-2-101.
When accountability exists, 45-2-302.
Definitions, 45-8-332.
Reckless or malicious use of explosives, 45-8-333.
Possession of destructive device, 45-8-334.
Possession prima facie evidence of unlawful purpose, 45-8-337.
Administrative rules governing use of explosives — Department of Justice, 50-3-102.

45-8-336. Possession of a silencer. (1) A person commits the offense of possession of a silencer if he possesses, manufactures, transports, buys, or sells a silencer and has the purpose to use it to commit an offense or knows that another person has such a purpose.

(2) A person convicted of the offense of possession of a silencer is punishable by imprisonment in the state prison for a term of not less than 5 years or more than 30 years or a fine of not less than $1,000 or more than $20,000 or by both such fine and imprisonment.

History: En. 94-8-209.4 by Sec. 75, Ch. 359, L. 1977; R.C.M. 1947, 94-8-209.4.

Cross-References
Knowingly defined, 45-2-101.
Offense defined, 45-2-101.
Person defined, 45-2-101.
Possession defined, 45-2-101.
Purposely defined, 45-2-101.
Possession prima facie evidence of unlawful purpose, 45-8-337.

45-8-337. Possession of unregistered silencer or of bomb or similar device prima facie evidence of unlawful purpose. Possession of a silencer that is not registered under federal law or of a bomb or similar device charged or filled with one or more explosives is prima facie evidence of a purpose to use the same to commit an offense.

History: En. 94-8-209.5 by Sec. 76, Ch. 359, L. 1977; R.C.M. 1947, 94-8-209.5; amd. Sec. 5, Ch. 466, L. 1999; amd. Sec. 5, Ch. 581, L. 1999.

Compiler's Comments
1999 Amendments — Composite Section: Chapters 466 and 581 after "Possession of a silencer" inserted "that is not registered under federal law". Amendments effective October 1, 1999.

Cross-References
Offense defined, 45-2-101.
Possession defined, 45-2-101.
Purpose defined, 45-2-101.
Definitions, 45-8-332.
Reckless or malicious use of explosives, 45-8-333.
Possession of destructive device, 45-8-334.
Possession of explosives, 45-8-335.

45-8-338 reserved.

45-8-339. Carrying firearms on train — penalty. (1) Except as authorized by the management of a railroad, it is unlawful for a person not authorized to carry a weapon in the course of his official duties to knowingly or purposely carry or transport firearms on a train in this state unless, prior to boarding, the person has delivered all firearms and ammunition, if any, to the operator of the train.

(2) A person violating this section shall be punished by a fine not exceeding $500 or imprisonment in the county jail for a period not exceeding 6 months, or both.

History: En. Sec. 1, Ch. 601, L. 1991.

45-8-340. Sawed-off firearm — penalty. (1) A person commits the offense of possession of a sawed-off firearm if he knowingly possesses a rifle or shotgun that when originally manufactured had a barrel length of:

(a) 16 inches or more and an overall length of 26 inches or more in the case of a rifle; or

(b) 18 inches or more and an overall length of 26 inches or more in the case of a shotgun; and

(c) the firearm has been modified in a manner so that the barrel length, overall length, or both, are less than specified in subsection (1)(a) or (1)(b).

(2) The barrel length is the distance from the muzzle to the rear-most point of the chamber.

(3) This section does not apply to firearms possessed:

(a) by a peace officer of this state or one of its political subdivisions;

(b) by an officer of the United States government authorized to carry weapons;

(c) by a person in actual service as a national guardsman;

(d) by a person called to the aid of one of the persons named in subsections (3)(a) through (3)(c);

(e) for educational or scientific purposes in which the firearms are incapable of being fired;

(f) by a person who has a valid federal tax stamp for the firearm, issued by the bureau of alcohol, tobacco, and firearms; or

(g) by a bona fide collector of firearms if the firearm is a muzzleloading, sawed-off firearm manufactured before 1900.

(4) A person convicted of the offense of possession of a sawed-off firearm must be fined not less than $200 or more than $500 or imprisoned in the county jail for not less than 5 days or more than 6 months, or both, upon a first conviction. If a person has one or more prior convictions under this section or one or more prior felony convictions under a law of this state, another state, or the United States, he must be fined an amount not to exceed $1,000 or imprisoned in the state prison for a term not to exceed 5 years, or both.

History: En. Sec. 1, Ch. 334, L. 1989.

Cross-References

Observance of right to keep and bear arms, 1-1-224.

Knowingly defined, 45-2-101.

Offense defined, 45-2-101.

Person defined, 45-2-101.

Possession defined, 45-2-101.

45-8-341. Purchase of rifle or shotgun in contiguous state by Montana resident. Residents of Montana may purchase any rifle or rifles and shotgun or shotguns in a state contiguous to Montana, provided that such residents conform to the applicable provisions of the federal Gun Control Act of 1968 and regulations thereunder, as administered by the United States secretary of the treasury, and provided further that such residents conform to the provisions of law applicable to such purchase in Montana and in the state in which the purchase is made.

History: En. Sec. 1, Ch. 87, L. 1969; Sec. 94-3578.1, R.C.M. 1947; redes. 94-8-219 by Sec. 29, Ch. 513, L. 1973; R.C.M. 1947, 94-8-219.

45-8-342. Purchase of rifle or shotgun in Montana by resident of contiguous state. Residents of a state contiguous to Montana may purchase any rifle or rifles and shotgun or shotguns in Montana, provided that such residents conform to the applicable provisions of the federal Gun Control Act of 1968 and regulations thereunder, as administered by the United States secretary of the treasury, and provided further that such residents conform to the provisions of law applicable to such purchase in Montana and in the state in which such persons reside.

History: En. Sec. 2, Ch. 87, L. 1969; Sec. 94-3578.2, R.C.M. 1947; redes. 94-8-220 by Sec. 29, Ch. 513, L. 1973; R.C.M. 1947, 94-8-220.

45-8-343. Firing firearms. (1) Except as provided in subsections (2) and (3), every person who willfully shoots or fires off a gun, pistol, or any other firearm within the limits of any town or city or of any private enclosure which contains a dwelling house is punishable by a fine not exceeding $25 or such greater fine or a term of imprisonment, or both, as the town or city may impose.

(2) Firearms may be discharged at an indoor or outdoor rifle, pistol, or shotgun shooting range located within the limits of a town or city or in a private dwelling if the shooting range is approved by the local governing body.

(3) Subsection (1) does not apply if the discharge of a firearm is justifiable under Title 45, chapter 3, part 1.

History: En. Secs. 1, 2, p. 46, Ex. L. 1873; re-en. Sec. 185, 4th Div. Rev. Stat. 1879; re-en. Sec. 228, 4th Div. Comp. Stat. 1887; amd. Sec. 1161, Pen. C. 1895; re-en. Sec. 8834, Rev. C. 1907; re-en. Sec. 11530, R.C.M. 1921; re-en. Sec. 11530, R.C.M. 1935; Sec. 94-3578, R.C.M. 1947; redes. 94-8-218 by Sec. 29, Ch. 513, L. 1973; amd. Sec. 39, Ch. 359, L. 1977; R.C.M. 1947, 94-8-218; amd. Sec. 1, Ch. 20, L. 1981; amd. Sec. 1, Ch. 618, L. 1983.

Cross-References

Excessive fines and cruel and unusual punishments prohibited, Art. II, sec. 22, Mont. Const.

Local government with self-government powers — limit on fixing misdemeanor penalty, 7-1-111.

Disorderly conduct, 45-8-101.

45-8-344. Use of firearms by children under fourteen prohibited — exceptions. It is unlawful for a parent, guardian, or other person having charge or custody of a minor child under the age of 14 years to permit the minor child to carry or use in public any firearms, except when the child is accompanied by a person having charge or custody of the child or under the supervision of a qualified firearms safety instructor or an adult who has been authorized by the parent or guardian.

History: En. Sec. 1, Ch. 111, L. 1907; Sec. 8879, Rev. C. 1907; re-en. Sec. 11565, R.C.M. 1921; re-en. Sec. 11565, R.C.M. 1935; Sec. 94-3579, R.C.M. 1947; amd. Sec. 1, Ch. 139, L. 1963; redes. 94-8-221 by Sec. 29, Ch. 513, L. 1973; amd. Sec. 40, Ch. 359, L. 1977; R.C.M. 1947, 94-8-221; amd. Sec. 1, Ch. 600, L. 1993.

Cross-References

Criminal liability of parent or guardian — prosecution, 45-8-345.

Safety instruction for resident hunters under 18 years of age, 87-2-105.

45-8-345. Criminal liability of parent or guardian — prosecution. (1) Any parent, guardian, or other person violating the provisions of 45-8-344 shall be guilty of a misdemeanor.

(2) The county attorney, on complaint of any person, must prosecute violations of 45-8-344.

History: En. Sec. 2, Ch. 111, L. 1907; Sec. 8880, Rev. C. 1907; re-en. Sec. 11566, R.C.M. 1921; re-en. Sec. 11566, R.C.M. 1935; Sec. 94-3580, R.C.M. 1947; redes. 94-8-222 by Sec. 29, Ch. 513, L. 1973; R.C.M. 1947, 94-8-222.

Cross-References

When accountability exists, 45-2-302.

When no penalty specified, 46-18-212.

45-8-346 through 45-8-350 reserved.

45-8-351. Restriction on local government regulation of firearms. (1) Except as provided in subsection (2), no county, city, town, consolidated local government, or other local government unit may prohibit, register, tax, license, or regulate the purchase, sale or other transfer (including delay in purchase, sale, or other transfer), ownership, possession, transportation, use, or unconcealed carrying of any weapon, including a rifle, shotgun, handgun, or concealed handgun.

(2) (a) For public safety purposes, a city or town may regulate the discharge of rifles, shotguns, and handguns. A county, city, town, consolidated local government, or other local government unit has power to prevent and suppress the carrying of concealed or unconcealed weapons to a public assembly, publicly owned building, park under its jurisdiction, or school, and the possession of firearms by convicted felons, adjudicated mental incompetents, illegal aliens, and minors.

(b) Nothing contained herein shall allow any government to prohibit the legitimate display of firearms at shows or other public occasions by collectors and others, nor shall anything contained herein prohibit the legitimate transportation of firearms through any jurisdiction, whether in airports or otherwise.

History: En. Sec. 1, Ch. 589, L. 1985; amd. Sec. 11, Ch. 759, L. 1991.

Cross-References

Observance of right to keep and bear arms, 1-1-224.

45-8-352 through 45-8-359 reserved.

45-8-360. Establishment of individual licensure. In consideration that the right to keep and bear arms is protected and reserved to the people in Article II, section 12, of the Montana constitution, a person who has not been convicted of a violent, felony crime and who is lawfully able to own or to possess a firearm under the Montana constitution is considered to be individually licensed and verified by the state of Montana within the meaning of the provisions regarding individual licensure and verification in the federal Gun-Free School Zones Act.

History: En. Sec. 1, Ch. 317, L. 1995; amd. Sec. 1, Ch. 29, L. 1997.

45-8-361. Possession or allowing possession of weapon in school building — exceptions — penalties — seizure and forfeiture or return authorized — definitions. (1) A person commits the offense of possession of a weapon in a school building if the person purposely and knowingly possesses, carries, or stores a weapon in a school building.

(2) A parent or guardian of a minor commits the offense of allowing possession of a weapon in a school building if the parent or guardian purposely and knowingly permits the minor to possess, carry, or store a weapon in a school building.

(3) (a) Subsection (1) does not apply to law enforcement personnel.

(b) The trustees of a district may grant persons and entities advance permission to possess, carry, or store a weapon in a school building.

(4) (a) A person convicted under this section shall be fined an amount not to exceed $500, imprisoned in the county jail for a term not to exceed 6 months,

or both. The court shall consider alternatives to incarceration that are available in the community.

(b) (i) A weapon in violation of this section may be seized and, upon conviction of the person possessing or permitting possession of the weapon, may be forfeited to the state or returned to the lawful owner.

(ii) If a weapon seized under the provisions of this section is subsequently determined to have been stolen or otherwise taken from the owner's possession without permission, the weapon must be returned to the lawful owner.

(5) As used in this section:

(a) "school building" means all buildings owned or leased by a local school district that are used for instruction or for student activities. The term does not include a home school provided for in 20-5-109.

(b) "weapon" means any type of firearm, a knife with a blade 4 or more inches in length, a sword, a straight razor, a throwing star, nun-chucks, or brass or other metal knuckles. The term also includes any other article or instrument possessed with the purpose to commit a criminal offense.

History: En. Sec. 1, Ch. 435, L. 1997; amd. Sec. 6, Ch. 581, L. 1999.

Compiler's Comments

1999 Amendment: Chapter 581 in definition of weapon inserted second sentence expanding term to include article or instrument possessed with purpose to commit a criminal offense. Amendment effective October 1, 1999.

Part 4

Montana Street Terrorism Enforcement and Prevention Act

45-8-401. Short title. This part may be cited as the "Montana Street Terrorism Enforcement and Prevention Act".

History: En. Sec. 1, Ch. 285, L. 1997.

45-8-402. Definitions. As used in this part, the following definitions apply:

(1) "Criminal street gang" means any ongoing organization, association, or group of three or more persons, whether formal or informal, having as one of its primary activities the commission of one or more of the criminal acts enumerated in 45-8-405, having a common name or common identifying sign or symbol, and whose members individually or collectively engage in or have engaged in a pattern of criminal street gang activity.

(2) "Pattern of criminal street gang activity" has the meaning provided in 45-8-405.

History: En. Sec. 2, Ch. 285, L. 1997.

45-8-403. Use of threat to coerce gang membership — use of violence to coerce gang membership. (1) A person commits the offense of use of threat to coerce criminal street gang membership if the person purposely or knowingly threatens a person under 18 years of age with physical violence on two or more separate occasions with the intent to coerce, induce, or solicit the minor to actively participate in any criminal street gang whose members engage in a pattern of criminal street gang activity.

(2) A person commits the offense of use of violence to coerce criminal street gang membership if the person purposely or knowingly uses physical violence

to coerce, induce, or solicit a person under 18 years of age to actively participate in any criminal street gang whose members engage in a pattern of criminal street gang activity.

(3) (a) A person convicted of the offense of use of threat to coerce criminal street gang membership shall be imprisoned in the county jail for a term not to exceed 1 year.

(b) A person convicted of the offense of use of violence to coerce criminal street gang membership shall be imprisoned in a state prison for a term not to exceed 3 years.

(4) A person who is 16 years of age or older and less than 18 years of age who is named in a petition filed in youth court alleging delinquency for the alleged commission of the offense of use of threat to coerce criminal street gang membership or the offense of use of violence to coerce criminal street gang membership is subject to transfer of the case to district court under 41-5-206 or, if the case is not transferred to district court under 41-5-206, to the provisions of Title 41, chapter 5.

(5) This section may not be construed to limit prosecution under any other provision of law.

(6) A person may not be convicted of violating this section based on speech alone, except on a showing that the speech itself threatened violence against a specific person, that the defendant had the apparent ability to carry out the threat, and that physical harm was imminently likely to occur.

History: En. Sec. 3, Ch. 285, L. 1997.

45-8-404. Additional sentence for criminal street gang-related felony. (1) (a) A person who is convicted of a felony that the person committed for the benefit of, at the direction of, or in association with any criminal street gang for the purpose of promoting, furthering, or assisting any criminal conduct by criminal street gang members shall, in addition to the punishment provided for the commission of the underlying offense, be sentenced to a term of imprisonment in a state prison of not less than 1 year or more than 3 years, except as provided in 46-18-222.

(b) If the underlying felony described in subsection (1)(a) is committed on the grounds of, or within 1,000 feet of, a public school, as defined in 20-6-501, during hours when the facility is open for classes or school-related programs or when minors are using the facility, the additional term provided for in subsection (1) is 2 to 4 years.

(2) The imposition or execution of the minimum sentences prescribed by this section may not be deferred or suspended, except as provided in 46-18-222.

(3) An additional sentence prescribed by this section shall run consecutively to the sentence provided for the underlying offense.

History: En. Sec. 4, Ch. 285, L. 1997.

45-8-405. Pattern of criminal street gang activity. (1) For purposes of this part, "pattern of criminal street gang activity" means the commission, solicitation, conspiracy, attempt; adjudication as a delinquent youth for the commission, attempt, or solicitation; or conviction of two or more of the offenses listed in subsection (2) within a 3-year period, and that the offenses were committed on separate occasions.

(2) The offenses that form a pattern of criminal street gang activity include:

(a) deliberate homicide, as defined in 45-5-102;
(b) assault with a weapon, as defined in 45-5-213;
(c) intimidation, as defined in 45-5-203;
(d) kidnapping, as defined in 45-5-302;
(e) aggravated kidnapping, as defined in 45-5-303;
(f) robbery, as defined in 45-5-401;
(g) sexual intercourse without consent, as defined in 45-5-503;
(h) aggravated promotion of prostitution, as defined in 45-5-603;
(i) criminal mischief, as defined in 45-6-101;
(j) arson, as defined in 45-6-103;
(k) burglary, as defined in 45-6-204;
(l) theft, as defined in 45-6-301;
(m) forgery, as defined in 45-6-325;
(n) tampering with witnesses and informants, as defined in 45-7-206;
(o) bringing armed men into the state, as defined in 45-8-106;
(p) unlawful possession of a firearm by a convicted person, as defined in 45-8-313;
(q) carrying a concealed weapon, as defined in 45-8-316;
(r) possession of a deadly weapon by a prisoner, as defined in 45-8-318;
(s) possession of a destructive device, as defined in 45-8-334;
(t) possession of explosives, as defined in 45-8-335;
(u) possession of a sawed-off firearm, as defined in 45-8-340;
(v) the sale, possession for sale, transportation, manufacture, offer for sale, offer to manufacture, or other offense involving a dangerous drug as prohibited by Title 45, chapter 9;
(w) use of threat to coerce criminal street gang membership or use of violence to coerce criminal street gang membership provided in 45-8-403.

History: En. Sec. 5, Ch. 285, L. 1997; amd. Sec. 10, Ch. 432, L. 1999.

Compiler's Comments

1999 Amendment: Chapter 432 substituted (2)(b) concerning assault with a weapon for "felony assault, as defined in 45-5-202". Amendment effective October 1, 1999.

45-8-406. Supplying of firearms to criminal street gang. (1) A person commits the offense of supplying firearms to a criminal street gang if the person purposely or knowingly supplies, sells, or gives possession or control of any firearm to another, and the person has actual knowledge that the other person will use the firearm to commit an offense enumerated in 45-8-405 while actively participating in any criminal street gang whose members engage in a pattern of criminal street gang activity.

(2) Subsection (1) does not apply to a person who is convicted as a principal to the offense committed by the person to whom the firearm was supplied, sold, or given.

(3) A person convicted of the offense of supplying firearms to a criminal street gang shall be imprisoned in the county jail for a term not to exceed 1 year or be fined an amount not to exceed $1,000, or both.

History: En. Sec. 6, Ch. 285, L. 1997.

45-8-407. Exceptions. This part does not apply to employees engaged in lawful concerted activities for their mutual aid and protection or to the lawful activities of labor organizations or their members or agents.

History: En. Sec. 7, Ch. 285, L. 1997.

45-8-408. Adoption of local regulations. This part does not prevent a local government from adopting and enforcing ordinances or resolutions consistent with this part relating to criminal street gangs and criminal street gang violence.

History: En. Sec. 8, Ch. 285, L. 1997.

CHAPTER 9

DANGEROUS DRUGS

Part 1 — Offenses Involving Dangerous Drugs

45-9-101. Criminal distribution of dangerous drugs.
45-9-102. Criminal possession of dangerous drugs.
45-9-103. Criminal possession with intent to distribute.
45-9-104. Fraudulently obtaining dangerous drugs.
45-9-105. Altering labels on dangerous drugs.
45-9-106. Penalty for fraudulently obtaining dangerous drugs or altering the labels of dangerous drugs.
45-9-107. Criminal possession of precursors to dangerous drugs.
45-9-108. Exemptions.
45-9-109. Criminal distribution of dangerous drugs on or near school property — penalty — affirmative defense.
45-9-110. Criminal production or manufacture of dangerous drugs.
45-9-111. Imitation dangerous drugs — definitions.
45-9-112. Criminal distribution of imitation dangerous drug — penalty.
45-9-113. Criminal possession of imitation dangerous drug with the purpose to distribute — penalty.
45-9-114. Criminal advertisement of imitation dangerous drug — penalty.
45-9-115. Criminal manufacture of imitation dangerous drug — penalty.
45-9-116. Imitation dangerous drugs — exemptions — rules.
45-9-117 through 45-9-120 reserved.
45-9-121. Criminal possession of toxic substances — penalty.
45-9-122 through 45-9-124 reserved.
45-9-125. Continuing criminal enterprise — penalty.
45-9-126 reserved.
45-9-127. Carrying dangerous drugs on train — penalty.
45-9-128 and 45-9-129 reserved.
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Chapter Cross-References
Controlled substances, Title 50, ch. 32.

Part 1

Offenses Involving Dangerous Drugs

Part Cross-References
Controlled substances, Title 50, ch. 32.

45-9-101. Criminal distribution of dangerous drugs. (1) A person commits the offense of criminal distribution of dangerous drugs if the person sells, barters, exchanges, gives away, or offers to sell, barter, exchange, or give away any dangerous drug, as defined in 50-32-101.

(2) A person convicted of criminal distribution of a narcotic drug, as defined in 50-32-101(18)(d), or an opiate, as defined in 50-32-101(19), shall be imprisoned in the state prison for a term of not less than 2 years or more than life and may be fined not more than $50,000, except as provided in 46-18-222.

(3) A person convicted of criminal distribution of a dangerous drug included in Schedule I or Schedule II pursuant to 50-32-222 or 50-32-224, except marijuana or tetrahydrocannabinol, who has a prior conviction for criminal distribution of such a drug shall be imprisoned in the state prison for a term of not less than 10 years or more than life and may be fined not more than $50,000, except as provided in 46-18-222. Upon a third or subsequent conviction for criminal distribution of such a drug, the person shall be imprisoned in the state prison for a term of not less than 20 years or more than life and may be fined not more than $50,000, except as provided in 46-18-222.

(4) A person convicted of criminal distribution of dangerous drugs not otherwise provided for in subsection (2), (3), or (5) shall be imprisoned in the state prison for a term of not less than 1 year or more than life or be fined an amount of not more than $50,000, or both.

(5) A person who was an adult at the time of distribution and who is convicted of criminal distribution of dangerous drugs to a minor shall be sentenced as follows:

(a) If convicted pursuant to subsection (2), the person shall be imprisoned in the state prison for not less than 4 years or more than life and may be fined not more than $50,000, except as provided in 46-18-222.

(b) If convicted of the distribution of a dangerous drug included in Schedule I or Schedule II pursuant to 50-32-222 or 50-32-224 and if previously convicted of such a distribution, the person shall be imprisoned in the state prison for not less than 20 years or more than life and may be fined not more than $50,000, except as provided in 46-18-222.

(c) If convicted of the distribution of a dangerous drug included in Schedule I or Schedule II pursuant to 50-32-222 or 50-32-224 and if previously convicted of two or more such distributions, the person shall be imprisoned in the state prison for not less than 40 years or more than life and may be fined not more than $50,000, except as provided in 46-18-222.

(d) If convicted pursuant to subsection (4), the person shall be imprisoned in the state prison for not less than 2 years or more than life and may be fined not more than $50,000, except as provided in 46-18-222.

(6) Practitioners and agents under their supervision acting in the course of a professional practice, as defined by 50-32-101, are exempt from this section.

History: En. Sec. 4, Ch. 314, L. 1969; amd. Sec. 1, Ch. 55, L. 1973; amd. Sec. 24, Ch. 412, L. 1973; amd. Sec. 1, Ch. 258, L. 1974; amd. Sec. 1, Ch. 359, L. 1977; amd. Sec. 1, Ch. 584, L. 1977; R.C.M. 1947, 54-132; amd. Sec. 1, Ch. 587, L. 1979; amd. Sec. 7, Ch. 198, L. 1981; amd. Sec. 9, Ch. 583, L. 1981; amd. Sec. 1, Ch. 393, L. 1983; amd. Sec. 16, Ch. 3, L. 1985; amd. Sec. 1, Ch. 478, L. 1987; amd. Sec. 1, Ch. 575, L. 1989; amd. Sec. 3, Ch. 448, L. 1993; amd. Sec. 11, Ch. 432, L. 1999.

Compiler's Comments

1999 Amendment: Chapter 432 throughout section substituted references to criminal distribution and distribution for references to criminal sale and sale. Amendment effective October 1, 1999.

Cross-References

Criminal jurisdiction of Justices' Courts, 3-10-303.

Offense defined, 45-2-101.

Limitation on deferral or suspension of sentence, 46-18-201.

Controlled substances, Title 50, ch. 32.

Dangerous drug defined, 50-32-101.

Marijuana defined, 50-32-101.

Opiate defined, 50-32-101.

45-9-102. Criminal possession of dangerous drugs. (1) A person commits the offense of criminal possession of dangerous drugs if he possesses any dangerous drug, as defined in 50-32-101.

(2) A person convicted of criminal possession of marijuana or its derivatives in an amount the aggregate weight of which does not exceed 60 grams of marijuana or 1 gram of hashish is, for the first offense, guilty of a misdemeanor and shall be punished by a fine of not less than $100 or more than $500 and by imprisonment in the county jail for not more than 6 months. The minimum fine must be imposed as a condition of a suspended or deferred sentence. A person convicted of a second or subsequent offense under this subsection is punishable by a fine not to exceed $1,000 or imprisonment in the county jail for a term not to exceed 1 year or in the state prison for a term not to exceed 3 years or both such fine and imprisonment.

(3) A person convicted of criminal possession of an anabolic steroid as listed in 50-32-226 is, for the first offense, guilty of a misdemeanor and shall be punished by a fine of not less than $100 or more than $500 or by imprisonment in the county jail for not more than 6 months, or both.

(4) A person convicted of criminal possession of an opiate, as defined in 50-32-101(19), shall be imprisoned in the state prison for a term of not less than 2 years or more than 5 years and may be fined not more than $50,000, except as provided in 46-18-222.

(5) A person convicted of criminal possession of dangerous drugs not otherwise provided for in subsection (2), (3), or (4) shall be imprisoned in the state prison for a term not to exceed 5 years or be fined an amount not to exceed $50,000, or both.

(6) A person of the age of 21 years or under convicted of a first violation under this section is presumed to be entitled to a deferred imposition of sentence of imprisonment.

(7) Ultimate users and practitioners and agents under their supervision acting in the course of a professional practice, as defined by 50-32-101, are exempt from this section.

History: En. Sec. 5, Ch. 314, L. 1969; amd. Sec. 1, Ch. 228, L. 1971; amd. Sec. 26, Ch. 412, L. 1973; amd. Sec. 1, Ch. 174, L. 1974; amd. Sec. 2, Ch. 359, L. 1977; amd. Sec. 2, Ch.

584, L. 1977; R.C.M. 1947, 54-133; amd. Sec. 7, Ch. 198, L. 1981; amd. Sec. 2, Ch. 612, L. 1983; amd. Sec. 17, Ch. 3, L. 1985; amd. Sec. 1, Ch. 42, L. 1991.

Cross-References

Knowingly defined, 45-2-101.

Offense defined, 45-2-101.

Possession defined, 45-2-101.

Alternative sentencing authority, 45-9-202.

Limitation on deferral or suspension of sentence, 46-18-201.

Dismissal after deferred imposition of sentence, 46-18-204.

Dangerous drug defined, 50-32-101.

Marijuana defined, 50-32-101.

Opiate defined, 50-32-101.

45-9-103. Criminal possession with intent to distribute. (1) A person commits the offense of criminal possession with intent to distribute if the person possesses with intent to distribute any dangerous drug as defined in 50-32-101.

(2) A person convicted of criminal possession of an opiate, as defined in 50-32-101(19), with intent to distribute shall be imprisoned in the state prison for a term of not less than 2 years or more than 20 years and may be fined not more than $50,000, except as provided in 46-18-222.

(3) A person convicted of criminal possession with intent to distribute not otherwise provided for in subsection (2) shall be imprisoned in the state prison for a term of not more than 20 years or be fined an amount not to exceed $50,000, or both.

(4) Practitioners and agents under their supervision acting in the course of a professional practice as defined by 50-32-101 are exempt from this section.

History: En. 54-133.1 by Sec. 1, Ch. 545, L. 1975; amd. Sec. 3, Ch. 584, L. 1977; R.C.M. 1947, 54-133.1; amd. Sec. 7, Ch. 198, L. 1981; amd. Sec. 18, Ch. 3, L. 1985; amd. Sec. 1, Ch. 162, L. 1987; amd. Sec. 12, Ch. 432, L. 1999.

Compiler's Comments

1999 Amendment: Chapter 432 throughout section substituted "intent to distribute" for "intent to sell"; and made minor changes in style. Amendment effective October 1, 1999.

Cross-References

Knowingly defined, 45-2-101.

Offense defined, 45-2-101.

Possession defined, 45-2-101.

Limitation on deferral or suspension of sentence, 46-18-201.

Controlled substances, Title 50, ch. 32.

Dangerous drug defined, 50-32-101.

Marijuana defined, 50-32-101.

Opiate defined, 50-32-101.

45-9-104. Fraudulently obtaining dangerous drugs. A person commits the offense of fraudulently obtaining dangerous drugs if he obtains or attempts to obtain a dangerous drug, as defined in 50-32-101, by:

(1) fraud, deceit, misrepresentation, or subterfuge;

(2) falsely assuming the title of or representing himself to be a manufacturer, wholesaler, practitioner, pharmacist, owner of a pharmacy, or other person authorized to possess dangerous drugs;

(3) the use of a forged, altered, or fictitious prescription;

(4) the use of a false name or a false address on a prescription; or

(5) the concealment of a material fact.

History: En. Sec. 6, Ch. 314, L. 1969; amd. Sec. 3, Ch. 359, L. 1977; R.C.M. 1947, 54-134.

Cross-References

Obtain defined, 45-2-101.

Offense defined, 45-2-101.

Penalty for fraudulently obtaining dangerous drugs or altering labels of dangerous drugs, 45-9-106.

Controlled substances, Title 50, ch. 32.

Dangerous drug defined, 50-32-101.

45-9-105. Altering labels on dangerous drugs. A person commits the offense of altering labels on dangerous drugs if he affixes a false, forged, or altered label to or otherwise misrepresents a package or receptacle containing a dangerous drug, as defined in 50-32-101.

History: En. Sec. 7, Ch. 314, L. 1969; amd. Sec. 4, Ch. 359, L. 1977; R.C.M. 1947, 54-135.

Cross-References

Offense defined, 45-2-101.

Penalty for fraudulently obtaining dangerous drugs or altering labels of dangerous drugs, 45-9-106.

Controlled substances, Title 50, ch. 32.

Dangerous drug defined, 50-32-101.

45-9-106. Penalty for fraudulently obtaining dangerous drugs or altering the labels of dangerous drugs. (1) A person convicted of altering labels on dangerous drugs shall be imprisoned in the county jail for a term not to exceed 6 months.

(2) A person convicted of fraudulently obtaining dangerous drugs included in Schedule I, Schedule II, Schedule III, Schedule IV, or Schedule V in 50-32-222, 50-32-224, 50-32-226, 50-32-229, or 50-32-232 shall:

(a) upon his first conviction be imprisoned in the state prison for a term of not less than 1 year or not more than 5 years or fined an amount not to exceed $50,000, or both;

(b) upon his second conviction be imprisoned in the state prison for a term of not less than 5 years or not more than 10 years or fined an amount not to exceed $50,000, or both.

History: En. Sec. 8, Ch. 314, L. 1969; R.C.M. 1947, 54-136; amd. Sec. 1, Ch. 389, L. 1981; amd. Sec. 1, Ch. 179, L. 1991.

Cross-References

Fraudulently obtaining dangerous drugs, 45-9-104.

Altering labels on dangerous drugs, 45-9-105.

45-9-107. Criminal possession of precursors to dangerous drugs. (1) A person commits the offense of criminal possession of precursors to dangerous drugs if the person possesses any material, compound, mixture, or preparation that contains any combination of the following with intent to manufacture dangerous drugs:

(a) phenyl-2-propanone (phenylacetone);

(b) piperidine in conjunction with cyclohexanone;

(c) ephedrine;

(d) lead acetate;

(e) methylamine;

(f) methylformamide;

(g) n-methylephedrine;

(h) phenylpropanolamine;

(i) pseudoephedrine;

(j) anhydrous ammonia;

(k) hydriodic acid;

(l) red phosphorus;

(m) iodine in conjunction with ephedrine, pseudoephedrine, or red phosphorus;

(n) lithium in conjunction with anhydrous ammonia.

(2) A person convicted of criminal possession of precursors to dangerous drugs shall be imprisoned in the state prison for a term not less than 2 years or more than 20 years or be fined an amount not to exceed $50,000, or both.

History: En. Sec. 1, Ch. 291, L. 1979; amd. Sec. 7, Ch. 198, L. 1981; amd. Sec. 1, Ch. 202, L. 1989; amd. Sec. 1, Ch. 24, L. 1999.

Compiler's Comments

1999 Amendment: Chapter 24 in (1) after "possesses" inserted "any material, compound, mixture, or preparation that contains any combination of the following with intent to manufacture dangerous drugs"; in (1)(a) after "(phenylacetone)" deleted "with the intent to manufacture amphetamine or methamphetamine, or both"; in (1)(b) after "cyclohexanone" deleted "at the same time, or a combination product thereof, with the intent to manufacture phencyclidine (PCP)"; inserted (1)(c) through (1)(n) listing additional precursors to dangerous drugs; and made minor changes in style. Amendment effective October 1, 1999.

Cross-References

Possession defined, 45-2-101.

Exemptions, 45-9-108.

Dangerous drug defined, 50-32-101.

45-9-108. Exemptions. (1) The provisions of 45-9-107 do not apply to:

(a) a drug manufacturer licensed by the state;

(b) a person authorized by rules adopted by the board of pharmacy to possess the combination of substances;

(c) a person employed by or enrolled as a student in a college or university within the state who possesses any combination of substances listed in 45-9-107 for the purposes of teaching or research which is authorized by the college or university.

(2) The board of pharmacy shall adopt, amend, or repeal rules in accordance with the Montana Administrative Procedure Act to authorize the processing of any combination of the substances listed in 45-9-107 whenever it determines that there is a legitimate need and that the substances will be used for a lawful purpose.

History: En. Secs. 2, 3, Ch. 291, L. 1979; amd. Sec. 171, Ch. 575, L. 1981; amd. Sec. 1, Ch. 247, L. 1983.

Cross-References

Montana Administrative Procedure Act, Title 2, ch. 4.

Criminal possession of precursors to dangerous drugs, 45-9-107.

45-9-109. Criminal distribution of dangerous drugs on or near school property — penalty — affirmative defense. (1) A person commits the offense of criminal distribution of dangerous drugs on or near school property if the person violates 45-9-101 in, on, or within 1,000 feet of the real property comprising a public or private elementary or secondary school.

(2) Except as provided in 46-18-222, a person convicted of criminal distribution of dangerous drugs on or near school property:

(a) shall be imprisoned in the state prison for a term of not less than 3 years or more than life; and

(b) may be fined an amount of not more than $50,000.

(3) It is not a defense to prosecution under subsection (1) that the person did not know the distance involved.

(4) It is an affirmative defense to prosecution for a violation of this section that:

(a) the prohibited conduct took place entirely within a private residence; and

(b) no person 17 years of age or younger was present in the private residence at any time during the commission of the offense.

History: En. Sec. 1, Ch. 519, L. 1991; amd. Sec. 13, Ch. 432, L. 1999.

Compiler's Comments

1999 Amendment: Chapter 432 in (1) and (2) substituted "criminal distribution" for "criminal sale"; and made minor changes in style. Amendment effective October 1, 1999.

45-9-110. Criminal production or manufacture of dangerous drugs. (1) A person commits the offense of criminal production or manufacture of dangerous drugs if the person knowingly or purposely produces, manufactures, prepares, cultivates, compounds, or processes a dangerous drug, as defined in 50-32-101.

(2) A person convicted of criminal production or manufacture of a narcotic drug, as defined in 50-32-101(18)(d), or an opiate, as defined in 50-32-101(19), shall be imprisoned in the state prison for a term of not less than 5 years or more than life and may be fined not more than $50,000, except as provided in 46-18-222.

(3) A person convicted of criminal production or manufacture of a dangerous drug included in Schedule I of 50-32-222 or Schedule II of 50-32-224, except marijuana or tetrahydrocannabinol, who has a prior conviction that has become final for criminal production or manufacture of a Schedule I or Schedule II drug shall be imprisoned in the state prison for a term of not less than 20 years or more than life and may be fined not more than $50,000, except as provided in 46-18-222. Upon a third or subsequent conviction that has become final for criminal production or manufacture of a Schedule I or Schedule II drug, the person shall be imprisoned in the state prison for a term of not less than 40 years or more than life and may be fined not more than $50,000, except as provided in 46-18-222.

(4) A person convicted of criminal production or manufacture of marijuana, tetrahydrocannabinol, or a dangerous drug not referred to in subsections (2) and (3) shall be imprisoned in the state prison for a term not to exceed 10 years and may be fined not more than $50,000, except that if the dangerous drug is marijuana and the total weight is more than a pound or the number of plants is more than 30, the person shall be imprisoned in the state prison for not less than 2 years or more than life and may be fined not more than $50,000. "Weight" means the weight of the dry plant and includes the leaves and stem structure but does not include the root structure. A person convicted under this subsection who has a prior conviction that has become final for criminal production or manufacture of a drug under this subsection shall be imprisoned in the state prison for a term not to exceed twice that authorized for a first offense under this subsection and may be fined not more than $100,000.

(5) Practitioners and agents under their supervision acting in the course of a professional practice, as defined in 50-32-101, are exempt from this section.

History: En. Sec. 1, Ch. 448, L. 1993.

45-9-111. Imitation dangerous drugs — definitions. As used in 45-9-111 through 45-9-116 and 45-9-202, the following definitions apply:

(1) "Dangerous drug" has the meaning given to that term in 50-32-101.

(2) "Imitation dangerous drug" means a substance that is not a dangerous drug but that is expressly or impliedly represented to be a dangerous drug or

to simulate the effect of a dangerous drug and the appearance of which, including the color, shape, size, and markings, would lead a reasonable person to believe that the substance is a dangerous drug.

(3) "Person" includes any individual, business association, partnership, or corporation.

History: En. Sec. 1, Ch. 451, L. 1983; amd. Sec. 19, Ch. 3, L. 1985.

45-9-112. Criminal distribution of imitation dangerous drug — penalty. (1) A person commits the offense of criminal distribution of an imitation dangerous drug if the person knowingly or purposely sells, barters, exchanges, gives away, or offers to sell, barter, exchange, or give away any imitation dangerous drug.

(2) A person convicted of criminal distribution of an imitation dangerous drug to a person 18 years of age or older shall be imprisoned in the state prison for a term of not more than 5 years and may be fined not more than $50,000.

(3) A person convicted of criminal distribution of an imitation dangerous drug to a person under the age of 18 shall be imprisoned in the state prison for a term of not more than 10 years and may be fined not more than $50,000.

History: En. Sec. 2, Ch. 451, L. 1983; amd. Sec. 14, Ch. 432, L. 1999.

Compiler's Comments

1999 Amendment: Chapter 432 throughout section substituted "criminal distribution" for "criminal sale"; and made minor changes in style. Amendment effective October 1, 1999.

45-9-113. Criminal possession of imitation dangerous drug with the purpose to distribute — penalty. (1) A person commits the offense of criminal possession of an imitation dangerous drug with the purpose to distribute if the person possesses with the purpose to distribute any imitation dangerous drug.

(2) A person convicted of criminal possession of an imitation dangerous drug with the purpose to distribute shall be imprisoned in the state prison for a term of not more than 5 years and may be fined not more than $50,000.

(3) A person under 18 years of age convicted of a first violation under this section is presumed to be entitled to a deferred imposition of sentence.

History: En. Sec. 3, Ch. 451, L. 1983; amd. Sec. 15, Ch. 432, L. 1999.

Compiler's Comments

1999 Amendment: Chapter 432 in two places in (1) and in (2) substituted "purpose to distribute" for "purpose to sell"; and made minor changes in style. Amendment effective October 1, 1999.

45-9-114. Criminal advertisement of imitation dangerous drug — penalty. (1) A person commits the offense of criminal advertisement of an imitation dangerous drug if he knowingly or purposely places in any newspaper, magazine, handbill, or other publication or posts or distributes any advertisement or solicitation to promote the manufacture, sale, exchange, or distribution of an imitation dangerous drug.

(2) A person convicted of criminal advertisement of an imitation dangerous drug under this section is punishable by a fine not to exceed $100,000 or by imprisonment in the state prison for a term of not more than 10 years or by both such fine and imprisonment.

History: En. Sec. 4, Ch. 451, L. 1983.

45-9-115. Criminal manufacture of imitation dangerous drug — penalty. (1) A person commits the offense of criminal manufacture of an imitation dangerous drug if he knowingly or purposely manufactures, prepares, or cultivates any imitation dangerous drug.

(2) A person convicted of criminal manufacture of an imitation dangerous drug under this section is punishable by a fine not to exceed $100,000 or by imprisonment in the state prison for a term of not more than 10 years or by both such fine and imprisonment.

History: En. Sec. 5, Ch. 451, L. 1983.

45-9-116. Imitation dangerous drugs — exemptions — rules. (1) Sections 45-9-111 through 45-9-115 do not apply to:

(a) a person authorized by rules adopted by the board of pharmacy to possess with purpose to sell or sell imitation dangerous drugs;

(b) law enforcement personnel selling or possessing with purpose to sell imitation dangerous drugs while acting within the scope of their employment; and

(c) a person registered under the provisions of Title 50, chapter 32, part 3, who sells, or possesses with purpose to sell an imitation dangerous drug for use as a placebo, by that person or any other person so registered, in the course of professional practice or research.

(2) The board of pharmacy shall adopt, amend, or repeal rules in accordance with the Montana Administrative Procedure Act to authorize the possession with purpose to sell or sale of imitation dangerous drugs whenever it determines that there is a legitimate need and that the drugs will be used for a lawful purpose.

History: En. Sec. 6, Ch. 451, L. 1983; amd. Sec. 1, Ch. 247, L. 1983; amd. Sec. 20, Ch. 3, L. 1985.

45-9-117 through 45-9-120 reserved.

45-9-121. Criminal possession of toxic substances — penalty. (1) A person commits the offense of criminal possession of a toxic substance if he inhales or ingests or possesses with the purpose to inhale or ingest, for the purpose of altering his mental or physical state, any substance with toxic effects that is not manufactured for human consumption or inhalation, including but not limited to glue, fingernail polish, paint and paint thinners, petroleum products, aerosol propellants, and chemical solvents.

(2) The provisions of subsection (1) do not apply to a bona fide institution of higher education conducting research with human volunteers pursuant to guidelines adopted by the institution or any federal or state agency.

(3) A person convicted under this section shall be imprisoned in the county jail for a term not to exceed 6 months or be fined an amount not to exceed $500, or both.

(4) The youth court has jurisdiction of any violation of subsection (1) by a person under 18 years of age.

History: En. Sec. 1, Ch. 482, L. 1983.

45-9-122 through 45-9-124 reserved.

45-9-125. Continuing criminal enterprise — penalty. (1) A person who engages in a continuing criminal enterprise is guilty of a crime and upon conviction is punishable by a term of imprisonment and a fine not exceeding two times those authorized for the underlying offense. For purposes of this subsection, a person is engaged in a continuing criminal enterprise if:

(a) the person violates any provision of this chapter that is a felony; and

(b) the violation is a part of a continuing series of two or more violations of this chapter on separate occasions:

(i) that are undertaken by the person in concert with five or more other persons with respect to whom the person occupies a position of organizer, supervisor, or any other position of management; and

(ii) from which the person obtained substantial income or resources.

(2) A person who violates the provisions of subsection (1) after a previous judgment of conviction under that subsection has become final is punishable by a term of imprisonment not exceeding three times that authorized for the underlying offense.

(3) A sentence for a conviction under this section runs consecutively with the conviction for the underlying offense. Mandatory minimum sentences must be multiplied as provided in this section and may not be waived or suspended.

History: En. Sec. 1, Ch. 113, L. 1991.

45-9-126 reserved.

45-9-127. Carrying dangerous drugs on train — penalty. (1) A person commits the offense of carrying dangerous drugs on a train in this state if he is knowingly or purposely in criminal possession of a dangerous drug and boards any train.

(2) A person convicted of carrying dangerous drugs on a train in this state is subject to the penalties provided in 45-9-102.

History: En. Secs. 2, 3, Ch. 601, L. 1991.

45-9-128 and 45-9-129 reserved.

45-9-130. Mandatory fine for possession and storage of dangerous drugs — disposition of proceeds. (1) In addition to the punishments and fines set forth in this part, the court shall fine each person found to have possessed or stored dangerous drugs 35% of the market value of the drugs as determined by the court.

(2) The fines collected pursuant to subsection (1) during each calendar year must be transmitted by the clerk of court to the state treasurer no later than 10 days following the end of the calendar year. The state treasurer shall deposit the fines in the state general fund.

History: En. Sec. 1, Ch. 446, L. 1995.

Part 2

Procedural Provisions

45-9-201. Repealed. Sec. 3, Ch. 612, L. 1983.

History: En. Sec. 10, Ch. 314, L. 1969; amd. Sec. 6, Ch. 359, L. 1977; R.C.M. 1947, 54-138.

45-9-202. Alternative sentencing authority. (1) A person convicted of a dangerous drug felony offense under this chapter may, in lieu of imprisonment, be sentenced according to the alternatives provided in subsection (2).

(2) If the court determines, either from the face of the record or from a presentence investigation and report, that incarceration of the defendant is not appropriate, the court may, as a condition of a suspended or deferred sentence, impose one or more of the following alternatives:

(a) imposition of a fine not to exceed the maximum amount provided by statute for those offenses that specify a fine as part of the penalty or $1,000 for those offenses that do not specify a fine;

(b) commitment to a residential drug treatment facility licensed and approved by the state for rehabilitative treatment for not less than the minimum recommended time determined necessary by the facility and not more than 1 year;

(c) mandatory service of not more than 2,000 hours in a community-based drug treatment or drug education program with compliance to be monitored by the probation and parole bureau of the department of corrections based upon information provided by the treatment or education program;

(d) if recommended by the probation and parole bureau, placement in a program of intensive probation that requires, at a minimum, that the defendant comply with all of the following conditions:

(i) maintain employment or full-time student status at an approved school, making progress satisfactory to the probation officer, or be involved in supervised job searches and community service work designated by the probation officer;

(ii) pay probation supervision fees through the clerk of the district court of not less than $50 per month to be deposited in an account in the state special revenue fund to the credit of the department of corrections;

(iii) find a place to reside approved by the probation officer that may not be changed without the officer's approval;

(iv) remain at the residence at all times except to go to work, to attend school, or to perform community service or as otherwise specifically allowed by the probation officer;

(v) remain drug free and submit to drug and alcohol tests administered randomly not less than once each month by or under supervision of the probation officer;

(vi) perform not less than 10 hours of community service each month as approved by the probation officer, except that full-time students may be exempted or required to perform fewer hours of community service;

(vii) enroll or make satisfactory effort to seek enrollment in an approved drug rehabilitation program; and

(viii) comply with any other conditions imposed by the court to meet the needs of the community and the defendant;

(e) suspension or revocation of the defendant's driver's license issued under Title 61, chapter 5, subject to the following terms and conditions:

(i) upon the first conviction of an offense under this chapter, the driver's license must be suspended for 6 months;

(ii) upon the second conviction, the driver's license must be revoked for 1 year;

(iii) upon a third or subsequent conviction, the driver's license must be revoked for 3 years.

History: **En. Sec. 9, Ch. 314, L. 1969; amd. Sec. 5, Ch. 359, L. 1977; R.C.M. 1947, 54-137; amd. Sec. 7, Ch. 451, L. 1983; amd. Sec. 1, Ch. 262, L. 1991; amd. Sec. 1, Ch. 802, L. 1991; amd. Sec. 202, Ch. 546, L. 1995.**

Cross-References

Criminal possession of dangerous drugs, 45-9-102.

Fraudulently obtaining dangerous drugs, 45-9-104.

Altering labels on dangerous drugs, 45-9-105.

Criminal sale, or possession with purpose to sell, of imitation dangerous drug, 45-9-112, 45-9-113.

45-9-203. Surrender of license. If a court suspends or revokes a driver's license under 45-9-202(2)(e), the defendant shall, at the time of sentencing, surrender the license to the court. The court shall forward the license and a copy of the sentencing order to the department of justice. The defendant may apply to the department for issuance of a probationary license under 61-2-302.

History: **En. Sec. 2, Ch. 802, L. 1991.**

Cross-References

Alternative sentencing authority, 45-9-202.

45-9-204. Immunity from liability. (1) Except as provided in subsections (2) and (3), if a court imposes mandatory service under 45-9-202(2)(c) or community service under 45-9-202(2)(d), a public or private agency supervising the service, treatment, or education program in which the defendant is participating and the officers, agents, and employees of the public or private agency are immune from liability to the defendant for any acts or omissions alleged to have occurred within the course and scope of supervision.

(2) The immunity provided in subsection (1) does not extend to acts or omissions alleged to constitute gross negligence or intentional acts.

(3) The immunity provided in subsection (1) for a public agency does not extend to claims for workers' compensation benefits when the defendant is injured while performing community service.

History: **En. Sec. 3, Ch. 802, L. 1991.**

Cross-References

Alternative sentencing authority, 45-9-202.

45-9-205. Exemption from mandatory minimum sentences. If a sentencing judge imposes any of the sentencing alternatives specified in 45-9-202, the mandatory minimum sentences provided in 46-18-205(2) do not apply.

History: **En. Sec. 4, Ch. 802, L. 1991; amd. Sec. 4, Ch. 125, L. 1995; amd. Sec. 1, Ch. 52, L. 1999.**

Compiler's Comments

1999 Amendment: Chapter 52 near beginning substituted "sentencing judge" for "court" and near end substituted "46-18-205(2)" for "46-18-201(5)". Amendment effective October 1, 1999.

Cross-References

Alternative sentencing authority, 45-9-202.

45-9-206. Use or possession of property subject to criminal forfeiture — property subject to criminal forfeiture. (1) A person commits the offense of use or possession of property subject to criminal forfeiture if the person knowingly possesses, owns, uses, or attempts to use property that is subject to criminal forfeiture under this section. A person convicted of the offense of use or possession of property subject to criminal forfeiture shall be imprisoned in the state prison for a term not to exceed 10 years. Upon conviction, the property subject to criminal forfeiture is forfeited to the state and must be disposed of in accordance with the provisions of 44-12-205 and 44-12-206.

(2) The following property is subject to criminal forfeiture under this section:

(a) money, raw materials, products, equipment, and other property of any kind that is used or intended for use in manufacturing, preparing, cultivating, compounding, processing, delivering, importing, or exporting a dangerous drug in violation of 45-9-101, 45-9-103, or 45-9-110 or of 45-4-102 when the object of the conspiracy was a violation of 45-9-101, 45-9-103, or 45-9-110;

(b) property used or intended for use as a container for property enumerated in subsection (2)(a);

(c) except as provided in subsection (3), a conveyance, including an aircraft, vehicle, or vessel, used or intended for use to facilitate a violation of 45-9-101, 45-9-103, or 45-9-110 or of 45-4-102 when the object of the conspiracy was a violation of 45-9-101, 45-9-103, or 45-9-110;

(d) books, records, research products and materials, formulas, microfilm, tapes, and data used or intended for use in connection with a violation of 45-9-101, 45-9-103, or 45-9-110 or of 45-4-102 when the object of the conspiracy was a violation of 45-9-101, 45-9-103, or 45-9-110;

(e) (i) everything of value furnished or intended to be furnished in exchange for a dangerous drug in violation of 45-9-101, 45-9-103, or 45-9-110 or of 45-4-102 when the object of the conspiracy was a violation of 45-9-101, 45-9-103, or 45-9-110; and

(ii) all proceeds traceable to such an exchange;

(f) money, negotiable instruments, securities, and weapons used or intended to be used to facilitate a violation of 45-9-101, 45-9-103, or 45-9-110 or of 45-4-102 when the object of the conspiracy was a violation of 45-9-101, 45-9-103, or 45-9-110;

(g) personal property constituting or derived from proceeds obtained directly or indirectly from a violation of 45-9-101, 45-9-103, or 45-9-110 or of 45-4-102 when the object of the conspiracy was a violation of 45-9-101, 45-9-103, or 45-9-110; and

(h) real property, including any right, title, and interest in a lot or tract of land and any appurtenances or improvements, that is directly used or intended to be used in any manner to facilitate a violation of or that is derived from or maintained by proceeds resulting from a violation of 45-9-101, 45-9-103, or 45-9-110 or of 45-4-102 when the object of the conspiracy was a violation of 45-9-101, 45-9-103, or 45-9-110. An owner's interest in real property is not subject to criminal forfeiture by reason of an act or omission unless it is proved that the act or omission was the owner's or was with the owner's express consent.

(3) A conveyance is not subject to criminal forfeiture under this section unless the owner or other person in charge of the conveyance knowingly used the conveyance to violate or knowingly consented to its use for the purpose of violating 45-9-101, 45-9-103, or 45-9-110 or of 45-4-102 when the object of the conspiracy was a violation of 45-9-101, 45-9-103, or 45-9-110.

(4) Criminal forfeiture under this section of property that is encumbered by a bona fide security interest is subject to that interest if the secured party did not use or consent to the use of the property in connection with a violation of 45-9-101, 45-9-103, or 45-9-110 or of 45-4-102 when the object of the conspiracy was a violation of 45-9-101, 45-9-103, or 45-9-110.

(5) Property subject to criminal forfeiture under this section may be seized under the following circumstances:

(a) A peace officer who has probable cause to make an arrest for a violation of 45-9-101, 45-9-103, or 45-9-110 or of 45-4-102 when the object of the conspiracy was a violation of 45-9-101, 45-9-103, or 45-9-110 may seize a conveyance obtained with proceeds of the violation or used to facilitate the violation and shall immediately deliver the conveyance to the peace officer's law enforcement agency, to be held as evidence until a criminal forfeiture is declared or release ordered.

(b) Property subject to criminal forfeiture under this section may be seized by a peace officer under a search warrant issued by a court having jurisdiction over the property.

(c) Seizure without a warrant may be made if:

(i) the seizure is incident to an arrest or a search under a search warrant issued for another purpose or an inspection under an administrative inspection warrant;

(ii) the property was the subject of a prior judgment in favor of the state in a criminal proceeding or a criminal forfeiture proceeding based on this section or on Title 44, chapter 12;

(iii) a peace officer has probable cause to believe that the property is directly or indirectly dangerous to health or safety; or

(iv) a peace officer has probable cause to believe that the property was used or is intended to be used in violation of 45-9-101, 45-9-103, or 45-9-110 or of 45-4-102 when the object of the conspiracy is a violation of 45-9-101, 45-9-103, or 45-9-110.

(6) As used in this section, "dangerous drug" means a substance designated as a dangerous drug under Title 50, chapter 32, parts 1 and 2.

(7) A prosecution under subsection (1) must be commenced within 45 days of the seizure of the property involved.

History: En. Sec. 1, Ch. 537, L. 1995.

45-9-207 reserved.

45-9-208. Mandatory dangerous drug information course. A person who is convicted of an offense under this chapter and given a sentence that makes the offense a misdemeanor, as defined in 45-2-101, shall, in addition to any other sentence imposed, be sentenced to complete a dangerous drug information course offered by a chemical dependency facility approved by the department of public health and human services under 53-24-208. The sentencing judge may include in the sentencing order a condition that the person shall undergo chemical dependency treatment if a certified chemical dependency counselor working with the person recommends treatment.

History: En. Sec. 1, Ch. 50, L. 1995; amd. Sec. 196, Ch. 42, L. 1997.

CHAPTER 10

MODEL DRUG PARAPHERNALIA ACT

Part 1 — General Provisions

45-10-101. Definitions.
45-10-102. Determination of what constitutes paraphernalia.
45-10-103. Criminal possession of drug paraphernalia.
45-10-104. Manufacture or delivery of drug paraphernalia.
45-10-105. Delivery of drug paraphernalia to a minor.
45-10-106. Advertisement of drug paraphernalia.
45-10-107. Exemptions.
45-10-108. Mandatory dangerous drug information course.

Part 1

General Provisions

Part Cross-References

Destruction or appropriation of physical evidence in criminal cases, 46-5-306 through 46-5-309.

45-10-101. Definitions. (1) As used in this part, the term "drug paraphernalia" means all equipment, products, and materials of any kind that are used, intended for use, or designed for use in planting, propagating, cultivating, growing, harvesting, manufacturing, compounding, converting, producing, processing, preparing, testing, analyzing, packaging, repackaging, storing, containing, concealing, injecting, ingesting, inhaling, or otherwise introducing into the human body a dangerous drug. It includes but is not limited to:

(a) kits used, intended for use, or designed for use in planting, propagating, cultivating, growing, or harvesting of any species of plant that is a dangerous drug or from which a dangerous drug can be derived;

(b) kits used, intended for use, or designed for use in manufacturing, compounding, converting, producing, processing, or preparing dangerous drugs;

(c) isomerization devices used, intended for use, or designed for use in increasing the potency of any species of plant that is a dangerous drug;

(d) testing equipment used, intended for use, or designed for use in identifying or in analyzing the strength, effectiveness, or purity of dangerous drugs;

(e) scales and balances used, intended for use, or designed for use in weighing or measuring dangerous drugs;

(f) dilutents and adulterants, such as quinine hydrochloride, mannitol, mannite, dextrose, and lactose, used, intended for use, or designed for use in cutting dangerous drugs;

(g) separation gins and sifters used, intended for use, or designed for use in removing twigs and seeds from or in otherwise cleaning or refining marijuana;

(h) blenders, bowls, containers, spoons, and mixing devices used, intended for use, or designed for use in compounding dangerous drugs;

(i) capsules, balloons, envelopes, and other containers used, intended for use, or designed for use in packaging small quantities of dangerous drugs;

(j) containers and other objects used, intended for use, or designed for use in storing or concealing dangerous drugs;

(k) objects used, intended for use, or designed for use in ingesting, inhaling, or otherwise introducing marijuana, cocaine, hashish, hashish oil, or other dangerous drug as defined by 50-32-101 into the human body, such as:

(i) metal, wooden, acrylic, glass, stone, plastic, or ceramic pipes with or without screens, permanent screens, hashish heads, or punctured metal bowls;

(ii) water pipes;

(iii) carburetion tubes and devices;

(iv) smoking and carburetion masks;

(v) roach clips, meaning objects used to hold burning material, such as a marijuana cigarette, that has become too small or too short to be held in the hand;

(vi) miniature cocaine spoons and cocaine vials;

(vii) chamber pipes;

(viii) carburetor pipes;

(ix) electric pipes;

(x) air-driven pipes;

(xi) chillums;

(xii) bongs;

(xiii) ice pipes or chillers.

(2) Words or phrases used in this part that are not defined by this section have the meaning given to them by the definitions contained in 50-32-101 unless the usage clearly indicates a different intent.

History: En. Sec. 1, Ch. 481, L. 1981.

45-10-102. Determination of what constitutes paraphernalia. In determining whether an object is drug paraphernalia, a court or other authority should consider, in addition to all other logically relevant factors, the following:

(1) statements by an owner or by anyone in control of the object concerning its use;

(2) prior convictions, if any, of an owner or of anyone in control of the object, under any state or federal law relating to any controlled substance or dangerous drug;

(3) the proximity of the object, in time and space, to a direct violation of this part;

(4) the proximity of the object to dangerous drugs;

(5) the existence of any residue of dangerous drugs on the object;

(6) direct or circumstantial evidence of the intent of an owner or of anyone in control of the object to deliver it to persons whom he knows, or should reasonably know, intend to use the object to facilitate a violation of 45-10-103 through 45-10-106. The innocence of an owner or of anyone in control of the object as to a direct violation of 45-10-103 through 45-10-106 does not prevent a finding that the object is intended for use or designed for use as drug paraphernalia.

(7) instructions, oral or written, provided with the object concerning its use;
(8) descriptive materials accompanying the object which explain or depict its use;
(9) national and local advertising concerning its use;
(10) the manner in which the object is displayed for sale;
(11) whether the owner or anyone in control of the object is a legitimate supplier of like or related items to the community, such as a licensed distributor or dealer of tobacco products;
(12) direct or circumstantial evidence of the ratio of sales of the object to the total sales of the business enterprise;
(13) the existence and scope of legitimate uses for the object in the community;
(14) expert testimony concerning its use.

History: En. Sec. 2, Ch. 481, L. 1981.

45-10-103. Criminal possession of drug paraphernalia. It is unlawful for any person to use or to possess with intent to use drug paraphernalia to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale, or otherwise introduce into the human body a dangerous drug. Any person who violates this section is guilty of a misdemeanor and upon conviction shall be imprisoned in the county jail for not more than 6 months, fined not more than $500, or both.

History: En. Sec. 3, Ch. 481, L. 1981.

45-10-104. Manufacture or delivery of drug paraphernalia. It is unlawful for any person to deliver, possess with intent to deliver, or manufacture with intent to deliver drug paraphernalia, knowing or under circumstances where one reasonably should know that it will be used to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale, or otherwise introduce into the human body a dangerous drug. Any person who violates this section is guilty of a misdemeanor and upon conviction shall be imprisoned in the county jail for not more than 6 months, fined not more than $500, or both.

History: En. Sec. 4, Ch. 481, L. 1981.

45-10-105. Delivery of drug paraphernalia to a minor. Any person 18 years of age or over who violates 45-10-104 by delivering drug paraphernalia to a person under 18 years of age who is at least 3 years his junior is guilty of a misdemeanor and upon conviction shall be imprisoned in the county jail for not more than 1 year, fined not more than $1,000, or both.

History: En. Sec. 5, Ch. 481, L. 1981.

45-10-106. Advertisement of drug paraphernalia. It is unlawful for any person to place in any newspaper, magazine, handbill, or other publication any advertisement knowing or under circumstances where one reasonably should know that the purpose of the advertisement, in whole or in part, is to promote the sale of objects designed or intended for use as drug paraphernalia. Any person who violates this section is guilty of a misdemeanor and upon conviction shall be imprisoned in the county jail for not more than 6 months, fined not more than $500, or both.

History: **En. Sec. 6, Ch. 481, L. 1981.**

45-10-107. Exemptions. Practitioners and agents under their supervision acting in the course of a professional practice as defined by 50-32-101 are exempt from this part.

History: **En. Sec. 7, Ch. 481, L. 1981.**

45-10-108. Mandatory dangerous drug information course. A person who is convicted of an offense under this chapter and given a sentence that makes the offense a misdemeanor, as defined in 45-2-101, shall, in addition to any other sentence imposed, be sentenced to complete a dangerous drug information course offered by a chemical dependency facility approved by the department of public health and human services under 53-24-208. The sentencing judge may include in the sentencing order a condition that the person shall undergo chemical dependency treatment if a certified chemical dependency counselor working with the person recommends treatment.

History: **En. Sec. 1, Ch. 50, L. 1995; amd. Sec. 197, Ch. 42, L. 1997.**

TITLE 46

CRIMINAL PROCEDURE

Ch.
1. General Provisions.
2. Jurisdiction.
3. Venue.
4. Investigative Procedures.
5. Search and Seizure.
6. Arrest.
7. Initial Appearance of Arrested Person.
8. Right to Counsel.
9. Bail.
10. Preliminary Examination.
11. Commencement of Prosecution.
12. Arraignment of Defendant.
13. Pretrial Motions.
14. Mental Competency of Accused.
15. Production of Evidence.
16. Trial.
17. Lower Court Proceedings.
18. Sentence and Judgment.
19. Execution of Judgment.
20. Appeals.
21. Postconviction Hearing.
22. Habeas Corpus.
23. Probation, Parole, and Clemency.
24. Treatment of Victims and Witnesses.
Chapters 25 through 29 reserved.
30. Uniform Criminal Extradition Act.
31. Interstate Agreement on Detainers.

CHAPTER 1

GENERAL PROVISIONS

Part 1 — Purpose and Application of Title

46-1-101. Repealed.
46-1-102. Repealed.
46-1-103. Scope — purpose — construction.

Part 2 — Definitions

46-1-201. Repealed.
46-1-202. Definitions.

Part 3 — Notice to Attorney General

46-1-301. Notice to be given to attorney general when state department or board initiates or intervenes in an action.
46-1-302. Notice of appeal to be served on attorney general.

Chapter Cross-References

Publication of rules of criminal procedure, 1-11-204.

Courts and judicial officers, Title 3, ch. 1.

Court actions permitted on nonjudicial days, 3-1-302.

Subsequent applications for orders refused — contempt, 3-1-502, 3-1-503.

District Courts, Title 3, ch. 5.
Crimes, Title 45.
Prosecution for Medicaid fraud, 53-6-157.
Enforcement of fish and wildlife laws, 87-1-105.

Part 1

Purpose and Application of Title

Part Cross-References

Administration of justice, Art. II, sec. 16, Mont. Const.
Due process, Art. II, sec. 17, Mont. Const.
Board of Crime Control, 2-15-2006, 44-4-301.
Types of actions — civil and criminal, 27-1-103.
Attorney General — criminal investigation, Title 44, ch. 2, part 1.
State system of criminal identification, Title 44, ch. 2, part 2.
Teletypewriter communications, Title 44, ch. 2, part 3.
Training coordinator for County Attorneys, Title 44, ch. 4, part 1.
Law Enforcement Academy, Title 44, ch. 10.

46-1-101. Repealed. Sec. 263, Ch. 800, L. 1991.

History: En. 95-101 by Sec. 1, Ch. 196, L. 1967; amd. Sec. 1, Ch. 184, L. 1977; R.C.M. 1947, 95-101.

46-1-102. Repealed. Sec. 263, Ch. 800, L. 1991.

History: En. 95-102 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-102.

46-1-103. Scope — purpose — construction. (1) This title governs the practice and procedure in all criminal proceedings in the courts of Montana except where provision for a different procedure is specifically provided by law.

(2) This title is intended to provide for the just determination of every criminal proceeding. The purposes of this title are to secure simplicity in procedure, fairness in administration, and elimination of unjustifiable expense and delay.

(3) Any irregularity in a proceeding specified by this title that does not affect the substantial rights of the accused must be disregarded.

History: En. Sec. 1, Ch. 800, L. 1991.

Part 2

Definitions

46-1-201. Repealed. Sec. 263, Ch. 800, L. 1991.

History: En. Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-201, 95-203, 95-204, 95-205, 95-206, 95-207, 95-208, 95-209, 95-210, 95-211.

46-1-202. Definitions. As used in this title, unless the context requires otherwise, the following definitions apply:

(1) "Arraignment" means the formal act of calling the defendant into open court to enter a plea answering a charge.

(2) "Arrest" means taking a person into custody in the manner authorized by law.

(3) "Arrest warrant" means a written order from a court directed to a peace officer or to some other person specifically named commanding that officer or person to arrest another. The term includes the original warrant of arrest and a copy certified by the issuing court.

(4) "Bail" means the security given for the primary purpose of ensuring the presence of the defendant in a pending criminal proceeding.

(5) “Charge” means a written statement that accuses a person of the commission of an offense, that is presented to a court, and that is contained in a complaint, information, or indictment.

(6) “Conviction” means a judgment or sentence entered upon a guilty or nolo contendere plea or upon a verdict or finding of guilty rendered by a legally constituted jury or by a court of competent jurisdiction authorized to try the case without a jury.

(7) “Court” means a place where justice is judicially administered and includes the judge of the court.

(8) “Included offense” means an offense that:

(a) is established by proof of the same or less than all the facts required to establish the commission of the offense charged;

(b) consists of an attempt to commit the offense charged or to commit an offense otherwise included in the offense charged; or

(c) differs from the offense charged only in the respect that a less serious injury or risk to the same person, property, or public interest or a lesser kind of culpability suffices to establish its commission.

(9) “Judge” means a person who is vested by law with the power to perform judicial functions.

(10) “Judgment” means an adjudication by a court that the defendant is guilty or not guilty, and if the adjudication is that the defendant is guilty, it includes the sentence pronounced by the court.

(11) “Make available for examination and reproduction” means to make material and information that is subject to disclosure available upon request at a designated place during specified reasonable times and to provide suitable facilities or arrangements for reproducing it. The term does not mean that the disclosing party is required to make copies at its expense, to deliver the materials or information to the other party, or to supply the facilities or materials required to carry out tests on disclosed items. The parties may by mutual consent make other or additional arrangements.

(12) “New trial” means a reexamination of the issue in the same court before another jury after a verdict or finding has been rendered.

(13) “Notice to appear” means a written direction that is issued by a peace officer and that requests a person to appear before a court at a stated time and place to answer a charge for the alleged commission of an offense.

(14) “Offense” means a violation of any penal statute of this state or any ordinance of its political subdivisions.

(15) “Parole” means the release to the community of a prisoner by a decision of the board of pardons and parole prior to the expiration of the prisoner’s term subject to conditions imposed by the board of pardons and parole and the supervision of the department of corrections.

(16) “Peace officer” means any person who by virtue of the person’s office or public employment is vested by law with a duty to maintain public order and make arrests for offenses while acting within the scope of the person’s authority.

(17) “Persistent felony offender” means an offender who has previously been convicted of a felony and who is presently being sentenced for a second felony committed on a different occasion than the first. An offender is considered to have been previously convicted of a felony if:

(a) the previous felony conviction was for an offense committed in this state or any other jurisdiction for which a sentence of imprisonment in excess of 1 year could have been imposed;

(b) less than 5 years have elapsed between the commission of the present offense and either:

(i) the previous felony conviction; or

(ii) the offender's release on parole or otherwise from prison or other commitment imposed as a result of a previous felony conviction; and

(c) the offender has not been pardoned on the ground of innocence and the conviction has not been set aside at the postconviction hearing.

(18) "Place of trial" means the geographical location and political subdivision in which the court that will hear the cause is situated.

(19) "Preliminary examination" means a hearing before a judge for the purpose of determining if there is probable cause to believe a felony has been committed by the defendant.

(20) "Probation" means release by the court without imprisonment of a defendant found guilty of a crime. The release is subject to the supervision of the department of corrections upon direction of the court.

(21) "Prosecutor" means an elected or appointed attorney who is vested by law with the power to initiate and carry out criminal proceedings on behalf of the state or a political subdivision.

(22) "Same transaction" means conduct consisting of a series of acts or omissions that are motivated by:

(a) a purpose to accomplish a criminal objective and that are necessary or incidental to the accomplishment of that objective; or

(b) a common purpose or plan that results in the repeated commission of the same offense or effect upon the same person or the property of the same person.

(23) "Search warrant" means an order that is:

(a) in writing;

(b) in the name of the state;

(c) signed by a judge;

(d) a particular description of the place, object, or person to be searched and the evidence, contraband, or person to be seized; and

(e) directed to a peace officer and commands the peace officer to search for evidence, contraband, or persons.

(24) "Sentence" means the judicial disposition of a criminal proceeding upon a plea of guilty or nolo contendere or upon a verdict or finding of guilty.

(25) "Statement" means:

(a) a writing signed or otherwise adopted or approved by a person;

(b) a video or audio recording of a person's communications or a transcript of the communications; and

(c) a writing containing a summary of a person's oral communications or admissions.

(26) "Summons" means a written order issued by the court that commands a person to appear before a court at a stated time and place to answer a charge for the offense set forth in the order.

(27) "Superseded notes" means handwritten notes, including field notes, that have been substantially incorporated into a statement. The notes may not

be considered a statement and are not subject to disclosure except as provided in 46-15-324.

(28) "Temporary road block" means any structure, device, or means used by a peace officer for the purpose of controlling all traffic through a point on the highway where all vehicles may be slowed or stopped.

(29) "Witness" means a person whose testimony is desired in a proceeding or investigation by a grand jury or in a criminal action, prosecution, or proceeding.

(30) "Work product" means legal research, records, correspondence, reports, and memoranda, both written and oral, to the extent that they contain the opinions, theories, and conclusions of the prosecutor, defense counsel, or their staff or investigators.

History: En. Sec. 2, Ch. 800, L. 1991; amd. Sec. 1, Ch. 262, L. 1991; amd. Sec. 1, Ch. 262, L. 1993; amd. Sec. 203, Ch. 546, L. 1995; amd. Sec. 6, Ch. 395, L. 1999.

Compiler's Comments

1999 Amendment: Chapter 395 in definition of conviction before "plea" inserted "or nolo contendere"; in definition of sentence after "plea" inserted "of guilty or nolo contendere"; and made minor changes in style. Amendment effective October 1, 1999.

Part 3

Notice to Attorney General

46-1-301. Notice to be given to attorney general when state department or board initiates or intervenes in an action. When a department or board of this state initiates or intervenes in an action in any court, a copy of the complaint, counterclaim, or cross-claim must be served on the attorney general.

History: En. Sec. 1, Ch. 91, L. 1979.

46-1-302. Notice of appeal to be served on attorney general. When a department or board of this state appeals from a judgment or order entered in any court of this state, a copy of the notice of appeal must be served on the attorney general.

History: En. Sec. 2, Ch. 91, L. 1979.

Cross-References

Initiation of criminal appeal, Title 46, ch. 20, part 2.

CHAPTER 2

JURISDICTION

Part 1 — Jurisdiction of the State

46-2-101. State criminal jurisdiction.

Part 2 — Jurisdiction of the Courts

46-2-201. Jurisdiction of the district court.
46-2-202. Jurisdiction of justices' courts.
46-2-203. Jurisdiction of city courts.
46-2-204. Jurisdiction of municipal courts.

Part 1
Jurisdiction of the State

Part Cross-References

Sovereignty and jurisdiction of state, Title 2, ch. 1.

Criminal jurisdiction of state — national forests, 2-1-210.

State criminal jurisdiction over Flathead Indian country, 2-1-301.

State criminal jurisdiction over other tribes, 2-1-302, 2-1-303, 2-1-306.

Limits on local government jurisdiction, 7-1-111.

46-2-101. State criminal jurisdiction. (1) A person is subject to prosecution in this state for an offense which he commits while either within or outside the state by his own conduct or that of another for which he is legally accountable if:

(a) the offense is committed either wholly or partly within the state;

(b) the conduct outside the state constitutes an attempt to commit an offense within the state and an act in furtherance of the offense occurs in the state; or

(c) the conduct within the state constitutes an attempt, solicitation, or conspiracy to commit in another jurisdiction an offense under the laws of this state and such other jurisdiction.

(2) An offense is committed partly within this state if either the conduct which is an element of the offense or the result which is an element occurs within the state. In homicide, the "result" is either the physical contact which causes death or the death itself, and if the body of a homicide victim is found within the state, the death is presumed to have occurred within the state.

(3) An offense which is based on an omission to perform a duty imposed by the law of this state is committed within the state, regardless of the location of the offender at the time of the omission.

(4) This state includes the land and water and the air space above such land and water with respect to which the state has legislative jurisdiction.

History: En. 95-304 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-304.

Part 2
Jurisdiction of the Courts

Part Cross-References

Jurisdiction of District Courts and other courts, Art. VII, Mont. Const.

Jurisdiction of Justices' Courts, Art. VII, sec. 5, Mont. Const.; 3-10-303.

Means to carry jurisdiction into effect, 3-1-113.

District Court jurisdiction, 3-5-302.

Jurisdiction of City Court, 3-11-102, 3-11-103.

Jurisdiction of military courts, 10-1-403, 10-1-408.

Jurisdiction of District and Justices' Courts — Montana Alcoholic Beverage Code, 16-6-201.

Jurisdiction of District and Justices' Courts — dentistry, 37-4-328.

Montana Youth Court Act, Title 41, ch. 5.

Jurisdiction of Youth Court, 41-5-203.

Youth Court — filing in District Court, 41-5-206.

Determination of court's jurisdiction, 45-1-201.

District Court jurisdiction — official misconduct, 45-7-401.

District Court jurisdiction — supervision of milk industry, 81-23-405.

46-2-201. Jurisdiction of the district court. The district courts have jurisdiction of all public offenses not otherwise provided for.

History: En. 95-301 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-301.

Cross-References

District Court jurisdiction, Art. VII, sec. 4, Mont. Const.; 3-5-302.

Jurisdiction of District Courts — Montana Alcoholic Beverage Code, 16-6-201.

Jurisdiction of District Courts — dentistry, 37-4-328.

Youth Court — filing in District Court, 41-5-206.

District Court jurisdiction — official misconduct, 45-7-401.

District Court jurisdiction — supervision of milk industry, 81-23-405.

46-2-202. Jurisdiction of justices' courts. The justices' courts have criminal jurisdiction as authorized by 3-10-303.

History: En. 95-302.1 by Sec. 2, Ch. 184, L. 1977; R.C.M. 1947, 95-302.1.

Cross-References

Jurisdiction of Justices' Courts, Art. VII, sec. 5, Mont. Const.; 3-10-303.

Jurisdiction of Justices' Courts — Montana Alcoholic Beverage Code, 16-6-201.

Jurisdiction of Justices' Courts — dentistry, 37-4-328.

Dangerous drugs, Title 45, ch. 9.

46-2-203. Jurisdiction of city courts. The city courts have criminal jurisdiction as authorized by 3-11-102 and 3-11-103.

History: En. 95-303 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-303(a).

Cross-References

Jurisdiction of City Courts, 3-11-102 through 3-11-104.

46-2-204. Jurisdiction of municipal courts. Municipal courts have criminal jurisdiction as authorized by 3-6-103.

History: En. 95-303 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-303(b).

CHAPTER 3

VENUE

Part 1 — General Provisions

46-3-101. Renumbered 46-3-111 by Code Commissioner, 1991.
46-3-102. Renumbered 46-3-112 by Code Commissioner, 1991.
46-3-103. Repealed.
46-3-104. Renumbered 46-3-113 by Code Commissioner, 1991.
46-3-105. Renumbered 46-3-114 by Code Commissioner, 1991.
46-3-106. Renumbered 46-3-115 by Code Commissioner, 1991.
46-3-107 through 46-3-109 reserved.
46-3-110. Filing the charge.
46-3-111. Place of trial.
46-3-112. Requisite act in multiple counties.
46-3-113. Assisting in commission of or committing an offense.
46-3-114. County of offense unknown.
46-3-115. Offense consummated within the state.

Part 2 — Venue for Certain Specific Crimes (Repealed. Sec. 263, Ch. 800, L. 1991)

Part 1

General Provisions

46-3-101. Renumbered 46-3-111 by Code Commissioner, 1991.

46-3-102. Renumbered 46-3-112 by Code Commissioner, 1991.

46-3-103. Repealed. Sec. 263, Ch. 800, L. 1991.

History: En. 95-403 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-403.

46-3-104. Renumbered 46-3-113 by Code Commissioner, 1991.

46-3-105. Renumbered 46-3-114 by Code Commissioner, 1991.

46-3-106. Renumbered 46-3-115 by Code Commissioner, 1991.

46-3-107 through 46-3-109 reserved.

46-3-110. Filing the charge. (1) In all criminal prosecutions, the charge must be filed in the county where the offense was committed unless otherwise provided by law.

(2) A charge for violation of 45-7-306 after imposition of a state prison sentence or after commitment to the department of corrections may, at the discretion of the county attorney for the county in which the person was arrested and without objection from the person charged, be filed in any county in the state.

History: En. Sec. 3, Ch. 800, L. 1991; amd. Sec. 1, Ch. 177, L. 1995.

46-3-111. Place of trial. (1) The place of trial must be in the county where the charge is filed unless otherwise provided by law.

(2) All objections that a charge is filed in the improper county are waived by a defendant unless made before the first witness is sworn at the time of trial. If an objection is made, a hearing must be held and the proper county in which to file the charge must be established before further proceedings may take place.

History: En. 95-401 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-401; amd. Sec. 4, Ch. 800, L. 1991; Sec. 46-3-101, MCA 1989; redes. 46-3-111 by Code Commissioner, 1991.

Cross-References

Rights of accused and of state — change of venue, Art. II, sec. 24, Mont. Const.

46-3-112. Requisite act in multiple counties. (1) Except as provided in 46-3-110(2), if two or more acts are requisite to the commission of an offense or if two or more acts are committed in furtherance of a common scheme, the charge may be filed in any county in which any of the acts or offenses occurred.

(2) Except as provided in 46-3-110(2), if an act requisite to the commission of an offense occurs or continues in more than one county, the charge may be filed in any county in which the act occurred or continued.

History: En. 95-402 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-402; amd. Sec. 1, Ch. 468, L. 1981; amd. Sec. 5, Ch. 800, L. 1991; Sec. 46-3-102, MCA 1989; redes. 46-3-112 by Code Commissioner, 1991; amd. Sec. 2, Ch. 177, L. 1995.

46-3-113. Assisting in commission of or committing an offense. Except as provided in 46-3-110(2), if a person in one county commits an offense or aids, abets, or procures the commission of an offense in another county, the charge may be filed in either county.

History: En. 95-404 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-404; amd. Sec. 6, Ch. 800, L. 1991; Sec. 46-3-104, MCA 1989; redes. 46-3-113 by Code Commissioner, 1991; amd. Sec. 3, Ch. 177, L. 1995.

Cross-References

When person legally accountable for conduct of another, 45-2-302.

46-3-114. County of offense unknown. (1) Except as provided in 46-3-110(2), if the county in which the offense was committed cannot be readily determined, the offender may be charged in any county in which it appears that an element of the offense occurred.

(2) Except as provided in 46-3-110(2), if an offense is committed in or against a public or private conveyance and it is doubtful in which county the offense occurred, the charge may be filed in any county in or through which the conveyance has traveled.

History: En. 95-405 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-405; amd. Sec. 7, Ch. 800, L. 1991; Sec. 46-3-105, MCA 1989; redes. 46-3-114 by Code Commissioner, 1991; amd. Sec. 4, Ch. 177, L. 1995.

46-3-115. Offense consummated within the state. Except as provided in 46-3-110(2), if an offense is committed partly within this state, the offense may be charged in any county where an act requisite to the commission of the offense is committed or continued.

History: En. 95-407 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-407; amd. Sec. 8, Ch. 800, L. 1991; Sec. 46-3-106, MCA 1989; redes. 46-3-115 by Code Commissioner, 1991; amd. Sec. 5, Ch. 177, L. 1995.

Part 2

Venue for Certain Specific Crimes (Repealed. Sec. 263, Ch. 800, L. 1991)

Part Compiler's Comments

Histories of Repealed Sections:

46-3-201. En. 95-406 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-406.

46-3-202. En. 95-408 by Sec. 1, Ch. 196, L. 1967; amd. Sec. 71, Ch. 359, L. 1977; R.C.M. 1947, 95-408.

46-3-203. En. 95-409 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-409.

46-3-204. En. 95-410 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-410.

46-3-205. En. 95-411 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-411.

46-3-206. En. 95-412 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-412.

CHAPTER 4

INVESTIGATIVE PROCEDURES

Part 1 — Investigation of Death—Autopsy

46-4-101. Jurisdiction — death and cause of death in different counties.
46-4-102. Repealed.
46-4-103. Autopsy — when conducted, scope.
46-4-104. Liability of mortuary or physician.
46-4-105 through 46-4-109 reserved.
46-4-110. Powers of coroner.
46-4-111. Coroner's authority to seize and preserve evidence.
46-4-112. Subpoenaing of witnesses and documents.
46-4-113. Examinations and tests.
46-4-114. Reporting fetal deaths.
46-4-115 through 46-4-119 reserved.
46-4-120. Notification of finding human remains.
46-4-121. Inquiry defined.
46-4-122. Human deaths requiring inquiry by coroner.
46-4-123. Inquiry report.

Part 2 — Inquests

46-4-201. Inquest — definition — when held — how conducted.
46-4-202. Summoning and swearing in of jurors — instructions.
46-4-203. Coroner's subpoena.
46-4-204. Repealed.
46-4-205. Verdict of jury — form.
46-4-206. Recording and filing of testimony and proceedings.
46-4-207. Coroner's register.

Part 3 — Investigative Subpoenas

46-4-301. Issuance of subpoena.
46-4-302. Penalty for failure to appear or obey.
46-4-303. Relief from improper subpoena.
46-4-304. Conduct of investigative inquiry.
46-4-305. Self-incrimination — immunity.
46-4-306. Applicability of other laws — costs.

Part 4 — Recording Numbers of Devices Used to Communicate

46-4-401. Definitions.
46-4-402. Limitations on use of pen register or trap and trace device.
46-4-403. Order for pen register or trap and trace device — installation — disclosures.
46-4-404. Immunity from suit.
46-4-405. Procedural irregularity — rule of evidence.

Chapter Cross-References

County Coroner, Title 7, ch. 4, part 29.

Witness fees — inquests, 26-2-503.

Part 1

Investigation of Death — Autopsy

46-4-101. Jurisdiction — death and cause of death in different counties. (1) The coroner of the county where a dead human body is found has jurisdiction if:

(a) the place of death is unknown;

(b) the dead human body was shipped into the county without proper permits; or

(c) the death occurred while the deceased was in transit in the state.

(2) When death occurs as a direct result of acts or events that occurred in another county, the coroner of the county where the acts or events causing death occurred has jurisdiction. If a coroner that has jurisdiction of a death fails to act, the state medical examiner has jurisdiction.

(3) A county coroner has primary jurisdiction in the county in which he is appointed or elected to serve; however, a qualified coroner may serve in another county upon the request of the coroner or county attorney of that county. A coroner may travel to another county to inquire into a death pursuant to 46-4-122.

History: En. 95-812 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-812; amd. Sec. 13, Ch. 660, L. 1991.

46-4-102. Repealed. Sec. 21, Ch. 660, L. 1991.

History: En. 95-801 by Sec. 1, Ch. 196, L. 1967; amd. Sec. 24, Ch. 530, L. 1977; R.C.M. 1947, 95-801.

46-4-103. Autopsy — when conducted, scope. (1) If in the opinion of the coroner an autopsy is advisable, he shall order one performed on any dead human body for which the death requires an inquiry and shall retain a medical examiner or associate medical examiner to perform it. Performance of autopsies is within the discretion of the coroner except that the county attorney or attorney general may require one. Consent of the family or next of kin of the deceased is not required for an autopsy that is ordered by the coroner, county attorney, or attorney general. In ordering an autopsy the coroner, county attorney, or attorney general shall order the body to be exhumed if it has been interred.

(2) The right to conduct an autopsy includes the right to retain specimens the medical examiner performing the autopsy considers necessary.

(3) The state of Montana shall pay any expenses incurred whenever an autopsy or investigation is initiated at the request of the state medical examiner or attorney general. The county shall pay any expenses incurred whenever an autopsy, investigation, or inquiry is initiated at the request of the county attorney or county coroner.

(4) If a county does not provide a morgue or other facility for postmortem examination, the county coroner may order the use of a funeral home or an appropriate hospital facility for the examination.

History: En. 95-802 by Sec. 1, Ch. 196, L. 1967; amd. Sec. 104, Ch. 349, L. 1974; amd. Sec. 25, Ch. 530, L. 1977; R.C.M. 1947, 95-802; amd. Sec. 14, Ch. 660, L. 1991.

Cross-References

Records and findings — copies maintained by State Medical Examiner's office, 44-3-214.

Autopsies — limitations, 50-21-103, 50-21-104.

46-4-104. Liability of mortuary or physician. A mortuary owner or person employed in a mortuary is not liable for the acts of the coroner performed in the removal of a body to a mortuary or during the course of an autopsy on that body. No criminal or civil action may arise against a licensed physician for performing an autopsy authorized by this chapter or for performing an autopsy on request of a federal officer investigating a death within a federal jurisdiction.

History: En. 95-813 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-813; amd. Sec. 2, Ch. 492, L. 1985; amd. Sec. 12, Ch. 800, L. 1991.

Cross-References

Exemption from liability for autopsy, 44-3-401.

46-4-105 through 46-4-109 reserved.

46-4-110. Powers of coroner. In the performance of his duties under this chapter, the coroner may:

(1) pronounce the fact of death of any human being under circumstances in which he has a duty to inquire pursuant to 46-4-122;

(2) certify and amend death certificates as considered necessary in circumstances under which he has a duty to inquire pursuant to 46-4-122;

(3) issue subpoenas pursuant to 46-4-112;

(4) order autopsies as provided in 46-4-103;

(5) conduct examinations and tests as considered necessary to determine the cause, manner, and circumstances of death and identification of a dead human body as provided in 46-4-101 and 46-4-113;

(6) order a dead human body to be disinterred or removed from its place of disposition, with or without the consent of the next of kin, under circumstances in which he has a duty to inquire pursuant to 46-4-122;

(7) conduct inquests pursuant to 46-4-201; and

(8) order cessation of any activity by any person or agency, other than the law enforcement agency having jurisdiction, that may obstruct or hinder the orderly conduct of an inquiry or the collection of information or evidence needed for an inquiry.

History: **En. Sec. 2, Ch. 660, L. 1991.**

Cross-References

Duties of County Coroner, 7-4-2911.

46-4-111. Coroner's authority to seize and preserve evidence. (1) A county coroner may enter any room, dwelling, building, or other place in which he has probable cause to believe that a dead human body or evidence of the circumstances of a death that requires investigation may be found. If refused entry, a coroner who is investigating a death pursuant to his authority may apply to a judge authorized to issue search warrants for a warrant to enter the premises and to search for and seize evidence of the cause of a death, including a dead human body.

(2) The application for a search warrant must:

(a) state facts sufficient to show probable cause that a human body or evidence of the circumstances of death is present in the place to be searched;

(b) particularly describe the place to be searched; and

(c) particularly describe the things to be seized.

(3) To preserve evidence of the cause of death, a coroner may:

(a) place under his custody and control any dwelling, building, item, vehicle, aircraft, railroad engine or train, vessel, enclosure, or open area for a period of not more than 10 days; and

(b) forbid entrance by an unauthorized person into any area specified in subsection (3)(a).

(4) A person may not enter an area that is restricted pursuant to subsection (3) without the permission of the coroner or the law enforcement agency having jurisdiction if there is also a criminal investigation in progress.

History: **En. Sec. 1, Ch. 660, L. 1991.**

Cross-References

Custody and disposition of bodies held pending investigation, 7-4-2915.

46-4-112. Subpoenaing of witnesses and documents. (1) In an inquiry or inquest, a coroner may:

(a) issue subpoenas for witnesses as provided in 46-4-203; and

(b) issue subpoenas commanding the production of books, records, papers, documents, and other objects as may be necessary and proper to the inquiry or inquest.

(2) Any material subpoenaed pursuant to subsection (1)(b) is confidential criminal justice information, as defined in 44-5-103, and public access to the information may be obtained only in accordance with 44-5-303. However, any material produced at an inquest is public information.

(3) Disobedience of a subpoena issued under 46-4-203 or this section is punishable in the same manner as disobedience of a subpoena issued by a justice of the peace as provided in Title 3, chapter 10, part 4.

History: En. Sec. 7, Ch. 660, L. 1991.

46-4-113. Examinations and tests. The coroner may direct a properly qualified expert to conduct any test or examination that he reasonably believes is necessary to determine the cause, manner, and circumstances of a death or to identify a dead human body. The coroner may also require examination by the next of kin or any other person when necessary to identify a dead human body.

History: En. Sec. 8, Ch. 660, L. 1991.

46-4-114. Reporting fetal deaths. A licensed nurse, a midwife, a physician assistant-certified, an emergency medical technician, a birthing assistant, or any other person who assists in the delivery that occurs outside a licensed medical facility of a fetus that is believed or declared to be dead shall report the death by the earliest means available to the coroner of the county in which the death occurred.

History: En. Sec. 6, Ch. 660, L. 1991.

46-4-115 through 46-4-119 reserved.

46-4-120. Notification of finding human remains. A person who finds a dead human body or fetus or remains that appear to be human shall immediately report this fact to the county coroner by telephone or by the fastest available means of communication.

History: En. Sec. 1, Ch. 287, L. 1993.

Cross-References

Protection of human remains and burial sites, Title 22, ch. 3, part 8.

46-4-121. Inquiry defined. For the purposes of this part, an inquiry by a county coroner is an informal examination of a death and its attendant circumstances to determine whether:

(1) an inquest, which is a formal inquiry, should be held;

(2) the reporting physician should certify the death;

(3) any further action or examination should be made concerning a death; or

(4) there is anything unusual or remarkable about a death that may warrant further action by the county attorney or the law enforcement agency that has jurisdiction.

History: En. Sec. 3, Ch. 660, L. 1991.

46-4-122. Human deaths requiring inquiry by coroner. The coroner shall inquire into and determine the cause and manner of death and all circumstances surrounding a human death:

(1) that was caused or is suspected to have been caused:

(a) in any degree by an injury, either recent or remote in origin; or

(b) by the deceased or any other person that was the result of an act or omission, including but not limited to:

(i) a criminal or suspected criminal act;

(ii) a medically suspicious death, unusual death, or death of unknown circumstances, including any fetal death; or

(iii) an accidental death; or

(c) by an agent, disease, or medical condition that poses a threat to public health;

(2) whenever the death occurred:

(a) while the deceased was incarcerated in a prison or jail or confined to a correctional or detention facility owned and operated by the state or a political subdivision of the state;

(b) while the deceased was in the custody of, or was being taken into the custody of, a law enforcement agency or a peace officer;

(c) during or as a result of the deceased's employment;

(d) less than 24 hours after the deceased was admitted to a medical facility or if the deceased was dead upon arrival at a medical facility; or

(e) in a manner that was unattended or unwitnessed and the deceased was not attended by a physician at any time in the 30-day period prior to death;

(3) if the dead human body is to be cremated or shipped into the state and lacks proper medical certification or burial or transmit permits; or

(4) that occurred under suspicious circumstances.

History: En. Sec. 4, Ch. 660, L. 1991; amd. Sec. 2, Ch. 287, L. 1993.

Cross-References

Custody and disposition of bodies held pending investigation, 7-4-2915.

46-4-123. Inquiry report. The coroner shall make a full report of the facts discovered in all human deaths requiring an inquiry under the provisions of 46-4-122. The report must be made in triplicate on a form provided by the division of forensic sciences of the department of justice. The coroner and the medical examiner shall each retain one copy and shall deliver the other copy to the county attorney. If the coroner orders an autopsy during the course of an inquiry, he shall also provide the medical examiner with a copy of the autopsy report. The forms must be completed and distributed as provided in this section as promptly as practicable.

History: En. Sec. 5, Ch. 660, L. 1991.

Part 2
Inquests

Part Cross-References

Jury of inquest defined, 3-15-105.

Jurors' fees, 3-15-203.

Jurors — competency and exemptions, Title 3, ch. 15, part 3.

Jurors — penalty for nonappearance, 3-15-321.

Juries of inquest — summoning and impaneling, Title 3, ch. 15, part 8.

46-4-201. Inquest — definition — when held — how conducted. (1) An inquest is a formal inquiry into the causes of and circumstances surrounding the death of a person and is conducted by the coroner before a coroner's jury.

(2) The coroner may hold an inquest only if requested to do so by the county attorney of the county in which death occurred or by the county attorney of the county in which the acts or events causing death occurred. However, the

county attorney shall order the coroner to hold an inquest if the death of a person occurs:

(a) in a prison, jail, or other correctional facility and is not caused by the terminal condition, as defined in 50-9-102, of, or the execution of a death penalty upon, the person while the person is incarcerated in the prison, jail, or other correctional facility because of conviction of a criminal offense. This subsection (2)(a) applies to a death caused by a terminal condition only if the person was under medical care at the time of death.

(b) while a person is being taken into custody or is in the custody of a peace officer or if the death is caused by a peace officer, except when criminal charges have been or will be filed.

(3) If an inquest is held, the proceedings are public. The coroner shall conduct the inquest with the aid and assistance of the county attorney. The coroner shall, and the county attorney may, examine each witness, after which the witness may be examined by the jurors. The inquest must be held in accordance with this part.

(4) (a) A coroner who also serves as a peace officer may not conduct an inquest into the death of a person who:

(i) died in a prison, jail, or other correctional facility;

(ii) died while in the custody of a peace officer; or

(iii) was killed by a peace officer.

(b) If a coroner is disqualified under subsection (4)(a), the county attorney shall request a qualified coroner of a neighboring county to conduct the inquest. The expenses of a coroner fulfilling the request, including salary, must be paid by the requesting county.

History: Ap. p. Sec. 1, Ch. 196, L. 1967; amd. Sec. 1, Ch. 250, L. 1975; Sec. 95-803, R.C.M. 1947; Ap. p. Sec. 1, Ch. 196, L. 1967; Sec. 95-809, R.C.M. 1947; R.C.M. 1947, 95-803(part), 95-809; amd. Sec. 1, Ch. 343, L. 1983; amd. Sec. 15, Ch. 660, L. 1991; amd. Sec. 1, Ch. 478, L. 1997.

Cross-References

Jury of inquest defined, 3-15-105.

Duties of County Coroner, 7-4-2911.

Payment of costs of inquest, 7-4-2913.

46-4-202. Summoning and swearing in of jurors — instructions. (1) For holding an inquest, the coroner shall summon a jury of at least 6 but not more than 12 persons qualified by law to serve as jurors and selected at random from a list of eligible jurors that is furnished to the coroner annually by the county clerk of court.

(2) The jury selected by the coroner must be sworn by the coroner to inquire who the person was and when, where, and by what means he came to his death and into the circumstances attending his death and to render a true verdict on the death according to the evidence offered to them or arising from the inspection of the body.

(3) The coroner shall instruct the jurors as to their duties.

History: (1)En. 95-803 by Sec. 1, Ch. 196, L. 1967; amd. Sec. 1, Ch. 250, L. 1975; Sec. 95-803, R.C.M. 1947; (2)En. 95-804 by Sec. 1, Ch. 196, L. 1967; Sec. 95-804, R.C.M. 1947; R.C.M. 1947, 95-803(part), 95-804; amd. Sec. 2, Ch. 343, L. 1983; amd. Sec. 16, Ch. 660, L. 1991.

Cross-References

Jurors' fees, 3-15-203.

Jurors — competency and exemptions, Title 3, ch. 15, part 3.

Jurors — penalty for nonappearance, 3-15-321.

Juries of inquest — summoning and impaneling, Title 3, ch. 15, part 8.

46-4-203. Coroner's subpoena. Upon the request of the county attorney, a coroner shall issue subpoenas for witnesses, returnable immediately or at a time and place the coroner may designate, that may be served by any competent person.

History: En. 95-805 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-805; amd. Sec. 1, Ch. 116, L. 1979; amd. Sec. 15, Ch. 800, L. 1991.

Cross-References

Witnesses at inquests, 26-2-503.

46-4-204. Repealed. Sec. 21, Ch. 660, L. 1991.

History: En. 95-806 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-806; amd. Sec. 3, Ch. 343, L. 1983.

46-4-205. Verdict of jury — form. The jury may view the body, and the county attorney may require the jury to view the body. The jury shall review the death scene and may do so by videotape, photographs, or slide transparencies. After viewing the body and the death scene and hearing the testimony, the jury shall render its verdict, which must be by majority vote, and certify the same in writing signed by each juror. The verdict must set forth:

(1) who the deceased person is;

(2) when and where he came to his death;

(3) if he came to his death by criminal means; and

(4) if he was killed or his death was occasioned by the act of another by criminal means, who committed the act, if known. If the jury finds that the death was not by criminal means, that fact must be stated on the verdict form.

History: En. 95-807 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-807; amd. Sec. 17, Ch. 660, L. 1991.

46-4-206. Recording and filing of testimony and proceedings. Testimony before a coroner's jury must be given under oath. The testimony of the witnesses examined and proceedings before the coroner's jury must be recorded and transcribed by a competent stenographer appointed by the coroner. The record of the inquest and the verdict of the jury must be filed by the coroner in the office of the clerk of the district court of the county in which the inquest was held. The expenses of recording and transcribing must be paid by the county upon claims duly rendered and certified to by the coroner in the same manner as other claims against the county are paid.

History: En. 95-808 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-808; amd. Sec. 18, Ch. 660, L. 1991.

46-4-207. Coroner's register. The county coroner shall keep an official register, in which he must enter the date of holding all inquests, the cause and circumstances of death, if known, and the name of the deceased, when known, and, when not, such description of the deceased as may be sufficient for identification.

History: En. 95-811 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-811.

Part 3
Investigative Subpoenas

Part Cross-References
Subpoenas, Title 26, ch. 2, part 1.
Subpoenas and witnesses, Title 46, ch. 15, part 1.

46-4-301. Issuance of subpoena. (1) Whenever a prosecutor has a duty to investigate alleged unlawful activity, any justice of the supreme court or district court judge of this state may cause subpoenas to be issued commanding the persons to whom they are directed to appear before the prosecutor and give testimony and produce books, records, papers, documents, and other objects as may be necessary and proper to the investigation.

(2) Except as provided in subsection (3), a subpoena may be issued only when it appears upon the affidavit of the prosecutor that the administration of justice requires it to be issued.

(3) In the case of constitutionally protected material, such as but not limited to medical records or information, a subpoena may be issued only when it appears upon the affidavit of the prosecutor that a compelling state interest requires it to be issued. In order to establish a compelling state interest for the issuance of such a subpoena, the prosecutor shall state facts and circumstances sufficient to support probable cause to believe that:

(a) an offense has been committed; and

(b) the information relative to the commission of that offense is in the possession of the person or institution to whom the subpoena is directed.

History: En. 95-720 by Sec. 1, Ch. 486, L. 1977; R.C.M. 1947, 95-720(1); amd. Sec. 19, Ch. 800, L. 1991; amd. Sec. 1, Ch. 318, L. 1999.

Compiler's Comments
1999 Amendment: Chapter 318 in (2) at beginning inserted exception clause; inserted (3) clarifying the showing necessary for the discovery of constitutionally protected material; and made minor changes in style. Amendment effective April 16, 1999.

46-4-302. Penalty for failure to appear or obey. (1) A person who, without just cause, fails to obey a subpoena served under this part is punishable for contempt of court.

(2) (a) A person who, after being granted immunity under 46-4-305, refuses to give testimony or produce evidence under this part must be brought without unnecessary delay before the judge issuing the subpoena or, in that judge's absence or inability to act, before the nearest or most accessible judge, who shall inform the person:

(i) of the contents and requirements of the subpoena;

(ii) that the person has been granted immunity and may not be excused from testifying or producing evidence on the grounds that the testimony may incriminate the person; and

(iii) that a refusal to testify or produce evidence as commanded in the subpoena is punishable as a contempt of court under Title 3, chapter 1, part 5.

(b) In the presence of the judge, the person must be examined by the prosecutor or produce evidence as commanded in the subpoena.

(c) A refusal to testify or produce evidence may be punished as a contempt under Title 3, chapter 1, part 5.

History: En. 95-720 by Sec. 1, Ch. 486, L. 1977; R.C.M. 1947, 95-720(2); amd. Sec. 1, Ch. 157, L. 1987; amd. Sec. 20, Ch. 800, L. 1991.

46-4-303. Relief from improper subpoena. A person aggrieved by a subpoena issued pursuant to this part may, within a reasonable time, file a motion to dismiss the subpoena and, in the case of a subpoena duces tecum, to limit its scope. The motion must be granted if the subpoena was improperly issued or, in the case of a subpoena duces tecum, if it is overly broad in its scope.

History: En. 95-720 by Sec. 1, Ch. 486, L. 1977; R.C.M. 1947, 95-720(3); amd. Sec. 21, Ch. 800, L. 1991.

46-4-304. Conduct of investigative inquiry. (1) The prosecutor may examine under oath all witnesses subpoenaed pursuant to this part. Testimony must be recorded. The witness has the right to have counsel present at all times. If the witness does not have funds to obtain counsel, the judge or justice shall appoint counsel.

(2) The secrecy and disclosure provisions relating to grand jury proceedings apply to proceedings conducted under subsection (1). A person who divulges the contents of the application or the proceedings without legal privilege to do so is punishable for contempt of court.

(3) All penalties for perjury or preparing, submitting, or offering false evidence apply to proceedings conducted under this part.

History: En. 95-721 by Sec. 2, Ch. 486, L. 1977; R.C.M. 1947, 95-721; amd. Sec. 22, Ch. 800, L. 1991.

46-4-305. Self-incrimination — immunity. (1) No person subpoenaed to give testimony pursuant to this part may be required to make a statement or to produce evidence that may be personally incriminating.

(2) The prosecutor may, with the approval of the judge who authorized the issuance of the subpoena, grant a person subpoenaed immunity from the use of any compelled testimony or evidence or any information directly or indirectly derived from the testimony or evidence against that person in a criminal prosecution.

(3) Nothing in this part prohibits a prosecutor from granting immunity from prosecution for or on account of any transaction, matter, or thing concerning which a witness is compelled to testify if the prosecutor determines, in the prosecutor's sole discretion, that the best interest of justice would be served by granting immunity.

(4) After being granted immunity, no person may be excused from testifying on the grounds that the testimony may be personally incriminating. Immunity may not extend to prosecution or punishment for false statements given pursuant to the subpoena.

(5) Nothing in this part requires a witness to divulge the contents of a privileged communication unless the privilege is waived as provided by law.

History: En. 95-722 by Sec. 3, Ch. 486, L. 1977; R.C.M. 1947, 95-722; amd. Sec. 3, Ch. 577, L. 1983; amd. Sec. 23, Ch. 800, L. 1991.

Cross-References

Self-incrimination and double jeopardy, Art. II, sec. 25, Mont. Const.

46-4-306. Applicability of other laws — costs. (1) The fees and mileage of witnesses subpoenaed pursuant to this part are the same as those required in criminal actions. The state shall bear all costs, including the cost of service, when the application for the subpoena is made by the attorney general, the appropriate county shall bear all costs, including the cost of service, when the application for the subpoena is made by a county attorney, and the appropriate city shall bear all costs, including the cost of service, when the application for the subpoena is made by a city attorney.

(2) All provisions relating to subpoenas in criminal actions apply to subpoenas issued pursuant to this part, including the provisions of 46-15-112, 46-15-113, and 46-15-120.

(3) Each investigative cost, including testing of evidence and persons, must be borne by the governmental entity whose action created the cost, unless another governmental entity agrees to or by law is required to bear the cost.

History: En. 95-723 by Sec. 4, Ch. 486, L. 1977; R.C.M. 1947, 95-723; amd. Sec. 259, Ch. 800, L. 1991; amd. Sec. 2, Ch. 262, L. 1993.

Cross-References

Witness fees, Title 26, ch. 2, part 5.

Part 4

Recording Numbers of Devices Used to Communicate

Part Compiler's Comments

Effective Date: This part is effective October 1, 1999.

46-4-401. Definitions. As used in this part, the following definitions apply:

(1) "Pen register" means a device that records or decodes electronic or other impulses that identify a number dialed or otherwise transmitted on a telephone line to which the pen register is attached. The term does not include a device used by a provider or customer of a wire or electronic communication service for billing, or recording as an incident to billing, for communications services, such as but not limited to caller identification services, or used for cost accounting or similar purposes in the ordinary course of business.

(2) "Trap and trace device" means a device that records or decodes incoming electronic or other impulses that identify the originating number of an instrument or device from which a wire or electronic communication was transmitted. The term does not include a device used by a provider or customer of a wire or electronic communication service for billing, or recording as an incident to billing, for communications services, such as but not limited to caller identification services, or used for cost accounting or similar purposes in the ordinary course of business.

History: En. Sec. 1, Ch. 97, L. 1999.

46-4-402. Limitations on use of pen register or trap and trace device. (1) A person may not install or use a pen register or trap and trace device without a court order obtained under 46-4-403, except as provided in subsection (2). Subsection (2) may not be construed to permit a law enforcement agent to operate a pen register or trap and trace device without a court order obtained under 46-4-403. The use of a pen register or trap and trace device that has the ability to record conversations is prohibited.

(2) Subsection (1) does not apply to the installation or use of a pen register or trap and trace device by a provider of a wire or electronic communication service:

(a) for the:

(i) operation, maintenance, or testing of the service;

(ii) protection of the rights and property of the provider; or

(iii) protection of a user of the service from abuse of or unlawful use of the service;

(b) to record the fact that a wire or electronic communication was initiated or completed in order to protect the provider, another provider furnishing service toward the completion of the communication, or a user of the service from fraudulent, unlawful, or abusive use of the service; or

(c) if the consent of each person whose originating or transmitted number is recorded or decoded is obtained.

(3) A person who knowingly violates subsection (1) commits a criminal offense punishable upon conviction by incarceration for a period of up to 6 months and a fine of up to $500.

History: En. Sec. 2, Ch. 97, L. 1999.

46-4-403. Order for pen register or trap and trace device — installation — disclosures. (1) A prosecutor may apply to the district court for an order, or for the extension of an existing order, for the installation and use of a pen register or a trap and trace device. The application must be in writing and under oath. The application must name the prosecutor and must also name the law enforcement agency that will use the pen register or trap and trace device. The applicant shall show probable cause for the order.

(2) If the court is satisfied that the applicant has shown probable cause for the order, the court shall issue the order. The order must state:

(a) the name, if known, of each person to whom the telephone line is leased or in whose name the telephone line to which a pen register or trap and trace device is to be attached is listed;

(b) the name, if known, of each person who is the subject of the criminal investigation;

(c) the number and, if known, the physical location of each telephone line to which a pen register or trap and trace device is to be attached and, for a trap and trace device, the geographic limits of the court order; and

(d) the offense or offenses to which the information that might be obtained relates.

(3) The order must direct the provider of the telephone service and a landlord, custodian, or other person to furnish the prosecutor and law enforcement agency with the information, facilities, and technical assistance necessary to install and operate the pen register or trap and trace device. The installation and operation must create the most minimal interference with the telephone service of each person whose originating or transmitted telephone number is recorded or decoded. Information received by the service provider from the operation of the pen register or trap and trace device must be given to the law enforcement agency at reasonable intervals during regular business hours.

(4) The order may cover a period not to exceed 60 days and may be extended for periods not to exceed 60 days for each extension. An extension may be granted only if the court is satisfied that probable cause for the extension has been shown.

(5) A person leasing or owning a telephone line that is subject to the order, the provider of the service, and any other person with knowledge of the order, pen register, or trap and trace device may not disclose the existence of the order, pen register, or trap and trace device to any person without the court's permission.

(6) A service provider, landlord, custodian, or other person must be reasonably compensated by the law enforcement agency for expenses incurred in furnishing facilities or assistance relating to the order.

(7) Proceedings conducted under this section are subject to the secrecy and disclosure provisions relating to grand jury proceedings. Any information obtained pursuant to an order issued under this section is confidential criminal justice information subject to the provisions of Title 44, chapter 5.

History: En. Sec. 3, Ch. 97, L. 1999.

46-4-404. Immunity from suit. Except for gross negligence or willful or wanton misconduct, there is no cause of action against a service provider, landlord, or custodian or their officers, employees, or agents or other nongovernmental person for injury or damage caused in furnishing facilities or assistance under the order or against a service provider or its officers, employees, or agents for providing the law enforcement agency with information received from the operation of the pen register or trap and trace device. The immunity provided by this section does not extend to any governmental agency, law enforcement agent, or prosecutor.

History: En. Sec. 4, Ch. 97, L. 1999.

46-4-405. Procedural irregularity — rule of evidence. An irregularity in a proceeding under this part may not be used to exclude evidence obtained under an order unless the irregularity affects substantial rights of the accused.

History: En. Sec. 5, Ch. 97, L. 1999.

CHAPTER 5

SEARCH AND SEIZURE

Part 1 — Legality and Admissibility

46-5-101. Searches and seizures — when authorized.
46-5-102. Scope of search incident to arrest.
46-5-103. When search and seizure not illegal.
46-5-104. Repealed.

Part 2 — Search Warrants

46-5-201. Repealed.
46-5-202. Renumbered 46-5-221 by Code Commissioner, 1991.
46-5-203. Renumbered 46-5-224 by Code Commissioner, 1991.
46-5-204. Renumbered 46-5-310 by Code Commissioner, 1991.
46-5-205. Renumbered 46-5-226 by Code Commissioner, 1991.
46-5-206. Renumbered 46-5-227 by Code Commissioner, 1991.
46-5-207. Renumbered 46-5-225 by Code Commissioner, 1991.
46-5-208. Renumbered 46-5-228(1) by Code Commissioner, 1991.
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46-5-210 and 46-5-211 reserved.
46-5-212. Pawnbroker to surrender stolen property — warrant.

46-5-213 through 46-5-219 reserved.
46-5-220. Authority to issue search warrant.
46-5-221. Grounds for search warrant.
46-5-222. Search warrants issued by telephone.
46-5-223. To whom search warrant directed.
46-5-224. What may be seized with search warrant.
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Part 3 — Procedure in Regard to Property Seized

46-5-301. Return.
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46-5-305. Disposition of unclaimed property.
46-5-306. Purpose.
46-5-307. Petition for destruction, disposal, or use of evidence.
46-5-308. Order.
46-5-309. Applicability of other statutes.
46-5-310. Filing of return.
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46-5-312. Return of property seized — right to possess.

Part 4 — Stop and Frisk

46-5-401. Investigative stop.
46-5-402. Stop and frisk.
46-5-403. Duration of stop.

Part 5 — Roadblocks

46-5-501. Repealed.
46-5-502. Authority to establish roadblocks.
46-5-503. Repealed.
46-5-504. Repealed.
46-5-505. Repealed.
46-5-506 through 46-5-509 reserved.
46-5-510. Establishing roadblock.

Chapter Cross-References

Search and seizure, Art. II, sec. 11, Mont. Const.

Part 1
Legality and Admissibility

Part Cross-References

Search of student rooms at university, 20-25-513.

Powers of Game Wardens — search and arrest, 87-1-506.

46-5-101. Searches and seizures — when authorized. A search of a person, object, or place may be made and evidence, contraband, and persons may be seized in accordance with Title 46 when a search is made:

(1) by the authority of a search warrant; or

(2) in accordance with judicially recognized exceptions to the warrant requirement.

History: En. 95-701 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-701; amd. Sec. 47, Ch. 800, L. 1991; amd. Sec. 3, Ch. 262, L. 1993.

Cross-References

Unreasonable searches and seizures prohibited, Art. II, sec. 11, Mont. Const.

46-5-102. Scope of search incident to arrest. When a lawful arrest is effected, a peace officer may reasonably search the person arrested and the area within such person's immediate presence for the purpose of:

(1) protecting the officer from attack;

(2) preventing the person from escaping;

(3) discovering and seizing the fruits of the crime; or

(4) discovering and seizing any persons, instruments, articles, or things which may have been used in the commission of or which may constitute evidence of the offense.

History: En. 95-702 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-702.

46-5-103. When search and seizure not illegal. (1) A search and seizure, whether with or without a warrant, may not be held to be illegal if:

(a) the defendant has disclaimed any right to or interest in the place or object searched or the evidence, contraband, or person seized;

(b) a right of the defendant has not been infringed by the search and seizure; or

(c) any irregularity in the proceedings has no effect on the substantial rights of the accused.

(2) Evidence, contraband, or persons lawfully seized are admissible as evidence in any prosecution or proceeding whether or not the prosecution or proceeding is for the offense in connection with which the search was originally made.

History: En. 95-717 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-717; amd. Sec. 48, Ch. 800, L. 1991.

46-5-104. Repealed. Sec. 263, Ch. 800, L. 1991.

History: En. 95-718 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-718.

Part 2

Search Warrants

46-5-201. Repealed. Sec. 263, Ch. 800, L. 1991.

History: En. 95-703 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-703; amd. Sec. 2, Ch. 116, L. 1979.

46-5-202. Renumbered 46-5-221 by Code Commissioner, 1991.

46-5-203. Renumbered 46-5-224 by Code Commissioner, 1991.

46-5-204. Renumbered 46-5-310 by Code Commissioner, 1991.

46-5-205. Renumbered 46-5-226 by Code Commissioner, 1991.

46-5-206. Renumbered 46-5-227 by Code Commissioner, 1991.

46-5-207. Renumbered 46-5-225 by Code Commissioner, 1991.

46-5-208. Renumbered 46-5-228(1) by Code Commissioner, 1991.

46-5-209. Renumbered 46-5-228(2) by Code Commissioner, 1991.

46-5-210 and 46-5-211 reserved.

46-5-212. Pawnbroker to surrender stolen property — warrant. (1) When a peace officer informs a pawnbroker or dealer who buys and sells secondhand merchandise that property pawned to or purchased by the pawnbroker or dealer is stolen property, as defined in 45-2-101, the pawnbroker or dealer who buys and sells secondhand merchandise shall hold the property for 30 days upon issuance of an administrative warrant by a peace officer. Following the expiration of the 30-day period, the pawnbroker or dealer shall surrender the property to the peace officer upon demand. The peace officer shall give the pawnbroker or dealer a receipt for any property surrendered by the pawnbroker or dealer. During the 30-day period, the pawnbroker or dealer may appeal the validity of the administrative warrant in justice's court or in municipal court.

(2) As used in this section, "administrative warrant" means a warrant:

(a) issued by the administrative head, or the administrative head's designee, of the investigating agency of the jurisdiction;

(b) that describes the property to be held; and

(c) that states that the pawnbroker or dealer shall hold the property for 30 days from the date of receipt.

History: En. Sec. 2, Ch. 470, L. 1989; amd. Sec. 1, Ch. 344, L. 1993; amd. Sec. 1, Ch. 310, L. 1995; amd. Sec. 1, Ch. 12, L. 1997.

Cross-References

Pawnbroker to keep register, 31-1-402.

Theft by disposal of stolen property, 45-6-314.

46-5-213 through 46-5-219 reserved.

46-5-220. Authority to issue search warrant. (1) A peace officer, the city or county attorney, or the attorney general may apply for a search warrant.

(2) A search warrant may be issued by:

(a) a city or municipal court judge or justice of the peace within the judge's geographical jurisdiction; or

(b) a district court judge within this state.

History: En. Sec. 49, Ch. 800, L. 1991.

46-5-221. Grounds for search warrant. A judge shall issue a search warrant to a person upon application, in writing or by telephone, made under oath or affirmation, that:

(1) states facts sufficient to support probable cause to believe that an offense has been committed;

(2) states facts sufficient to support probable cause to believe that evidence, contraband, or persons connected with the offense may be found;

(3) particularly describes the place, object, or persons to be searched; and

(4) particularly describes who or what is to be seized.

History: En. 95-704 by Sec. 1, Ch. 196, L. 1967; amd. Sec. 7, Ch. 184, L. 1977; R.C.M. 1947, 95-704; amd. Sec. 3, Ch. 116, L. 1979; amd. Sec. 1, Ch. 339, L. 1979; amd. Sec. 50, Ch. 800, L. 1991; Sec. 46-5-202, MCA 1989; redes. 46-5-221 by Code Commissioner, 1991.

Cross-References

Search warrants issuable for enforcement of liquor laws, 16-6-102.

Penalty for procuring search warrant by false swearing, 45-7-202.

46-5-222. Search warrants issued by telephone. (1) Whenever the application for a search warrant is made by telephone, the applicant shall, in addition to the requirements contained in 46-5-221, state reasons to justify immediate issuance of a search warrant.

(2) All testimony given over the telephone that is intended to support an application for a search warrant must be given on oath or affirmation and must identify the person testifying. For the purpose of this section, the judge is authorized to administer an oath or affirmation by telephone.

(3) Sworn or affirmed testimony given over the telephone must be electronically recorded by the judge on a recording device in the custody of the judge when the application is made. The recording must be retained in the court records and must be transcribed verbatim as soon as possible after the application is made. The recording must include the time and date it was recorded.

(4) If the judge approves a warrant over the telephone, the peace officer serving the warrant shall sign the search warrant in the officer's own name and in the judge's name. The peace officer signing the judge's name shall initial the judge's name indicating the signature was authorized by the judge but signed by the officer.

(5) Any search warrant issued by telephone must be signed by the issuing judge or the judge's successor as soon as possible after it has been issued.

History: En. Sec. 51, Ch. 800, L. 1991.

46-5-223. To whom search warrant directed. A search warrant must be directed to a specific peace officer commanding the officer to search for and seize the evidence, contraband, or person designated in the warrant.

History: En. Sec. 52, Ch. 800, L. 1991.

46-5-224. What may be seized with search warrant. A warrant may be issued under this section to search for and seize any:

(1) evidence;

(2) contraband; or

(3) person for whose arrest there is probable cause, for whom there has been a warrant of arrest issued, or who is unlawfully restrained.

History: En. 95-705 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-705; amd. Sec. 53, Ch. 800, L. 1991; Sec. 46-5-203, MCA 1989; redes. 46-5-224 by Code Commissioner, 1991.

46-5-225. When warrant may be served. The warrant may be served at any time of the day or night. The warrant must be served within 10 days from the time of issuance. Any warrant not served within 10 days is void and must be returned to the court or the judge issuing the warrant and identified as "not served".

History: En. 95-711 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-711; amd. Sec. 59, Ch. 800, L. 1991; Sec. 46-5-207, MCA 1989; redes. 46-5-225 by Code Commissioner, 1991.

46-5-226. Service of search warrant. A search warrant must in all cases be served by the peace officer specifically named and by no other person except in aid of the officer when the officer is present and acting in its service.

History: En. 95-707 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-707; amd. Sec. 54, Ch. 800, L. 1991; Sec. 46-5-205, MCA 1989; redes. 46-5-226 by Code Commissioner, 1991.

46-5-227. Service and return of search warrant. Service of a search warrant is made by exhibiting the original warrant or a duplicate original warrant at the place or to the person to be searched. The officer taking property under the warrant shall give to the person from whom or from whose premises the property is taken a copy of the search warrant and a receipt for the property taken or shall leave the copy and receipt at the place from which the property was taken. Failure to leave a copy and receipt may not render the property seized inadmissible at trial.

History: **En. 95-708 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-708; amd. Sec. 55, Ch. 800, L. 1991; Sec. 46-5-206, MCA 1989; redes. 46-5-227 by Code Commissioner, 1991.**

46-5-228. Procedures assisting in execution of service of search warrant. (1) All necessary and reasonable force may be used to serve a search warrant or to effect an entry into any building, property, or object to serve a search warrant.

(2) The person serving the search warrant may reasonably detain and search any person on the premises being searched at the time of the search:

(a) for self-protection; or

(b) to prevent the disposal or concealment of any evidence, contraband, or persons particularly described in the warrant.

History: **(1)En. 95-709 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-709; amd. Sec. 56, Ch. 800, L. 1991; Sec. 46-5-208, MCA 1989; redes. 46-5-228(1) by Code Commissioner, 1991; (2)En. 95-710 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-710; amd. Sec. 57, Ch. 800, L. 1991; Sec. 46-5-209, MCA 1989; redes. 46-5-228(2) by Code Commissioner, 1991.**

Part 3

Procedure in Regard to Property Seized

46-5-301. Return. (1) A return must be made promptly and must be accompanied by a written inventory of any evidence or contraband taken, verified by the person serving the warrant. The return must be made before the judge who issued the warrant or, if the judge is absent or unavailable, before the nearest available judge.

(2) The judge shall, upon request, deliver a copy of the inventory and the order of custody or disposition to the person from whom or from whose premises the property was taken and to the applicant for the warrant.

(3) The judge shall enter an order providing for the custody or appropriate disposition of the evidence or contraband seized pending further proceedings.

History: **En. 95-712 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-712; amd. Sec. 58, Ch. 800, L. 1991.**

46-5-302. Repealed. Sec. 263, Ch. 800, L. 1991.

History: **En. 95-713 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-713.**

46-5-303. Renumbered 46-5-311 by Code Commissioner, 1991.

46-5-304. Renumbered 46-5-312 by Code Commissioner, 1991.

46-5-305. Disposition of unclaimed property. If property seized as evidence is not claimed within 6 months of completion of the case for which it was seized, it must be disposed of pursuant to the provisions of 46-5-306 through 46-5-309.

History: **En. 95-716 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-716; amd. Sec. 4, Ch. 116, L. 1979; amd. Sec. 5, Ch. 348, L. 1989.**

Cross-References

Sale of attached property, Title 27, ch. 18, part 8.

46-5-306. Purpose. The purpose of 46-5-306 through 46-5-309 is to provide a procedure by which physical evidence in criminal cases may be destroyed or appropriated for law enforcement use when prosecutions have been completed and no further legal proceeding is contemplated or when it does not appear that criminal charges will be initiated.

History: En. Sec. 1, Ch. 348, L. 1989.

46-5-307. Petition for destruction, disposal, or use of evidence. (1) The prosecutor may file a petition with the court alleging that there exist certain items held as evidence either by the law enforcement agency or the court and that the items no longer have any evidentiary value. The petition must include:

(a) the name and title of the petitioner;

(b) the items of evidence sought to be destroyed, disposed of, or used, including a specific description of each that may be attached to the petition by separate inventory;

(c) when the items were seized;

(d) whether the items constitute contraband, which for the purposes of 46-5-306 through 46-5-309 means any property that is unlawful to produce or possess;

(e) whether the items relate to a filed case and, if so, the court and cause number of the case and its procedural status;

(f) whether, in those instances in which the items are not contraband, an effort has been made to return the items to the apparent owner and the results of the effort;

(g) an allegation to the effect that any criminal prosecutions involving the items of evidence have been completed and no appeals are pending or that no criminal charges have been filed or are presently contemplated; and

(h) the petitioner's intentions relative to disposition of the items.

(2) If the petition requests the destruction or use of contraband, it must describe how destruction is to be accomplished or how the contraband has training or law enforcement value and its contemplated use by a law enforcement agency.

(3) The county attorney shall provide a victim of the offense with a copy of the petition and shall advise the court whether the victim wishes to be heard on the petition.

History: En. Sec. 2, Ch. 348, L. 1989; amd. Sec. 2, Ch. 186, L. 1997.

46-5-308. Order. (1) The court may enter an order providing for the destruction or disposition of the evidence. If a victim of the offense wishes to be heard on the petition, the court shall schedule a hearing on the petition and shall allow the victim to be heard in open court. The court shall consider the victim's statements prior to issuing an order under this section. A proposed order must be presented by the petitioner to the court and may include:

(a) authorization to destroy all contraband listed in the petition, the method of destruction, and the time within which the destruction must be accomplished;

(b) if certain contraband is requested by the petitioner for training or law enforcement purposes, authorization to use the items and a description of each;

(c) if the petition requests training or law enforcement use of noncontraband items, authorization to retain the items by the law enforcement agency and a description of the items;

(d) if the evidence is money and the owner cannot be ascertained and no civil forfeiture action is pending, authorization to deposit the money to the appropriate city, county, or state drug forfeiture fund;

(e) if the petition requests, authorization to sell noncontraband property at public sale or auction and to deposit the proceeds to the appropriate city, county, or state drug forfeiture fund; or

(f) authorization to destroy all items not otherwise provided for.

(2) The order must specify the time period in which destruction or sale must occur. Within 10 days following the destruction or sale, a return must be filed with the court, listing the property destroyed or sold and the date and method of disposition.

History: En. Sec. 3, Ch. 348, L. 1989; amd. Sec. 3, Ch. 186, L. 1997.

Cross-References

Drug forfeiture funds — disposition, 44-12-206.

46-5-309. Applicability of other statutes. The provisions of Title 70, chapter 9, relating to the disposition of unclaimed or abandoned property, do not apply to actions filed pursuant to 46-5-306 through 46-5-309.

History: En. Sec. 4, Ch. 348, L. 1989.

46-5-310. Filing of return. (1) The application on which the warrant is issued must be retained by the judge but is not required to be filed with the clerk of the court or with the court, if there is no clerk, until the warrant has been served or has been returned "not served".

(2) The judge before whom the warrant is returned shall attach to the warrant a copy of the return, the inventory, and all other papers in connection with the warrant and shall file them with the issuing court.

History: En. 95-706 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-706; amd. Sec. 60, Ch. 800, L. 1991; Sec. 46-5-204, MCA 1989; redes. 46-5-310 by Code Commissioner, 1991.

46-5-311. Custody and disposition — seizure without search warrant. (1) Evidence or contraband lawfully seized without a warrant may be retained in the custody of the officer making the seizure for a time sufficient to complete an investigation.

(2) Notice of the seizure and a receipt for the evidence or contraband seized must be given to the person from whose possession the evidence or contraband was taken and to the owner of the evidence or contraband if the owner is reasonably ascertainable. The failure to give a receipt may not render the evidence seized inadmissible at trial.

History: En. 95-714 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-714; amd. Sec. 61, Ch. 800, L. 1991; Sec. 46-5-303, MCA 1989; redes. 46-5-311 by Code Commissioner, 1991.

Cross-References

Return of crime victim's property, 46-24-206.

46-5-312. Return of property seized — right to possess. (1) A person claiming the right to possession of property seized as evidence may apply to the judge for its return. The judge shall give written notice as the judge considers adequate to the prosecutor and all persons who have or may have an interest in the property and shall hold a hearing to determine the right to possession.

(2) If the right to possession is established, the judge shall order the property, other than contraband, returned if:

(a) the property is not needed as evidence;

(b) the property is needed and satisfactory arrangements can be made for its return for subsequent use as evidence; or

(c) all proceedings in which the property might be required have been completed.

History: En. 95-715 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-715; amd. Sec. 62, Ch. 800, L. 1991; Sec. 46-5-304, MCA 1989; redes. 46-5-312 by Code Commissioner, 1991.

Part 4
Stop and Frisk

46-5-401. Investigative stop. In order to obtain or verify an account of the person's presence or conduct or to determine whether to arrest the person, a peace officer may stop any person or vehicle that is observed in circumstances that create a particularized suspicion that the person or occupant of the vehicle has committed, is committing, or is about to commit an offense.

History: En. 95-719 by Sec. 4, Ch. 513, L. 1973; amd. Sec. 8, Ch. 184, L. 1977; R.C.M. 1947, 95-719(1) thru (3); amd. Sec. 42, Ch. 800, L. 1991.

46-5-402. Stop and frisk. A peace officer who has lawfully stopped a person under 46-5-401 or this section:

(1) may frisk the person and take other reasonably necessary steps for protection if the officer has reasonable cause to suspect that the person is armed and presently dangerous to the officer or another person present;

(2) may take possession of any object that is discovered during the course of the frisk if the officer has probable cause to believe the object is a deadly weapon;

(3) may demand the name and present address of the person; and

(4) shall inform the person, as promptly as possible under the circumstances and in any case before questioning the person, that the officer is a peace officer, that the stop is not an arrest but rather a temporary detention for an investigation, and that upon completion of the investigation, the person will be released if not arrested.

History: En. 95-719 by Sec. 4, Ch. 513, L. 1973; amd. Sec. 8, Ch. 184, L. 1977; R.C.M. 1947, 95-719(4) thru (7); amd. Sec. 43, Ch. 800, L. 1991.

46-5-403. Duration of stop. A stop authorized by 46-5-401 or 46-6-411 may not last longer than is necessary to effectuate the purpose of the stop.

History: En. Sec. 44, Ch. 800, L. 1991.

Part 5
Roadblocks

46-5-501. Repealed. Sec. 263, Ch. 800, L. 1991.

History: En. 95-618 by Sec. 1, Ch. 196, L. 1967; amd. Sec. 1, Ch. 18, L. 1971; R.C.M. 1947, 95-618(a).

46-5-502. Authority to establish roadblocks. Any law enforcement agency of this state is authorized to establish, within its jurisdiction, temporary roadblocks on the highways of this state for the purpose of apprehending persons wanted for violation of the laws of this state, of any other state, or of the United States who are using the highways of this state, identifying drivers, or checking for driver's licenses, vehicle registration, and insurance.

History: En. 95-618 by Sec. 1, Ch. 196, L. 1967; amd. Sec. 1, Ch. 18, L. 1971; R.C.M. 1947, 95-618(b); amd. Sec. 45, Ch. 800, L. 1991.

46-5-503. Repealed. Sec. 263, Ch. 800, L. 1991.

History: En. 95-618 by Sec. 1, Ch. 196, L. 1967; amd. Sec. 1, Ch. 18, L. 1971; R.C.M. 1947, 95-618(c).

46-5-504. Repealed. Sec. 263, Ch. 800, L. 1991.

History: En. 95-618 by Sec. 1, Ch. 196, L. 1967; amd. Sec. 1, Ch. 18, L. 1971; R.C.M. 1947, 95-618(d).

46-5-505. Repealed. Sec. 263, Ch. 800, L. 1991.

History: En. 95-618 by Sec. 1, Ch. 196, L. 1967; amd. Sec. 1, Ch. 18, L. 1971; R.C.M. 1947, 95-618(e).

46-5-506 through 46-5-509 reserved.

46-5-510. Establishing roadblock. A written plan for establishing a roadblock must be designed by supervisory officers within the law enforcement agency to ensure motorist safety, minimize motorist inconvenience, and prevent the arbitrary selection of vehicles by providing a schedule for the selection of vehicles to be stopped.

History: En. Sec. 46, Ch. 800, L. 1991.

CHAPTER 6

ARREST

Part 1 — General Provisions

46-6-101. Repealed.
46-6-102. Persons exempt from arrest.
46-6-103. Repealed.
46-6-104. Method of arrest.
46-6-105. Time of making arrest.
46-6-106. Renumbered 46-6-312 by Code Commissioner, 1991.

Part 2 — Arrest With a Warrant

46-6-201. Issuance of arrest warrant upon complaint.
46-6-202. Renumbered 46-6-214 and 46-6-215 by Code Commissioner, 1991.
46-6-203. Renumbered 46-6-216 by Code Commissioner, 1991.
46-6-204. Minor irregularities in warrant.
46-6-205 through 46-6-209 reserved.
46-6-210. Arrest by peace officer.
46-6-211. Issuance of arrest warrant or summons.
46-6-212. Failure to appear following summons or notice to appear.
46-6-213. Form and content of summons.
46-6-214. Form and content of arrest warrant.
46-6-215. Execution of warrant.
46-6-216. Manner of arrest with warrant.

Part 3 — Warrantless Arrest and Notice to Appear

46-6-301. Repealed.
46-6-302. Renumbered 46-6-213 by Code Commissioner, 1991.
46-6-303. Renumbered 46-6-212(1) by Code Commissioner, 1991.
46-6-304. Renumbered 46-6-212(2) by Code Commissioner, 1991.
46-6-305 through 46-6-309 reserved.
46-6-310. Notice to appear.
46-6-311. Basis for arrest without warrant — arrest of primary aggressor.
46-6-312. Manner of arrest without warrant.
46-6-313. Release.

Part 4 — Arrest by a Peace Officer

46-6-401. Renumbered 46-6-210 by Code Commissioner, 1991.
46-6-402. Assisting a peace officer.
46-6-403. Renumbered 46-6-313 by Code Commissioner, 1991.
46-6-404. Renumbered 46-6-310 by Code Commissioner, 1991.
46-6-405 through 46-6-410 reserved.
46-6-411. Assisting officer of another state.
46-6-412. Arrest by officer of the United States customs service or immigration and naturalization service.
46-6-413 through 46-6-420 reserved.
46-6-421. Renumbered 46-6-601 by Code Commissioner, 1991.
46-6-422. Renumbered 46-6-602 by Code Commissioner, 1991.

Part 5 — Arrest by a Private Person

46-6-501. Repealed.
46-6-502. Arrest by private person.
46-6-503. Repealed.
46-6-504. Repealed.
46-6-505. Custody by peace officer.
46-6-506. Temporary detention by merchant — liability.

Part 6 — Domestic Violence Provisions

46-6-601. Written report when no arrest made in domestic violence situation.
46-6-602. Notice of rights to victim in partner or family member assault.
46-6-603. Partner or family member assault — seizure of weapon.

Chapter Cross-References

Power of County Commissioners — rewards for felons, 7-32-2301.

Power of City or Town Council — arrests, 7-32-4301.

Escape from custody — use of force to prevent, 45-3-106.

Use of force in resisting arrest, 45-3-108.

Escape from custody — definition, 45-7-306.

Part 1

General Provisions

46-6-101. Repealed. Sec. 263, Ch. 800, L. 1991.
History: En. 95-601 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-601.

46-6-102. Persons exempt from arrest. (1) Electors shall in all cases except treason, felony, or breach of the peace be privileged from arrest during their attendance at election and in going to and returning from the same.

(2) Senators and representatives shall in all cases except felony or breach of the peace be privileged from arrest during the sessions of the state legislature and in going to and returning from the same.

(3) The militia shall in all cases except treason, felony, or breach of the peace be privileged from arrest during their attendance at musters and election and in going to and returning from the same.

(4) Judges, attorneys, clerks, sheriffs, and other court officers shall be privileged from arrest while attending court and while going to and returning from court.

History: En. 95-616 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-616.

Cross-References

Treason — of what it consists, Art. II, sec. 30, Mont. Const.

Immunity of electors at polling places, Art. IV, sec. 6, Mont. Const.

Immunity of legislators from arrest, Art. V, sec. 8, Mont. Const.

Exemption from arrest and service of process, 46-15-120.

46-6-103. Repealed. Sec. 263, Ch. 800, L. 1991.

History: En. 95-617 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-617.

46-6-104. Method of arrest. (1) An arrest is made by an actual restraint of the person to be arrested or by the person's submission to the custody of the person making the arrest.

(2) All necessary and reasonable force may be used in making an arrest, but the person arrested may not be subject to any greater restraint than is necessary to hold or detain that person.

(3) All necessary and reasonable force may be used to effect an entry into any building or property or part thereof to make an authorized arrest.

History: En. 95-602 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-602; amd. Sec. 34, Ch. 800, L. 1991.

46-6-105. Time of making arrest. An arrest may be made at any time of the day or night, except that a person may not be arrested in the person's home or private dwelling place at night for a misdemeanor committed at some other time and place unless upon the direction of a judge endorsed upon an arrest warrant. However, a person may be arrested in the person's home or private dwelling at night if the person is being arrested pursuant to 46-6-311 for the offense of partner or family member assault.

History: En. 95-607 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-607; amd. Sec. 4, Ch. 700, L. 1985; amd. Sec. 35, Ch. 800, L. 1991; amd. Sec. 13, Ch. 350, L. 1995.

Cross-References

Criminal offense of partner or family member assault, 45-5-206.

46-6-106. Renumbered 46-6-312 by Code Commissioner, 1991.

Part 2
Arrest With a Warrant

Part Cross-References

Criminal process on United States land, Title 2, ch. 1, part 2; 2-1-307.

46-6-201. Issuance of arrest warrant upon complaint. If it appears from the contents of the complaint and the examination of the complainant and from the examination of other witnesses or affidavits, if any, that there is probable cause to believe that the person against whom the complaint was made has committed an offense, a warrant shall be issued by the court for the arrest of the person complained against. The court, in its discretion, may issue a summons instead of a warrant. Upon the request of the prosecutor, the court shall issue a summons instead of a warrant. More than one warrant or summons may issue on the same complaint.

History: **En. 95-603 by Sec. 1, Ch. 196, L. 1967; amd. Sec. 6, Ch. 184, L. 1977; R.C.M. 1947, 95-603(1) thru (3); amd. Sec. 4, Ch. 262, L. 1993.**

Cross-References

Issuance of warrant upon failure to comply with conditions of bail, 46-9-505.

46-6-202. Renumbered 46-6-214 and 46-6-215 by Code Commissioner, 1991.

46-6-203. Renumbered 46-6-216 by Code Commissioner, 1991.

46-6-204. Minor irregularities in warrant. No warrant of arrest shall be dismissed nor shall any person in custody for an offense be discharged from such custody because of technical irregularities not affecting the substantial rights of the accused.

History: **En. 95-605 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-605.**

46-6-205 through 46-6-209 reserved.

46-6-210. Arrest by peace officer. A peace officer may arrest a person when the officer has a warrant commanding that the person be arrested or when the officer believes on reasonable grounds:

(1) that a warrant for the person's arrest has been issued in this state, except that unless otherwise provided by law, a warrant for violation of a city ordinance may not be acted upon unless the person is located within the limits of the city in which the violation is alleged to have occurred; or

(2) that a felony warrant for the person's arrest has been issued in another jurisdiction.

History: **En. 95-608 by Sec. 1, Ch. 196, L. 1967; amd. Sup. Ct. Ord. 11450-2-3-4, Oct. 10, 1968, eff. Dec. 1, 1968; R.C.M. 1947, 95-608; amd. Sec. 5, Ch. 700, L. 1985; amd. Sec. 28, Ch. 800, L. 1991; Sec. 46-6-401, MCA 1989; redes. 46-6-210 by Code Commissioner, 1991; amd. Sec. 5, Ch. 262, L. 1993.**

Cross-References

Reserve and auxiliary officers, 7-32-201.

Victims of partner an family member assault, sexual assault, and stalking — eligibility for order of protection, 40-15-102.

Law enforcement — procedures required regarding orders of protection, 40-15-303.

Criminal offense of partner or family member assault, 45-5-206.

46-6-211. Issuance of arrest warrant or summons. (1) Upon the filing of a charge, the court may issue a summons or an arrest warrant as provided in 46-11-201. A summons may be issued to a corporation upon the filing of a charge against it. More than one warrant or summons may be issued on the same charge.

(2) A summons may be served personally or by first-class mail.

History: **En. Sec. 29, Ch. 800, L. 1991; amd. Sec. 198, Ch. 42, L. 1997.**

46-6-212. Failure to appear following summons or notice to appear. (1) If, after the issuance of a summons or notice to appear, the judge becomes satisfied that the person has not appeared or will not appear as commanded, the judge may at once issue an arrest warrant.

(2) If after being summoned the corporation does not appear, a plea of not guilty must be entered in accordance with 46-12-204 and the matter must proceed to trial and judgment without further process.

History: (1)En. 95-613 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-613; amd. Sec. 26, Ch. 800, L. 1991; Sec. 46-6-303, MCA 1989; redes. 46-6-212(1) by Code Commissioner, 1991; (2)En. 95-615 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-615; amd. Sec. 27, Ch. 800, L. 1991; Sec. 46-6-304, MCA 1989; redes. 46-6-212(2) by Code Commissioner, 1991.

Cross-References

Subpoenas and witnesses, Title 46, ch. 15, part 1.

46-6-213. Form and content of summons. (1) When authorized to issue an arrest warrant, a court may instead issue a summons.

(2) A summons may be served personally or by first-class mail.

(3) The summons must:

(a) be in writing in the name of the state of Montana or in the name of the municipality if the violation of a municipal ordinance is charged;

(b) state the name of the person summoned and that person's address, if known;

(c) set forth the nature of the offense;

(d) state the date when issued and the municipality or county where issued;

(e) be signed by the judge of the court with the title of office noted; and

(f) command the person to appear before a court at a certain time and place.

(4) The summons must plainly state that, upon failure to appear following the service of summons, an arrest warrant must be issued immediately or, if the service is made to a corporation, that a plea of not guilty will be entered.

History: En. 95-612 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-612(b); amd. Sec. 25, Ch. 800, L. 1991; Sec. 46-6-302, MCA 1989; redes. 46-6-213 by Code Commissioner, 1991.

46-6-214. Form and content of arrest warrant. (1) An arrest warrant must:

(a) be in writing in the name of the state of Montana or in the name of a municipality if a violation of a municipal ordinance is charged;

(b) set forth the nature of the offense;

(c) command that the person against whom the complaint was made be arrested and brought before the nearest or most accessible court for an initial appearance;

(d) specify the name of the person to be arrested or, if that person's name is unknown, designate the person by any name or description by which the person can be identified with reasonable certainty;

(e) state the date when issued and the municipality or county where issued; and

(f) be signed by the judge of the court with the title of office noted.

(2) The arrest warrant may specify the amount of bail.

History: En. 95-603 by Sec. 1, Ch. 196, L. 1967; amd. Sec. 6, Ch. 184, L. 1977; R.C.M. 1947, 95-603(4) thru (6); amd. Sec. 30, Ch. 800, L. 1991; Sec. 46-6-202(1), (2), MCA 1989; redes. 46-6-214 by Code Commissioner, 1991.

46-6-215. Execution of warrant. An arrest warrant may be directed to all peace officers in the state. It must be executed by a peace officer and may be executed in any county of the state. Arrest warrants issued for the violation of city ordinances may not be executed outside the city limits, except as otherwise provided by law.

History: En. 95-603 by Sec. 1, Ch. 196, L. 1967; amd. Sec. 6, Ch. 184, L. 1977; R.C.M. 1947, 95-603(4) thru (6); amd. Sec. 30, Ch. 800, L. 1991; Sec. 46-6-202(3), MCA 1989; redes. 46-6-215 by Code Commissioner, 1991.

46-6-216. Manner of arrest with warrant. (1) When making an arrest pursuant to a warrant, a peace officer shall inform the person to be arrested of the officer's authority, the intention to arrest that person, the cause of the arrest, and the fact that a warrant has been issued for that person's arrest, except:

(a) when the person flees or forcibly resists before the peace officer has an opportunity to inform the person; or

(b) when the giving of the information will imperil the arrest.

(2) The peace officer need not have possession of the warrant at the time of the arrest, but after the arrest, the warrant must be shown to the person arrested as soon as practicable if the person requests.

History: En. 95-604 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-604; amd. Sec. 5, Ch. 116, L. 1979; amd. Sec. 31, Ch. 800, L. 1991; Sec. 46-6-203, MCA 1989; redes. 46-6-216 by Code Commissioner, 1991.

Part 3

Warrantless Arrest and Notice to Appear

46-6-301. Repealed. Sec. 263, Ch. 800, L. 1991.

History: En. 95-612 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-612(a), (c).

46-6-302. Renumbered 46-6-213 by Code Commissioner, 1991.

46-6-303. Renumbered 46-6-212(1) by Code Commissioner, 1991.

46-6-304. Renumbered 46-6-212(2) by Code Commissioner, 1991.

46-6-305 through 46-6-309 reserved.

46-6-310. Notice to appear. (1) Whenever a peace officer is authorized to arrest a person without a warrant, the officer may instead issue the person a notice to appear.

(2) The notice must:

(a) be in writing;

(b) state the person's name and address, if known;

(c) set forth the nature of the offense;

(d) be signed by the issuing officer; and

(e) direct the person to appear before a court at a certain time and place.

(3) Upon failure of the person to appear, a summons or arrest warrant may be issued.

History: En. 95-614 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-614; amd. Sec. 24, Ch. 800, L. 1991; Sec. 46-6-404, MCA 1989; redes. 46-6-310 by Code Commissioner, 1991.

46-6-311. Basis for arrest without warrant — arrest of primary aggressor. (1) A peace officer may arrest a person when a warrant has not been issued if the officer has probable cause to believe that the person is committing an offense or that the person has committed an offense and existing circumstances require immediate arrest.

(2) (a) The summoning of a peace officer to a place of residence by a partner or family member constitutes an exigent circumstance for making an arrest. Arrest is the preferred response in partner or family member assault cases involving injury to the victim, use or threatened use of a weapon, violation of a restraining order, or other imminent danger to the victim.

(b) When a peace officer responds to a partner or family member assault complaint and if it appears that the parties were involved in mutual aggression, the officer shall evaluate the situation to determine who is the primary aggressor. If, based on the officer's evaluation, the officer determines that one person is the primary aggressor, the officer may arrest only the primary aggressor. A determination of who the primary aggressor is must be based on but is not limited to the following considerations, regardless of who was the first aggressor:

(i) the prior history of violence between the partners or family members, if information about the prior history is available to the officer;

(ii) the relative severity of injuries received by each person;

(iii) whether an act of or threat of violence was taken in self-defense;

(iv) the relative sizes and apparent strength of each person;

(v) the apparent fear or lack of fear between the partners or family members; and

(vi) statements made by witnesses.

History: En. Sec. 32, Ch. 800, L. 1991; amd. Sec. 3, Ch. 425, L. 1993; amd. Sec. 14, Ch. 350, L. 1995; amd. Sec. 6, Ch. 484, L. 1997.

Cross-References

Partner and family member assault, sexual assault, and stalking — safety and protection of victims, Title 40, ch. 15.

Law enforcement procedures required regarding orders of protection, 40-15-303.

Law enforcement — domestic violence provisions, Title 46, ch. 6, part 6.

Appearance before judge required before bail available in partner or family member assault or stalking cases, 46-9-302.

46-6-312. Manner of arrest without warrant. A peace officer making an arrest without a warrant shall inform the person to be arrested of the officer's authority, of the intention to arrest that person, and of the cause of the arrest, except when the person to be arrested is actually engaged in the commission of or in an attempt to commit an offense or is pursued immediately after its commission, after an escape, or when the giving of the information will imperil the arrest.

History: En. 95-606 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-606; amd. Sec. 33, Ch. 800, L. 1991; Sec. 46-6-106, MCA 1989; redes. 46-6-312 by Code Commissioner, 1991; amd. Sec. 6, Ch. 262, L. 1993.

Cross-References

Arrest of accused without warrant, 46-30-301.

46-6-313. Release. When no warrant has been issued, a peace officer having custody of a person arrested may release the arrested person without requiring that person to appear before a court when the officer is satisfied that there are insufficient grounds to commence prosecution.

History: En. 95-610 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-610; amd. Sec. 37, Ch. 800, L. 1991; Sec. 46-6-403, MCA 1989; redes. 46-6-313 by Code Commissioner, 1991.

Part 4
Arrest by a Peace Officer

Part Cross-References

Duty of Police Chief to arrest, 7-32-4105.

Offenses for which patrol officers may make arrests, 44-1-1001.

Powers of Game Wardens — search and arrest, 87-1-506.

46-6-401. Renumbered 46-6-210 by Code Commissioner, 1991.

46-6-402. Assisting a peace officer. (1) A peace officer making a lawful arrest may command the aid of persons 18 years of age or older.

(2) A person commanded to aid a peace officer in making an arrest:

(a) has the same authority to arrest as that officer; and

(b) is not civilly liable for any reasonable conduct in aid of the officer.

History: En. 95-609 by Sec. 1, Ch. 196, L. 1967; amd. Sec. 60, Ch. 535, L. 1975; R.C.M. 1947, 95-609; amd. Sec. 38, Ch. 800, L. 1991.

Cross-References

Failure to aid peace officer, 45-7-304.

46-6-403. Renumbered 46-6-313 by Code Commissioner, 1991.

46-6-404. Renumbered 46-6-310 by Code Commissioner, 1991.

46-6-405 through 46-6-410 reserved.

46-6-411. Assisting officer of another state. (1) Any peace officer of another state, of the United States, or of the District of Columbia who enters this state in close pursuit of a person in order to arrest the person has the same authority to arrest and hold the person in custody as peace officers of this state have to arrest and hold in custody a person on the ground that the person has committed a crime in this state.

(2) If an arrest is made in this state by an officer of another state, of the United States, or of the District of Columbia, the officer shall without unnecessary delay take the arrested person before a judge of a court of record, who shall conduct a hearing for the sole purpose of determining if the arrest was in accordance with the provisions of subsection (1) and not for the purpose of determining the guilt or innocence of the arrested person.

(3) If the judge determines that the arrest was in accordance with subsection (1), the judge shall commit the arrested person to the custody of the officer making the arrest, who shall without unnecessary delay take the arrested person to the state from which that person fled. If the judge determines that the arrest was unlawful, the judge shall discharge the person arrested.

(4) This section may not be construed to make unlawful any arrest in this state that would otherwise be lawful.

History: En. 95-619 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-619(part); amd. Sec. 39, Ch. 800, L. 1991.

46-6-412. Arrest by officer of the United States customs service or immigration and naturalization service. An officer of the United States customs service or immigration and naturalization service may make an arrest without a warrant if the officer is on duty and one or more of the following situations exist:

(1) A person commits or attempts to commit an offense in the officer's presence.

(2) The officer believes on reasonable grounds that the person is committing an offense or that the person committed an offense and the circumstances require his immediate arrest.

(3) The officer believes on reasonable grounds that a warrant for the person's arrest has been issued in this state.

(4) The officer believes on reasonable grounds that a felony warrant for the person's arrest has been issued in another jurisdiction.

History: En. Sec. 1, Ch. 107, L. 1983.

Cross-References

Sovereignty and jurisdiction of state, 2-1-102.

46-6-413 through 46-6-420 reserved.

46-6-421. Renumbered 46-6-601 by Code Commissioner, 1991.

46-6-422. Renumbered 46-6-602 by Code Commissioner, 1991.

Part 5

Arrest by a Private Person

46-6-501. Repealed. Sec. 263, Ch. 800, L. 1991.

History: En. 95-611.1 by Sec. 1, Ch. 274, L. 1974; R.C.M. 1947, 95-611.1.

46-6-502. Arrest by private person. (1) A private person may arrest another when there is probable cause to believe that the person is committing or has committed an offense and the existing circumstances require the person's immediate arrest.

(2) A private person making an arrest shall immediately notify the nearest available law enforcement agency or peace officer and give custody of the person arrested to the officer or agency.

History: En. 95-611 by Sec. 1, Ch. 196, L. 1967; amd. Sec. 3, Ch. 274, L. 1974; R.C.M. 1947, 95-611(part); amd. Sec. 40, Ch. 800, L. 1991.

Cross-References

Limitation on arrest authority of auxiliary officer, 7-32-233.

46-6-503. Repealed. Sec. 263, Ch. 800, L. 1991.

History: En. 95-611 by Sec. 1, Ch. 196, L. 1967; amd. Sec. 3, Ch. 274, L. 1974; R.C.M. 1947, 95-611(part).

46-6-504. Repealed. Sec. 1, Ch. 205, L. 1987.

History: En. 95-611.2 by Sec. 2, Ch. 274, L. 1974; R.C.M. 1947, 95-611.2.

46-6-505. Custody by peace officer. A peace officer who, pursuant to law, takes custody of a person arrested by a private citizen shall proceed in accordance with 46-6-104 and 46-6-312 and as otherwise provided by law.

History: En. Sec. 41, Ch. 800, L. 1991.

46-6-506. Temporary detention by merchant — liability. (1) A merchant, as defined in 30-11-301, who has reason to believe that a person has committed or is in the process of committing the offense of theft may stop and temporarily detain that person. The merchant:

(a) shall promptly inform the person that the stop is for investigation of shoplifting and that upon completion of the investigation, the person will be released or turned over to the custody of a peace officer;

(b) may demand the person's name and present or last address and question the person in a reasonable manner for the purpose of ascertaining whether or not the person is guilty of shoplifting;

(c) may take into possession any merchandise for which the purchase price has not been paid and that is in the possession of the person or has been concealed from full view; and

(d) may detain the person or request the person to remain on the premises until a peace officer arrives.

(2) A stop, detention, questioning, or recovery of merchandise under this section must be done in a reasonable manner and time. Unless evidence of concealment is obvious and apparent to the merchant, this section does not authorize a search of the detained person other than a search of the person's coat or other outer garments and any package, bag, or other container. After the purpose of a stop has been accomplished or 30 minutes have elapsed, whichever occurs first, the merchant shall allow the person to go unless the person is arrested and turned over to the custody of a peace officer.

(3) A merchant stopping, detaining, or arresting a person on the belief that the person is shoplifting is not liable for damages to the person unless the merchant acts in a manner contrary to this section.

(4) As used in this section, the following definitions apply:

(a) "Concealment" means any act or deception done purposely or knowingly upon or outside the premises of a wholesale or retail store or other mercantile establishment, with the intent to deprive the merchant of all or part of the value of the merchandise. The following acts or deceptive conduct is prima facie evidence of concealment:

(i) concealing merchandise upon the person or in a container or otherwise removing merchandise from full view while upon the premises;

(ii) removing, changing, or altering a price tag;

(iii) transferring or moving any merchandise upon the premises to obtain a lower price than the merchandise was offered for sale for by the merchant; or

(iv) abandoning or disposing of any merchandise in such a manner that the merchant will be deprived of all or part of the value of the merchandise.

(b) "Shoplifting" means the theft of any goods offered for sale by a wholesale or retail store or other mercantile establishment.

History: En. Sec. 1, Ch. 180, L. 1993.

Cross-References

Control of shoplifting, 7-32-4303.

Civil penalty for shoplifting, 27-1-718.

Part 6

Domestic Violence Provisions

Part Cross-References

Partner and family member assault, sexual assault, and stalking — safety and protection of victims, Title 40, ch. 15.

Basis for arrest without warrant — arrest preferred response in partner or family member assault cases, 46-6-311.

Appearance before judge required before bail available in partner or family member assault or stalking cases, 46-9-302.

Partner or family member assault offenders — supervision by misdemeanor probation office, 46-23-1005.

46-6-601. Written report when no arrest made in domestic violence situation. When a peace officer is called to the scene of a reported incident of domestic violence but does not make an arrest, the peace officer shall file a written report with the officer commanding the law enforcement agency employing the peace officer, setting forth the reason or reasons for the decision.

History: En. Sec. 2, Ch. 700, L. 1985; amd. Sec. 36, Ch. 800, L. 1991; Sec. 46-6-421, MCA 1989; redes. 46-6-601 by Code Commissioner, 1991.

Cross-References

Criminal offense of partner or family member assault, 45-5-206.

Victims of partner and family member assault, sexual assault, and stalking — eligibility for order of protection, 40-15-102.

Law enforcement — procedures required regarding orders of protection, 40-15-303.

Arrest preferred response in partner or family member assault cases, 46-6-311.

46-6-602. Notice of rights to victim in partner or family member assault. Whenever a peace officer arrests a person for partner or family member assault, as defined in 45-5-206, or responds to a call in which partner or family member assault is suspected, the officer, outside the presence of the offender, shall advise the victim of the availability of a shelter or other services in the community and give the victim immediate notice of any legal rights and remedies available. The notice must include furnishing the victim with a copy of the following statement:

"The city or county attorney's office can file criminal charges against an offender if the offender committed the offense of partner or family member assault.

In addition to the criminal charges filed by the state of Montana, you are entitled to the following civil remedies:

You may go to court and file a petition requesting any of the following orders for relief:

(1) an order of protection that prohibits the offender from threatening to hurt you or hurting you;

(2) an order of protection that directs the offender to leave your home and prohibits the offender from having any contact with you;

(3) an order of protection that prevents the offender from transferring any property except in the usual course of business;

(4) an order of protection that prohibits the offender from being within 1,500 feet or other appropriate distance of you, any named family member, and your worksite or other specified place;

(5) an order of protection that gives you possession of necessary personal property;

(6) an order of protection that prohibits the offender from possessing or using the firearm used in the assault.

If you file a petition in district court, the district court may order all of the above and may award custody of your minor children to you or to the other parent. The district court may order visitation of your children between the parents. The district court may order the offender to pay support payments to you if the offender has a legal obligation to pay you support payments.

The forms that you need to obtain an order of protection are at ______________. You may call ____________ at ____________ for additional information about an order of protection.

You may file a petition in district court at ____________.

You may be eligible for restitution payments from the offender (the offender would repay you for costs that you have had to pay as a result of the assault) or for crime victims compensation payments (a fund administered by the state of Montana for innocent victims of crime). You may call ____________ at ____________ for additional information about restitution or crime victims compensation.

If a person has been found guilty of partner or family member assault against you or a partner or family member, as defined in 45-5-206, or has been found guilty of stalking or another offense involving bodily harm or the threat of bodily harm against you or a partner or family member, you may choose to keep your residential address off the list of registered voters by contacting the county election administrator at ______________.

The following agencies may be able to give you additional information or emergency help. (List telephone numbers and addresses of agencies other than shelters with secret locations and a brief summary of services that are available.)"

History: En. Sec. 3, Ch. 700, L. 1985; Sec. 46-6-422, MCA 1989; redes. 46-6-602 by Code Commissioner, 1991; amd. Sec. 4, Ch. 425, L. 1993; amd. Sec. 15, Ch. 350, L. 1995; amd. Sec. 3, Ch. 233, L. 1997.

46-6-603. Partner or family member assault — seizure of weapon. (1) A peace officer who responds to a call relating to partner or family member assault shall seize the weapon used or threatened to be used in the alleged assault.

(2) The responding officer may, as appropriate:

(a) take reasonable action necessary to provide for the safety of a victim and any other member of the household;

(b) transport or arrange for the transportation of the victim and any other member of the household to a safe location; and

(c) assist a victim and any other member of the household to remove necessary personal items.

(3) A weapon seized under this section may not be returned to the offender until acquittal or until the return is ordered by the court.

History: En. Sec. 19, Ch. 350, L. 1995.

Cross-References

Temporary order of protection — prohibiting possession or use of firearm used in assault, 40-15-201.

CHAPTER 7

INITIAL APPEARANCE OF ARRESTED PERSON

Part 1 — General Provisions

46-7-101. Appearance of arrested person — use of two-way electronic audio-video communication.
46-7-102. Duty of court.
46-7-103. Renumbered 46-10-105 by Code Commissioner, 1991.

Part 1
General Provisions

46-7-101. Appearance of arrested person — use of two-way electronic audio-video communication. (1) A person arrested, whether with or without a warrant, must be taken without unnecessary delay before the nearest and most accessible judge for an initial appearance.

(2) A defendant's initial appearance before a judge may, in the discretion of the court, be satisfied either by the defendant's physical appearance before the court or by two-way electronic audio-video communication. The audio-video communication must operate so that the defendant and the judge can see each other simultaneously and converse with each other and so that the defendant and his counsel, if any, can communicate privately. A judge may order a defendant's physical appearance in court for an initial appearance hearing.

History: En. 95-901 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-901; amd. Sec. 1, Ch. 710, L. 1991; amd. Sec. 87, Ch. 800, L. 1991.

46-7-102. Duty of court. (1) The judge shall inform the defendant:

(a) of the charge or charges against the defendant;

(b) of the defendant's right to counsel;

(c) of the defendant's right to have counsel assigned by a court of record in accordance with the provisions of 46-8-101;

(d) of the general circumstances under which the defendant may obtain pretrial release;

(e) of the defendant's right to refuse to make a statement and the fact that any statement made by the defendant may be offered in evidence at the defendant's trial; and

(f) of the defendant's right to a judicial determination of whether probable cause exists if the charge is made by a complaint alleging the commission of a felony.

(2) The judge shall admit the defendant to bail as provided by law.

History: En. 95-902 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-902(part); amd. Sec. 88, Ch. 800, L. 1991; amd. Sec. 1, Ch. 129, L. 1997; amd. Sec. 1, Ch. 346, L. 1999.

Compiler's Comments

1999 Amendment: Chapter 346 deleted former (1)(g) that read: "(g) if the charge is a misdemeanor filed in justice's or city court, of the defendant's right to elect one jury trial, either in justice's or city court or on appeal to the district court, as provided in 46-17-201"; and made minor changes in style. Amendment effective April 19, 1999.

Cross-References

Bail, Art. II, sec. 21, Mont. Const.

Rights of accused, Art. II, sec. 24, Mont. Const.

Right to counsel, 46-8-101.

Bail provisions, Title 46, ch. 9.

Court to advise defendant of rights, 46-12-210.

Right to counsel — sentencing hearing, 46-18-223.

Court to advise defendant of rights — extradition proceedings, 46-30-217.

46-7-103. Renumbered 46-10-105 by Code Commissioner, 1991.

CHAPTER 8

RIGHT TO COUNSEL

Part 1 — Extent of Right—Indigency Repayment of Costs

46-8-101. Right to counsel.
46-8-102. Waiver of counsel.
46-8-103. Duration of appointment.
46-8-104. Appointment after trial.
46-8-105 through 46-8-110 reserved.
46-8-111. Eligibility for court-appointed counsel — determination of indigence.
46-8-112. Repealed.
46-8-113. Payment for court-appointed counsel by defendant.
46-8-114. Time and method of payment.
46-8-115. Effect of nonpayment.

Part 2 — Compensation of Assigned Counsel

46-8-201. Remuneration of appointed counsel.
46-8-202. Public defender's office.
46-8-203 through 46-8-209 reserved.
46-8-210. Short title.
46-8-211. Office of appellate defender — appellate defender — hiring — dismissal — staff.
46-8-212. Appellate defender — qualifications — duties.
46-8-213. Appellate defender — classification — salary — expenses.

Chapter Cross-References

Rights of accused, Art. II, sec. 24, Mont. Const.

Part 1

Extent of Right — Indigency Repayment of Costs

46-8-101. Right to counsel. (1) During the initial appearance before the court, every defendant must be informed of the right to have counsel, and must be asked if the aid of counsel is desired.

(2) If the defendant desires counsel, is unable to employ counsel, and is entitled to have counsel assigned, the court shall assign counsel to the defendant without unnecessary delay.

(3) The defendant, if unable to employ counsel, is entitled to have counsel assigned if:

(a) the offense charged is a felony;

(b) the offense charged is a misdemeanor and the court desires to retain imprisonment as a sentencing option; or

(c) the interests of justice would be served by assignment.

History: En. 95-1001 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-1001; amd. Sec. 1, Ch. 415, L. 1981; amd. Sec. 63, Ch. 800, L. 1991.

Cross-References

Rights of accused, Art. II, sec. 24, Mont. Const.

Duty of court to advise at initial appearance, 46-7-102.

Right to counsel — sentencing hearing, 46-18-223.

Court to advise defendant of rights — extradition proceedings, 46-30-217.

46-8-102. Waiver of counsel. A defendant may waive the right to counsel when the court ascertains that the waiver is made knowingly, voluntarily, and intelligently.

History: En. 95-1002 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-1002; amd. Sec. 2, Ch. 386, L. 1979; amd. Sec. 64, Ch. 800, L. 1991.

46-8-103. Duration of appointment. (1) When counsel has been assigned, the assignment is effective until final judgment, including any proceeding upon direct appeal to the Montana supreme court, unless relieved by order of the court that assigned counsel or that has jurisdiction over the case.

(2) If counsel finds the defendant's case on appeal to be wholly frivolous, counsel shall advise the court of that fact and request permission to withdraw. The request to withdraw must be accompanied by a memorandum referring to anything in the record that might arguably support the appeal. The defendant is entitled to receive a copy of counsel's memorandum and to file a reply with the court.

History: En. 95-1003 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-1003; amd. Sec. 65, Ch. 800, L. 1991.

46-8-104. Appointment after trial. Any court of record may assign counsel to defend any defendant, petitioner, or appellant in any postconviction criminal action or proceeding if he desires counsel and is unable to employ counsel.

History: En. 95-1004 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-1004.

46-8-105 through 46-8-110 reserved.

46-8-111. Eligibility for court-appointed counsel — determination of indigence. (1) The court shall make a determination of indigence.

(2) In applying for court-appointed counsel, a defendant shall submit a sworn financial statement demonstrating financial inability to obtain legal representation without substantial hardship in providing for personal or family necessities. The statement is not admissible in a civil or criminal action except when offered for impeachment purposes or in a subsequent prosecution of the declarant for perjury or false swearing.

History: En. Sec. 2, Ch. 415, L. 1981; amd. Sec. 1, Ch. 479, L. 1987; amd. Sec. 66, Ch. 800, L. 1991.

46-8-112. Repealed. Sec. 263, Ch. 800, L. 1991.

History: En. Sec. 3, Ch. 415, L. 1981.

46-8-113. Payment for court-appointed counsel by defendant. (1) The court may require a convicted defendant to pay the costs of court-appointed counsel as a part of or a condition under the sentence imposed as provided in Title 46.

(2) Costs must be limited to reasonable compensation and costs incurred by the court-appointed counsel in the criminal proceeding.

(3) The court may not sentence a defendant to pay the costs of court-appointed counsel unless the defendant is or will be able to pay them. In determining the amount and method of payment of costs, the court shall take into account the financial resources of the defendant and the nature of the burden that payment of costs will impose.

(4) A defendant who has been sentenced to pay costs may at any time petition the court that sentenced the defendant for remission of the payment of costs or of any unpaid portion of the costs. If it appears to the satisfaction of the court that payment of the amount due will impose manifest hardship on the defendant or the defendant's immediate family, the court may remit all or part of the amount due in costs or modify the method of payment.

History: En. Sec. 4, Ch. 415, L. 1981; amd. Sec. 67, Ch. 800, L. 1991; amd. Sec. 7, Ch. 262, L. 1993.

Cross-References

State assumption of certain District Court expenses, 3-5-901.

46-8-114. Time and method of payment. When a defendant is sentenced to pay the costs of court-appointed counsel, the court may order payment to be made within a specified period of time or in specified installments. Payments must be made to the clerk of the district court. The clerk of the district court shall distribute the payments to the government agency responsible for the expense of court-appointed counsel as provided for in 46-8-201.

History: En. Sec. 5, Ch. 415, L. 1981; amd. Sec. 1, Ch. 295, L. 1985; amd. Sec. 9, Ch. 680, L. 1985; amd. Sec. 68, Ch. 800, L. 1991.

46-8-115. Effect of nonpayment. (1) When a defendant who is sentenced to pay the costs of court-appointed counsel defaults in payment of the costs or of any installment, the court on motion of the prosecutor or on its own motion may require the defendant to show cause why the default should not be treated as contempt of court and may issue a show cause citation or an arrest warrant requiring the defendant's appearance.

(2) Unless the defendant shows that the default was not attributable to an intentional refusal to obey the order of the court or to a failure on the defendant's part to make a good faith effort to make the payment, the court may find that the default constitutes civil contempt.

(3) The term of imprisonment for contempt for nonpayment of the costs of court-appointed counsel must be set forth in the judgment and may not exceed 1 day for each $25 of the payment, 30 days if the order for payment of costs was imposed upon conviction of a misdemeanor, or 1 year in any other case, whichever is the shorter period. A person committed for nonpayment of costs must be given credit toward payment for each day of imprisonment at the rate specified in the judgment.

(4) If it appears to the satisfaction of the court that the default in the payment of costs is not contempt, the court may enter an order allowing the defendant additional time for payment, reducing the amount of the payment or of each installment, or revoking the order for payment of the unpaid portion of the costs in whole or in part.

(5) A default in the payment of costs or any installment may be collected by any means authorized by law for the enforcement of a judgment. The writ of execution for the collection of costs may not discharge a defendant committed to imprisonment for contempt until the amount of the payment for costs has actually been collected.

History: En. Sec. 6, Ch. 415, L. 1981; amd. Sec. 69, Ch. 800, L. 1991; amd. Sec. 8, Ch. 262, L. 1993.

Part 2
Compensation of Assigned Counsel

46-8-201. Remuneration of appointed counsel. (1) Whenever in a criminal proceeding an attorney represents or defends any person by order of the court on the ground that the person is financially unable to employ counsel, the attorney must be paid for the services a sum as a judge or justice of the state supreme court certifies to be a reasonable compensation and be reimbursed for reasonable costs incurred in the criminal proceeding.

(2) The expense of implementing subsection (1) is chargeable as provided in 3-5-901 to the county in which the proceeding arose, the state, or both, except that:

(a) in proceedings solely involving the violation of a city ordinance or state statute prosecuted in a municipal or city court, the expense is chargeable to the city or town in which the proceeding arose; or

(b) when there has been an arrest by agents of the department of fish, wildlife, and parks or agents of the department of justice and the charge is prosecuted by personnel of the state agency that made the charge, the expense must be borne by the prosecuting state agency.

History: En. 95-1005 by Sec. 1, Ch. 196, L. 1967; amd. Sec. 1, Ch. 186, L. 1973; amd. Sec. 1, Ch. 15, L. 1974; amd. Sec. 9, Ch. 184, L. 1977; R.C.M. 1947, 95-1005; amd. Sec. 2, Ch. 218, L. 1979; amd. Sec. 2, Ch. 295, L. 1985; amd. Sec. 10, Ch. 680, L. 1985; amd. Sec. 8, Ch. 1, Sp. L. 1985; amd. Sec. 7, Ch. 704, L. 1991; amd. Sec. 70, Ch. 800, L. 1991; amd. Sec. 9, Ch. 262, L. 1993.

46-8-202. Public defender's office. Any county through its board of county commissioners may provide for the creation of a public defender's office and the appointment of a salaried public defender and such assistant public defenders as may be necessary to satisfy the legal requirements in providing counsel for defendants unable to employ counsel. The costs of such office shall be at state expense payable according to procedures established under 3-5-902(1) and, to the extent those costs are not paid by the state, at county expense in accordance with 3-5-901(3) and 3-5-902(1).

History: En. 95-1006 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-1006; amd. Sec. 11, Ch. 680, L. 1985.

46-8-203 through 46-8-209 reserved.

46-8-210. Short title. Sections 46-8-210 through 46-8-213 may be cited as the "Appellate Defender Act".

History: En. Sec. 1, Ch. 781, L. 1991.

46-8-211. Office of appellate defender — appellate defender — hiring — dismissal — staff. (1) There is an office of appellate defender.

(2) The appellate defender must be hired by and shall serve at the pleasure of the appellate defender commission.

(3) The appellate defender shall hire and supervise the work of supporting personnel authorized by the commission.

History: En. Sec. 3, Ch. 781, L. 1991.

46-8-212. Appellate defender — qualifications — duties. (1) The appellate defender and any deputy or assistant appellate defender:

(a) must be an attorney licensed to practice law in this state;

(b) shall perform duties as may be provided by law or established by the appellate defender commission; and

(c) must have those qualifications otherwise required by the commission.

(2) The duties of the appellate defender are to:

(a) assume responsibility for appeals from district court and petitions for postconviction relief from proceedings in district court on behalf of indigent defendants only after conviction, as defined by 46-1-202, when:

(i) the defendant alleges that ineffective assistance of counsel resulted in conviction;

(ii) a district judge or the chief justice or an associate justice of the supreme court finds further representation by previously appointed counsel would not serve the interests of justice; or

(iii) the appellate defender agrees to assist in or assume responsibility for appeal;

(b) aid the commission in compiling and keeping current a statewide roster of attorneys eligible for appointment by an appropriate court as trial and appellate defense counsel for the indigent;

(c) keep a record of those services and expenses for the commission; and

(d) perform the duties otherwise established by the commission.

History: En. Sec. 4, Ch. 781, L. 1991.

46-8-213. Appellate defender — classification — salary — expenses. The appellate defender and staff must be classified according to the state classification pay plan and are entitled to salaries, wages, benefits, and expenses as provided in Title 2, chapter 18.

History: En. Sec. 5, Ch. 781, L. 1991.

CHAPTER 9

BAIL

Part 1 — Definition and Availability of Bail

46-9-101. Repealed.
46-9-102. Bailable offenses.
46-9-103. Renumbered 46-9-107 by Code Commissioner, 1991.
46-9-104. Bail on a new trial.
46-9-105. General authority for release and detention.
46-9-106. Release or detention of defendant pending trial.
46-9-107. Release or detention pending appeal — revocation — sentencing hearing.
46-9-108. Conditions upon defendant's release — notice to victim of stalker's release.
46-9-109. Release or detention hearing.
46-9-110. Release order.
46-9-111. Release on own recognizance.
46-9-112 through 46-9-114 reserved.
46-9-115. Release ordered by court where charge not pending.
46-9-116 through 46-9-120 reserved.
46-9-121. Return of bail bond after conviction.

Part 2 — Bail—General Procedural Provisions

46-9-201. Who may admit to bail.
46-9-202. Renumbered 46-9-115 by Code Commissioner, 1991.
46-9-203. Report to county attorney concerning drug users.
46-9-204. Repealed.

46-9-205. Renumbered 46-9-510 by Code Commissioner, 1991.
46-9-206. Setting bail — appearance or use of two-way electronic audio-video communication.

Part 3 — The Amount of Bail

46-9-301. Determining the amount of bail.
46-9-302. Bail schedule — acceptance by peace officer.
46-9-303. Repealed.
46-9-304 through 46-9-310 reserved.
46-9-311. Reduction, increase, revocation, or substitution of bail.

Part 4 — Furnishing Bail

46-9-401. Forms of bail.
46-9-402. Persons prohibited from furnishing bail security.
46-9-403. Qualifying property as bail.
46-9-404. Repealed.
46-9-405 through 46-9-410 reserved.
46-9-411. Repealed.
46-9-412. Guaranteed arrest bond certificates.
46-9-413. Repealed.
46-9-414. Certificates accepted in lieu of cash.

Part 5 — Conditions of Bail—Violation Thereof

46-9-501. Renumbered 46-9-108 by Code Commissioner, 1991.
46-9-502. Conditions performed — bail discharged.
46-9-503. Violation of release condition — forfeiture.
46-9-504. Renumbered 46-9-512 by Code Commissioner, 1991.
46-9-505. Issuance of arrest warrant — redetermining bail.
46-9-506 through 46-9-509 reserved.
46-9-510. Surrender of defendant.
46-9-511. Forfeiture procedure.
46-9-512. Use of forfeited bail as restitution.

Chapter Cross-References

Bail, Art. II, sec. 21, Mont. Const.

Part 1

Definition and Availability of Bail

46-9-101. Repealed. Sec. 263, Ch. 800, L. 1991.

History: En. 95-1101 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-1101; amd. Sec. 1, Ch. 692, L. 1985.

46-9-102. Bailable offenses. (1) All persons shall be bailable before conviction, except when death is a possible punishment for the offense charged and the proof is evident or the presumption great that the person is guilty of the offense charged.

(2) On the hearing of an application for admission to bail made before or after indictment or information for a capital offense, the burden of showing that the proof is evident or the presumption great that the defendant is guilty of the offense is on the state.

History: En. 95-1108 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-1108.

Cross-References

Bailable offenses, Art. II, sec. 21, Mont. Const.

Duty of judge to admit defendant to bail in accordance with law, 46-7-102.

46-9-103. Renumbered 46-9-107 by Code Commissioner, 1991.

46-9-104. Bail on a new trial. If the judgment of conviction is reversed and the cause remanded for a new trial, the trial court may order that the bail stand pending such trial or substitute, reduce, or increase bail.

History: En. 95-1119 by Sec. 1, Ch. 196, L. 1967; amd. Sec. 12, Ch. 184, L. 1977; R.C.M. 1947, 95-1119.

46-9-105. General authority for release and detention. (1) An arrested person must be released or detained pending judicial proceedings pursuant to Title 46, chapter 9.

(2) If a person is released, that person shall appear to answer the charge for the alleged commission of the offense, as ordered, in the court having jurisdiction.

History: En. Sec. 71, Ch. 800, L. 1991.

46-9-106. Release or detention of defendant pending trial. Before a verdict has been rendered, the court shall:

(1) authorize the release of the defendant upon reasonable conditions that ensure the appearance of the defendant and protect the safety of the community or of any person; or

(2) detain the defendant when there is probable cause to believe that the defendant committed an offense for which death is a possible punishment and adequate safeguards are not available to ensure the defendant's appearance and the safety of the community.

History: En. Sec. 72, Ch. 800, L. 1991.

46-9-107. Release or detention pending appeal — revocation — sentencing hearing. A person intending to appeal from a judgment imposing a fine only or from any judgment rendered by a justice's court or city court must be admitted to bail. The court shall order the detention of a defendant found guilty of an offense who is awaiting imposition or execution of sentence or a revocation hearing or who has filed an appeal unless the court finds that, if released, the defendant is not likely to flee or pose a danger to the safety of any person or the community.

History: En. 95-1109 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-1109; amd. Sec. 1, Ch. 207, L. 1979; amd. Sec. 2, Ch. 692, L. 1985; amd. Sec. 73, Ch. 800, L. 1991; Sec. 46-9-103, MCA 1989; redes. 46-9-107 by Code Commissioner, 1991.

46-9-108. Conditions upon defendant's release — notice to victim of stalker's release. (1) The court may impose any condition that will reasonably ensure the appearance of the defendant as required or that will ensure the safety of any person or the community, including but not limited to the following conditions:

(a) the defendant may not commit an offense during the period of release;

(b) the defendant shall remain in the custody of a designated person who agrees to supervise the defendant and report any violation of a release condition to the court, if the designated person is reasonably able to assure the court that the defendant will appear as required and will not pose a danger to the safety of any person or the community;

(c) the defendant shall maintain employment or, if unemployed, actively seek employment;

(d) the defendant shall abide by specified restrictions on the defendant's personal associations, place of abode, and travel;

(e) the defendant shall avoid all contact with an alleged victim of the crime and any potential witness who may testify concerning the offense;

(f) the defendant shall report on a regular basis to a designated agency or individual, pretrial services agency, or other appropriate individual;

(g) the defendant shall comply with a specified curfew;

(h) the defendant may not possess a firearm, destructive device, or other dangerous weapon;

(i) the defendant may not use or possess alcohol, or any dangerous drug or other controlled substance without a legal prescription;

(j) the defendant shall furnish bail in accordance with 46-9-401; or

(k) the defendant shall return to custody for specified hours following release from employment, schooling, or other approved purposes.

(2) The court may not impose an unreasonable condition that results in pretrial detention of the defendant and shall subject the defendant to the least restrictive condition or combination of conditions that will ensure the defendant's appearance and provide for protection of any person or the community. At any time, the court may, upon a reasonable basis, amend the order to impose additional or different conditions of release upon its own motion or upon the motion of either party.

(3) Whenever a person accused of a violation of 45-5-220 is admitted to bail, the court shall, as soon as possible under the circumstances, make one and if necessary more reasonable attempts, by means that include but are not limited to certified mail, to notify the alleged victim or, if the alleged victim is a minor, the alleged victim's parent or guardian of the accused's release.

History: En. 95-1118 by Sec. 1, Ch. 196, L. 1967; amd. Sec. 11, Ch. 184, L. 1977; R.C.M. 1947, 95-1118; amd. Sec. 4, Ch. 692, L. 1985; amd. Sec. 74, Ch. 800, L. 1991; Sec. 46-9-501, MCA 1989; redes. 46-9-108 by Code Commissioner, 1991; amd. Sec. 3, Ch. 292, L. 1993.

46-9-109. Release or detention hearing. (1) The release or detention of the defendant must be determined immediately upon the defendant's initial appearance.

(2) In determining whether the defendant should be released or detained, the court shall take into account the available information concerning:

(a) the nature and circumstances of the offense charged, including whether the offense involved the use of force or violence;

(b) the weight of the evidence against the defendant;

(c) the history and characteristics of the defendant, including:

(i) the defendant's character, physical and mental condition, family ties, employment, financial resources, length of residence in the community, community ties, past conduct, history relating to alcohol or drug abuse, criminal history, and record concerning the appearance at court proceedings; and

(ii) whether at the time of the current arrest or offense, the defendant was on probation, on parole, or on other release pending trial, sentencing, appeal, or completion of sentencing for an offense;

(d) the nature and seriousness of the danger to any person or the community that would be posed by the defendant's release; and

(e) the property available as collateral for the defendant's release to determine if it will reasonably ensure the appearance of the defendant as required.

(3) Upon the motion of any party or the court, a hearing may be held to determine whether bail is established in the appropriate amount or whether any other condition or restriction upon the defendant's release will reasonably ensure the appearance of the defendant and the safety of any person or the community.

History: En. Sec. 75, Ch. 800, L. 1991.

46-9-110. Release order. A release order issued by the court must include a written statement setting forth any restrictions or conditions upon the defendant's release.

History: En. Sec. 76, Ch. 800, L. 1991.

46-9-111. Release on own recognizance. Any person in custody, if otherwise eligible for bail, may be released on his personal recognizance subject to such conditions as the court may reasonably prescribe to assure his appearance when required. Any person released as herein provided shall be fully apprised by the court of the penalty provided for failure to comply with the terms of his recognizance.

History: En. 95-1106 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-1106.

46-9-112 through 46-9-114 reserved.

46-9-115. Release ordered by court where charge not pending. If release is ordered or bail is accepted by a court other than the court in which the charge is pending, any bonds, instrument of ownership, or money posted and a written statement of other conditions of release must be delivered without delay to the court in which the charge is pending.

History: En. 95-1105 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-1105; amd. Sec. 3, Ch. 710, L. 1991; amd. Sec. 77, Ch. 800, L. 1991; Sec. 46-9-202, MCA 1989; redes. 46-9-115 by Code Commissioner, 1991.

46-9-116 through 46-9-120 reserved.

46-9-121. Return of bail bond after conviction. If a commercial surety bond is posted as bail and the defendant is convicted, the bond must be released and returned to the surety within 30 days after the conviction. If the defendant appeals, the court may order that bail be provided during the appeal.

History: En. Sec. 1, Ch. 270, L. 1993.

Part 2

Bail — General Procedural Provisions

46-9-201. Who may admit to bail. A judge may admit to bail any defendant properly appearing before the judge in a bail proceeding. When bound over to any court or judge having jurisdiction of the offense charged, bail must be continued provided that the court or judge having jurisdiction may increase, reduce, or substitute bail. On appeal, a judge before whom the trial was had or a judge having the power to issue a writ of habeas corpus may admit the defendant to bail. For purposes of this section, a defendant's appearance before a judge may be either by physical appearance before the court or by two-way electronic audio-video communication as provided in 46-9-206.

History: En. 95-1102 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-1102(a); amd. Sec. 2, Ch. 710, L. 1991; amd. Sec. 10, Ch. 262, L. 1993.

46-9-202. Renumbered 46-9-115 by Code Commissioner, 1991.

46-9-203. Report to county attorney concerning drug users. A city judge, judge of a municipal court, or justice of the peace shall report immediately to the county attorney of the county wherein his court is located any knowledge or information acquired by him in a trial of a cause or hearing before him, which knowledge or information shows or tends to show that any person is a drug user or drug addict. If such person is under arrest or liberated on bail at the time the knowledge or information is acquired, such person may not be liberated, if under arrest, or the bail discharged by the judge or justice of the peace until the report is made to the county attorney.

History: En. Sec. 10, Ch. 202, L. 1921; re-en. Sec. 3198, R.C.M. 1921; re-en. Sec. 3198, R.C.M. 1935; R.C.M. 1947, 66-1520; amd. Sec. 6, Ch. 116, L. 1979.

46-9-204. Repealed. Sec. 263, Ch. 800, L. 1991.

History: En. 95-1102 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-1102(b).

46-9-205. Renumbered 46-9-510 by Code Commissioner, 1991.

46-9-206. Setting bail — appearance or use of two-way electronic audio-video communication. The requirement that a defendant be taken before a judge for setting of bail may, in the discretion of the court, be satisfied either by the defendant's physical appearance before the court or by two-way electronic audio-video communication. The audio-video communication must operate so that the defendant and the judge can see each other simultaneously and converse with each other, so that the defendant and his counsel, if any, can communicate privately, and so that the defendant and his counsel are both physically present in the same place during the two-way electronic audio-video communication. The defendant may waive the requirement that his counsel be in the defendant's physical presence during the two-way electronic audio-video communication. A judge may order a defendant's physical appearance in court for the hearing of an application for admission to bail.

History: En. Sec. 3, Ch. 710, L. 1991.

Part 3

The Amount of Bail

46-9-301. Determining the amount of bail. In all cases that bail is determined to be necessary, bail must be reasonable in amount and the amount shall be:

(1) sufficient to ensure the presence of the defendant in a pending criminal proceeding;

(2) sufficient to assure compliance with the conditions set forth in the bail;

(3) sufficient to protect any person from bodily injury;

(4) not oppressive;

(5) commensurate with the nature of the offense charged;

(6) considerate of the financial ability of the accused;

(7) considerate of the defendant's prior record;

(8) considerate of the length of time the defendant has resided in the community and of his ties to the community;

(9) considerate of the defendant's family relationships and ties;

(10) considerate of the defendant's employment status; and

(11) sufficient to include the charge imposed in 46-18-236.

History: En. 95-1110 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-1110; amd. Sec. 3, Ch. 692, L. 1985; amd. Sec. 2, Ch. 17, Sp. L. June 1986.

Cross-References

Excessive bail prohibited, Art. II, sec. 22, Mont. Const.

46-9-302. Bail schedule — acceptance by peace officer. (1) A judge may establish and post a schedule of bail for offenses over which the judge has original jurisdiction. A person may not be released on bail without first appearing before the judge when the offense is any assault on a partner or family member, as partner or family member is defined in 45-5-206, or stalking, as defined in 45-5-220.

(2) A peace officer may accept bail on behalf of a judge:

(a) in accordance with the bail schedule established under subsection (1); or

(b) whenever the warrant of arrest specifies the amount of bail.

(3) Whenever a peace officer accepts bail, the officer shall give a signed receipt to the offender setting forth the bail received. The peace officer shall then deliver the bail to the judge before whom the offender is to appear, and the judge shall give a receipt to the peace officer for the bail delivered.

History: En. 95-1103 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-1103; amd. Sec. 6, Ch. 700, L. 1985; amd. Sec. 78, Ch. 800, L. 1991; amd. Sec. 4, Ch. 292, L. 1993; amd. Sec. 5, Ch. 425, L. 1993; amd. Sec. 16, Ch. 350, L. 1995; amd. Sec. 7, Ch. 484, L. 1997.

Cross-References

Partner and family member assault, sexual assault, and stalking — safety and protection of victims, Title 40, ch. 15.

Duty of patrol officer to accept bail, 44-1-1101.

Procedure for acceptance of bail by patrol officer, 44-1-1102.

Criminal offense of partner or family member assault, 45-5-206.

Criminal offense of stalking, 45-5-220.

Basis for arrest without warrant — arrest preferred response in partner or family member assault cases, 46-6-311.

46-9-303. Repealed. Sec. 263, Ch. 800, L. 1991.

History: En. 95-1104 by Sec. 1, Ch. 196, L. 1967; amd. Sec. 10, Ch. 184, L. 1977; R.C.M. 1947, 95-1104.

46-9-304 through 46-9-310 reserved.

46-9-311. Reduction, increase, revocation, or substitution of bail. (1) Upon application by the state or the defendant, the court before which the proceeding is pending may increase or reduce the amount of bail, substitute one bail for another, alter the conditions of the bail, or revoke bail.

(2) Reasonable notice of such application must be given to the opposing parties or their attorneys by the applicant.

History: En. 95-1111 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-1111; amd. Sec. 7, Ch. 116, L. 1979.

Part 4

Furnishing Bail

46-9-401. Forms of bail. (1) Bail may be furnished in the following ways:

(a) by a deposit with the court of an amount equal to the required bail of cash, stocks, bonds, certificates of deposit, or other personal property approved by the court;

(b) by pledging real estate situated within the state with an unencumbered equity, not exempt, owned by the defendant or sureties at a value double the amount of the required bail;

(c) by posting a written undertaking executed by the defendant and by two sufficient sureties; or

(d) by posting a commercial surety bond executed by the defendant and by a qualified agent for and on behalf of the surety company.

(2) The amount of the bond must ensure the appearance of the defendant at all times required through all stages of the proceeding including trial de novo, if any, and unless the bond is denied by the court pursuant to 46-9-107, must remain in effect until final sentence is pronounced in open court.

(3) Nothing in this chapter prohibits a surety from surrendering the defendant pursuant to 46-9-510 in a case in which the surety feels insecure in accepting liability for the defendant.

History: En. 95-1112 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-1112; amd. Sec. 79, Ch. 800, L. 1991.

46-9-402. Persons prohibited from furnishing bail security. No attorney-at-law and no official authorized to admit another to bail shall act as surety or furnish bail.

History: En. 95-1120 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-1120.

Cross-References

Attorney not to become surety on bond, 37-61-419.

46-9-403. Qualifying property as bail. (1) If property posted as a condition of release is personal property, the defendant or sureties shall file a sworn schedule that must contain a list of the personal property, including a description of each item, its location and market value, and the total market value of all items listed.

(2) If the property is real estate:

(a) the defendant or sureties shall file a sworn schedule that must contain a legal description of the property, a description of any and all encumbrances on the property, including the amount of each and the holder of the encumbrance, and the market value of the unencumbered equity owned by the defendant or sureties; and

(b) a certified copy of the schedule of the property must be filed immediately by the court in the office of the clerk and recorder of the county in which the property is situated. The state has a lien on the property from the time the copy is filed. The clerk and recorder shall enter, index, and record the schedule without requiring any fee.

(3) If the property posted as a condition of release is a written undertaking with sureties, each surety must be a resident or freeholder within the state. Each surety must be worth the amount specified in the undertaking, exclusive of property exempt from execution, but the court or judge on taking the property may allow more than two sureties to justify severally and in amounts less than that expressed in the undertaking if the whole justification is equivalent to the amount required.

(4) If the property posted as a condition of release is a commercial bond, it may be executed by any domestic or foreign surety company that is qualified

to transact surety business in this state. The undertaking must be in the form prescribed by the commissioner of insurance and must state the following:

(a) the name and address of the commercial surety company that issued the bond;

(b) the amount of the bond and the unqualified obligation of the surety company to pay the court should the defendant fail to appear as guaranteed; and

(c) a provision that the surety company may not revoke the undertaking without good cause.

(5) The court may examine the sufficiency of an undertaking and take any action it considers proper to ensure that a sufficient undertaking is posted.

History: **En. 95-1113 by Sec. 1, Ch. 196, L. 1967; amd. Sup. Ct. Ord. 11450-2-3-4, Oct. 10, 1968, eff. Dec. 1, 1968; R.C.M. 1947, 95-1113; amd. Sec. 8, Ch. 116, L. 1979; amd. Sec. 80, Ch. 800, L. 1991.**

Cross-References

Suretyship, Title 28, ch. 11, part 4.

46-9-404. Repealed. Sec. 263, Ch. 800, L. 1991.

History: **En. 95-1114 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-1114.**

46-9-405 through 46-9-410 reserved.

46-9-411. Repealed. Sec. 263, Ch. 800, L. 1991.

History: **En. 95-1121 by Sec. 1, Ch. 196, L. 1967; amd. Sec. 13, Ch. 184, L. 1977; R.C.M. 1947, 95-1121(3); amd. Sec. 1, Ch. 415, L. 1989.**

46-9-412. Guaranteed arrest bond certificates. (1) A domestic or foreign surety company that has qualified to transact surety business in this state may, in any year, become surety in an amount not exceeding $1,000 with respect to any guaranteed arrest bond certificates issued in the year by an automobile club or association or by an insurance company authorized to write automobile liability insurance within this state by filing with the commissioner of insurance an undertaking to become surety.

(2) The form of the undertaking must be prescribed by the commissioner of insurance and must include those matters required by 46-9-401.

History: **En. 95-1121 by Sec. 1, Ch. 196, L. 1967; amd. Sec. 13, Ch. 184, L. 1977; R.C.M. 1947, 95-1121(1), (2); amd. Sec. 2, Ch. 415, L. 1989; amd. Sec. 81, Ch. 800, L. 1991; amd. Sec. 11, Ch. 262, L. 1993.**

Cross-References

Surety insurance, 33-1-211.

Suretyship, Title 33, ch. 26.

46-9-413. Repealed. Sec. 263, Ch. 800, L. 1991.

History: **En. 95-1123 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-1123.**

46-9-414. Certificates accepted in lieu of cash. (1) A guaranteed arrest bond certificate must, when posted by the person whose signature appears on the certificate, be accepted in lieu of cash bail in an amount not exceeding $1,000 as a bail bond to guarantee the appearance of the person in any court, including a municipal court, in this state at the time required by the court when the person was arrested for violation of a motor vehicle law of this state or an ordinance of a municipality in this state (except for the offense of driving while intoxicated or for any felony) committed prior to the date of expiration shown on the guaranteed arrest bond certificate.

(2) A guaranteed arrest bond certificate is subject to the same forfeiture and enforcement provisions established by this chapter unless otherwise provided by law.

History: En. 95-1122 by Sec. 1, Ch. 196, L. 1967; amd. Sec. 14, Ch. 184, L. 1977; R.C.M. 1947, 95-1122; amd. Sec. 3, Ch. 415, L. 1989; amd. Sec. 82, Ch. 800, L. 1991.

Part 5

Conditions of Bail — Violation Thereof

Part Cross-References

Bail-jumping, 45-7-308.

46-9-501. Renumbered 46-9-108 by Code Commissioner, 1991.

46-9-502. Conditions performed — bail discharged. When the conditions of bail have been performed and the accused has been discharged from his obligations in the cause, the court shall return to him or his sureties the deposit of any cash, stocks, or bonds. If the bail is real estate, the court shall notify in writing the county clerk and recorder and the lien of the bail bond on the real estate shall be discharged. If the bail is a written undertaking or a commercial surety bond, it shall be discharged and the sureties exonerated.

History: En. 95-1116 by Sec. 1, Ch. 196, L. 1967; amd. Sup. Ct. Ord. 11450-2-3-4, Oct. 10, 1968, eff. Dec. 1, 1968; R.C.M. 1947, 95-1116(a).

46-9-503. Violation of release condition — forfeiture. (1) If a defendant violates a condition of release, including failure to appear, the prosecutor may make a written motion to the court for revocation of the order of release. A judge may issue a warrant for the arrest of a defendant charged with violating a condition of release. Upon arrest, the defendant must be brought before a judge in accordance with 46-7-101.

(2) If a defendant fails to appear before a court as required and bail has been posted, the judge may declare the bail forfeited. Notice of the order of forfeiture must be mailed to the defendant and the defendant's sureties at their last-known address within 10 working days or the bond becomes void and must be released and returned to the surety within 5 working days.

(3) If at any time within 90 days after the forfeiture the defendant's sureties appear and satisfactorily excuse the defendant's failure to appear, the judge may direct the forfeiture to be discharged upon terms as may be just. If at any time within 90 days after the forfeiture the defendant appears and satisfactorily excuses the defendant's failure to appear, the judge shall direct the forfeiture to be discharged upon terms as may be just.

(4) The surety bail bond must be exonerated upon proof of the defendant's death or incarceration or subjection to court-ordered treatment in a foreign jurisdiction for a period exceeding the time limits under subsection (3).

History: En. 95-1116 by Sec. 1, Ch. 196, L. 1967; amd. Sup. Ct. Ord. 11450-2-3-4, Oct. 10, 1968, eff. Dec. 1, 1968; R.C.M. 1947, 95-1116(b), (c); amd. Sec. 83, Ch. 800, L. 1991; amd. Sec. 2, Ch. 270, L. 1993; amd. Sec. 2, Ch. 456, L. 1997.

Cross-References

Forfeiture of bail, 46-30-305.

46-9-504. Renumbered 46-9-512 by Code Commissioner, 1991.

46-9-505. Issuance of arrest warrant — redetermining bail. (1) Upon failure to comply with any condition of a bail or recognizance, the court having jurisdiction at the time of the failure may, in addition to any other action provided by law, issue a warrant for the arrest of the person.

(2) On verified application by the prosecutor setting forth facts or circumstances constituting a breach or threatened breach of any of the conditions of the bail or a threat or an attempt to influence the pending proceeding, the court may issue a warrant for the arrest of the defendant.

(3) Upon the arrest, the defendant must be brought before the court without unnecessary delay and the court shall conduct a hearing and determine bail in accordance with 46-9-311.

History: En. 95-1107 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-1107; amd. Sec. 12, Ch. 262, L. 1993.

46-9-506 through 46-9-509 reserved.

46-9-510. Surrender of defendant. (1) At any time before the forfeiture of bail:

(a) the defendant may surrender to the court or any peace officer of this state; or

(b) the surety company may arrest the defendant and surrender the defendant to the court or any peace officer of this state.

(2) The peace officer shall detain the defendant in the officer's custody as upon commitment and shall file a certificate, acknowledging the surrender, in the court having jurisdiction of the defendant. The court may then order the bail exonerated.

History: En. 95-1115 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-1115; amd. Sec. 84, Ch. 800, L. 1991; Sec. 46-9-205, MCA 1989; redes. 46-9-510 by Code Commissioner, 1991.

46-9-511. Forfeiture procedure. When an order of forfeiture is not discharged, the court having jurisdiction shall proceed with the forfeiture of bail as follows:

(1) if money has been posted as bail, the court shall pay the money to the treasury of the city or county where the money was posted; or

(2) if other property is posted as a condition of release, the property must be sold in the same manner as property sold in civil actions. The proceeds of the sale must be used to satisfy all court costs and prior encumbrances, if any, and from the balance, a sufficient sum to satisfy the judgment or forfeiture must be paid into the treasury of the city or county where the case is pending.

(3) If a surety bond has been posted as bail, execution may be issued against the sureties or the surety company in the same manner as executions in civil actions.

History: En. Sec. 85, Ch. 800, L. 1991.

46-9-512. Use of forfeited bail as restitution. (1) If the court enters a judgment declaring bail to be forfeited or if the order of forfeiture is not discharged, the court having jurisdiction may order the bail forfeited to be paid as restitution to any victim of the offense for which the court has received bail. Whenever the court believes that restitution may be proper, the court shall order a hearing for the purpose of considering the nature and extent of the victim's pecuniary loss as defined by law.

(2) If the court finds that restitution is appropriate, the court shall order restitution in an amount not exceeding the amount of the victim's complaint or the amount of the victim's pecuniary loss.

(3) An order to require restitution is a judgment against the defendant and the defendant's sureties, and the court may order the restitution to be made by payment of money deposited as bail. Any balance of the bail money must be disposed of in the same manner as provided in 46-9-511.

(4) A determination or decision under this section is not admissible as evidence in any other civil action and is not res judicata in any civil action.

History: En. 95-1117 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-1117; amd. Sec. 1, Ch. 132, L. 1985; amd. Sec. 1, Ch. 142, L. 1989; amd. Sec. 86, Ch. 800, L. 1991; Sec. 46-9-504, MCA 1989; redes. 46-9-512 by Code Commissioner, 1991.

Cross-References

Execution, Title 25, ch. 13, 14.

Execution sale, Title 25, ch. 13, part 7.

Redemption of real property after execution sale, Title 25, ch. 13, part 8.

CHAPTER 10

PRELIMINARY EXAMINATION

Part 1 — General Provisions

46-10-101. Repealed.
46-10-102. Renumbered 46-10-106 by Code Commissioner, 1991.
46-10-103 and 46-10-104 reserved.
46-10-105. Preliminary examination — when held.
46-10-106. Waiver.

Part 2 — Procedure at Preliminary Examination

46-10-201. Repealed.
46-10-202. Presentation of evidence.
46-10-203. Disposition of defendant.
46-10-204. Record of preliminary examination.

Part 1

General Provisions

46-10-101. Repealed. Sec. 263, Ch. 800, L. 1991.

History: En. 95-1201 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-1201.

46-10-102. Renumbered 46-10-106 by Code Commissioner, 1991.

46-10-103 and 46-10-104 reserved.

46-10-105. Preliminary examination — when held. After the initial appearance, in all cases in which the charge is triable in district court, the justice's court shall, within a reasonable time, hold a preliminary examination unless:

(1) the defendant waives a preliminary examination;

(2) the district court has granted leave to file an information;

(3) an indictment has been returned; or

(4) the case is triable in justice's court.

History: En. 95-902 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-902(part); amd. Sec. 89, Ch. 800, L. 1991; Sec. 46-7-103, MCA 1989; redes. 46-10-105 by Code Commissioner, 1991.

Cross-References

Justices' Courts' jurisdiction — preliminary hearings, 3-10-303.

46-10-106. Waiver. If the defendant waives the preliminary examination, the judge shall hold the defendant to answer to the court having jurisdiction of the offense.

History: En. 95-1202 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-1202(b); amd. Sec. 9, Ch. 116, L. 1979; amd. Sec. 90, Ch. 800, L. 1991; Sec. 46-10-102, MCA 1989; redes. 46-10-106 by Code Commissioner, 1991.

Part 2

Procedure at Preliminary Examination

46-10-201. Repealed. Sec. 49, Ch. 262, L. 1993.

History: En. 95-1202 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-1202(c); amd. Sec. 10, Ch. 116, L. 1979; amd. Sec. 260, Ch. 800, L. 1991.

46-10-202. Presentation of evidence. (1) The defendant may not enter a plea. The judge shall hear the evidence without unnecessary delay. All witnesses must be examined in the presence of the defendant. The defendant may cross-examine witnesses against the defendant and may introduce evidence in the defendant's own behalf. For purposes of this section, a preliminary examination conducted by the use of two-way electronic audio-video communication that allows all of the participants to be observed and heard by all other participants and that allows the defendant to cross-examine witnesses is considered to be an examination of a witness in the presence of the defendant. Two-way electronic audio-video communication may not be used unless the defendant's counsel is physically present with the defendant, unless this requirement is waived by the defendant.

(2) During the examination of a witness or when the defendant is making a statement or testifying, the judge may, and on the request of the defendant or state shall, exclude all other witnesses. The judge may also cause the witnesses to be kept separate and to be prevented from communicating with each other until all are examined.

(3) An objection to evidence on the ground that it has been acquired by unlawful means is not properly made at the preliminary examination. Motions to suppress must be made to the trial court as provided in 46-13-302.

(4) For purposes of a hearing under this chapter, a defendant may, in the discretion of the court, appear before the court either by physical appearance or by two-way electronic audio-video communication. The audio-video communication must operate so that the defendant and the judge can see each other simultaneously and converse with each other, so that the defendant and the defendant's counsel, if any, can communicate privately, and so that the defendant and the defendant's counsel are both physically present in the same place during the two-way electronic audio-video communication. The defendant may waive the requirement that counsel be in the defendant's physical presence during the two-way electronic audio-video communication. A judge may order a defendant's physical appearance in court for a preliminary examination.

History: En. Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-1202(part), 95-1203; amd. Sec. 11, Ch. 116, L. 1979; amd. Sec. 4, Ch. 710, L. 1991; amd. Sec. 91, Ch. 800, L. 1991; amd. Sec. 13, Ch. 262, L. 1993.

46-10-203. Disposition of defendant. (1) If from the evidence it appears that there is probable cause to believe that an offense has been committed and that the defendant committed it, the judge shall hold the defendant to answer to the court having jurisdiction of the offense.

(2) If it appears from the evidence that there is insufficient probable cause to believe that an offense has been committed or that the defendant committed it, the judge shall dismiss the complaint and discharge the defendant. The discharge of the defendant may not preclude the state from instituting a subsequent prosecution for the same offense.

History: En. 95-1202 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-1202(part); amd. Sec. 12, Ch. 116, L. 1979; amd. Sec. 92, Ch. 800, L. 1991.

46-10-204. Record of preliminary examination. (1) The testimony of each witness must be taken by a court-appointed stenographer upon demand by the county attorney, the defendant, or the defendant's counsel.

(2) After concluding the proceeding, if the judge holds the defendant to answer a charge, the judge shall transmit immediately to the clerk of the court having jurisdiction of the offense all papers in the proceeding and any bail taken by the judge.

History: En. 95-1202 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-1202(d); amd. Sec. 13, Ch. 116, L. 1979; amd. Sec. 93, Ch. 800, L. 1991.

CHAPTER 11

COMMENCEMENT OF PROSECUTION

Part 1 — Methods of Commencing Prosecution

46-11-101. Methods of commencing prosecution.
46-11-102. Required methods.
46-11-103 through 46-11-109 reserved.
46-11-110. Filing complaint.
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Chapter Cross-References

Initiation of criminal proceedings — grand jury, Art. II, sec. 20, Mont. Const.

Repeal of law creating criminal offense — when bar to prosecution, 1-2-205.

Attorney General or County Attorney to prosecute — The Legislative Audit Act, 5-13-310.

Power of Commissioner of Political Practices, Title 13, ch. 37, part 1.

Duty of County Attorney — election law violations, 13-37-124, 13-37-125.

Unfair trade practices — immunity from misdemeanor prosecution — suit for injunction, 30-14-222.

Prosecution — unemployment compensation, 39-51-309.

Statute of limitations, 45-1-205, 45-1-206.

Commencing prosecution — official misconduct, 45-7-401.

Immunity for witness — Montana Consumer Product Safety Act of 1975, 50-30-108.

Notice and hearing before prosecution — Montana Consumer Product Safety Act of 1975, 50-30-302, 50-30-303.

Notice and hearing before prosecution — Montana Food, Drug, and Cosmetic Act, 50-31-504, 50-31-505.

Part 1

Methods of Commencing Prosecution

46-11-101. Methods of commencing prosecution. A prosecution may be commenced by:

(1) a complaint;

(2) an information following a preliminary examination or waiver of a preliminary examination;

(3) an information after leave of court has been granted; or

(4) an indictment upon a finding by a grand jury.

History: En. 95-1501 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-1501; amd. Sec. 94, Ch. 800, L. 1991.

Cross-References

Statute of limitations — prosecution commenced when indictment found or information or complaint filed, 45-1-205.

46-11-102. Required methods. (1) All prosecutions of offenses charged in a district court must be by indictment or information.

(2) All other prosecutions of offenses must be by complaint.

History: En. 95-1502 by Sec. 1, Ch. 196, L. 1967; amd. Sec. 18, Ch. 184, L. 1977; R.C.M. 1947, 95-1502; amd. Sec. 95, Ch. 800, L. 1991.

46-11-103 through 46-11-109 reserved.

46-11-110. Filing complaint. When a complaint is presented to a court charging a person with the commission of an offense, the court shall examine the sworn complaint or any affidavits, if filed, to determine whether probable cause exists to allow the filing of a charge.

History: En. Sec. 96, Ch. 800, L. 1991; amd. Sec. 14, Ch. 262, L. 1993.

46-11-111. Amending complaint. A court may allow a complaint to be amended under the same circumstances and in the same manner as an information as provided in 46-11-205.

History: En. Sec. 97, Ch. 800, L. 1991; amd. Sec. 52, Ch. 18, L. 1995.

Part 2

Filing of Information

46-11-201. Leave to file information. (1) The prosecutor may apply directly to the district court for permission to file an information against a named defendant. If the defendant named is a district court judge, the prosecutor shall apply directly to the supreme court for leave to file the information.

(2) An application must be by affidavit supported by evidence that the judge or chief justice may require. If it appears that there is probable cause to believe that an offense has been committed by the defendant, the judge or chief justice shall grant leave to file the information, otherwise the application is denied.

(3) When leave to file an information has been granted, a warrant or summons may issue for the defendant's arrest or appearance.

(4) When leave is granted to file an information against a district court judge, the chief justice shall designate and direct a judge of the district court of another district to preside at the trial of the information and hear and determine all pleas and motions affecting the defendant under the information before and after judgment. All necessary records must be transferred to the clerk of the district court of the district in which the action arose.

History: En. 95-1301 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-1301(a), (b); amd. Sec. 98, Ch. 800, L. 1991.

Cross-References

Prosecution of criminal offenses, Art. II, sec. 20, Mont. Const.

46-11-202. Repealed. Sec. 263, Ch. 800, L. 1991.

History: En. 95-1301 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-1301(c).

46-11-203. Time for filing information. (1) After a finding of probable cause following a preliminary examination or waiver of a preliminary examination or after leave of court has been granted, the prosecutor shall file within 30 days in the proper district court an information charging the defendant with the offense or any other offense supported by probable cause.

(2) Unless good cause to the contrary is shown, the court shall dismiss the prosecution if an information is not filed within 30 days as required in subsection (1).

History: En. 95-1302 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-1302; amd. Sec. 100, Ch. 800, L. 1991.

46-11-204. Repealed. Sec. 263, Ch. 800, L. 1991.

History: En. 95-1303 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-1303.

46-11-205. Amending information as to substance or form. (1) The court may allow an information to be amended in matters of substance at any time, but not less than 5 days before trial, provided that a motion is filed in a timely manner, states the nature of the proposed amendment, and is accompanied by an affidavit stating facts that show the existence of probable cause to support the charge as amended. A copy of the proposed amended information must be included with the motion to amend the information.

(2) If the court grants leave to amend the information, the defendant must be arraigned on the amended information without unreasonable delay and must be given a reasonable period of time to prepare for trial on the amended information.

(3) The court may permit an information to be amended as to form at any time before a verdict or finding is issued if no additional or different offense is charged and if the substantial rights of the defendant are not prejudiced.

History: En. 95-1505 by Sec. 1, Ch. 196, L. 1967; amd. Sec. 1, Ch. 431, L. 1977; R.C.M. 1947, 95-1505; amd. Sec. 1, Ch. 62, L. 1981; amd. Sec. 99, Ch. 800, L. 1991; Sec. 46-11-403, MCA 1989; redes. 46-11-205 by Code Commissioner, 1991.

Part 3

Grand Jury

Part Cross-References

Prosecution of criminal offenses, Art. II, sec. 20, Mont. Const.

Grand jury defined, 3-15-103.

Grand jury — composition, summoning, and impaneling, Title 3, ch. 15, part 6.

46-11-301. Summoning grand jury. (1) A grand jury may only be drawn and summoned when the district judge, in his discretion, considers a grand jury to be in the public interest and orders the grand jury to be drawn or summoned. The composition and drawing of a grand jury must be in accordance with the provisions of Title 3, chapter 15, part 6.

(2) The district judge may direct the selection of one or more alternate jurors, who shall sit as regular jurors before an indictment is found or a grand jury investigation is concluded. A member of the jury who becomes unable to perform the juror's duty may be replaced by an alternate.

History: En. 95-1401 by Sec. 1, Ch. 196, L. 1967; amd. Sec. 1, Ch. 3, L. 1973; R.C.M. 1947, 95-1401(part); amd. Sec. 101, Ch. 800, L. 1991.

46-11-302. Challenges to grand jury or grand jurors. (1) The prosecutor may challenge the panel of a grand jury on the ground that the grand jury was not selected, drawn, or summoned according to law and may challenge an individual juror on the ground that the juror is not legally qualified. Challenges must be made before the administration of the oath of the jurors, may be oral or in writing, and must be tried and decided by the court.

(2) At any time for cause shown, the district court may excuse or discharge a juror either temporarily or permanently, and in the latter event, the court may impanel another person in place of the juror discharged.

(3) A motion to dismiss the indictment may be based on the ground that the grand jury was not selected, drawn, or summoned according to law or that an individual juror was not legally qualified. An indictment may not be dismissed on the ground that one or more members are not legally qualified if it appears from the record kept pursuant to this part that eight or more jurors, after deducting those not legally qualified, concurred in finding the indictment.

History: En. 95-1402 by Sec. 1, Ch. 196, L. 1967; amd. Sec. 2, Ch. 3, L. 1973; R.C.M. 1947, 95-1402; amd. Sec. 102, Ch. 800, L. 1991; amd. Sec. 15, Ch. 262, L. 1993.

46-11-303. Foreman. The district court shall appoint one of the jurors to be foreman. The foreman has the power to administer oaths or affirmations and shall sign all indictments. The foreman or another juror designated by the foreman shall keep a record of the number of jurors concurring in the finding of every indictment and shall file the record with the clerk of court, but the record may not be made public except on order of the district court.

History: En. 95-1403 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-1403; amd. Sec. 103, Ch. 800, L. 1991.

46-11-304. Appointing special prosecutor. When the county attorney or attorney general is the subject of a grand jury investigation, the district court shall appoint a special prosecutor. If a special prosecutor is appointed, the county attorney's or attorney general's office may not participate in an official capacity, but staff members may appear as witnesses.

History: En. Sec. 104, Ch. 800, L. 1991.

46-11-305 and 46-11-306 reserved.

46-11-307. Closed hearing. Subject to any right to an open hearing in contempt proceedings, the court shall order a hearing on matters affecting a grand jury proceeding to be closed. This requirement may not affect a defendant's discovery rights after the filing of the indictment.

History: En. Sec. 106, Ch. 800, L. 1991.

46-11-308. Who may be present. The prosecutor, witnesses, interpreters, and a stenographer or operator of a recording device used for the purpose of taking the evidence may be present while the grand jury is in session. No person other than the jurors may be present while the grand jury is deliberating or voting.

History: En. Sec. 111, Ch. 800, L. 1991.

46-11-309 reserved.

46-11-310. Duties of grand jurors. The grand jury shall inquire into those matters as directed by the court summoning the jury and shall inquire into other matters as presented by the prosecutor.

History: En. Sec. 107, Ch. 800, L. 1991.

46-11-311. Charge to grand jury. When a grand jury is impaneled and sworn, it must be charged by the judge who summoned it. In making the charge, the district court shall instruct the jury as to its duties and the matters that jurors may consider. The prosecutor may bring additional matters before the grand jury that are consistent with the original charge or that are developed during the proceedings.

History: En. 95-1404 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-1404(a); amd. Sec. 105, Ch. 800, L. 1991.

46-11-312. Repealed. Sec. 263, Ch. 800, L. 1991.

History: En. Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-1404(part), 95-1405(a) thru (e).

46-11-313. Subpoena of witnesses. (1) A subpoena requiring the attendance of a witness before the grand jury may be signed and issued by the county attorney, by the foreman of the grand jury, or by the judge of the district court.

(2) The fees and mileage of witnesses subpoenaed pursuant to this section must be the same as those for witnesses in criminal actions.

(3) All provisions relating to subpoenas in criminal actions apply to subpoenas issued pursuant to this section, including the provisions of Title 46, chapter 15, part 1.

History: En. 95-1407 by Sec. 1, Ch. 196, L. 1967; amd. Sec. 16, Ch. 184, L. 1977; R.C.M. 1947, 95-1407; amd. Sec. 108, Ch. 800, L. 1991.

46-11-314. Reception of evidence. In the investigation of a charge, the grand jury shall receive no other evidence than that given by witnesses produced and sworn before it or that furnished by legal evidence or the deposition of a witness.

History: En. 95-1408 by Sec. 1, Ch. 196, L. 1967; amd. Sec. 17, Ch. 184, L. 1977; R.C.M. 1947, 95-1408(1), (2); amd. Sec. 109, Ch. 800, L. 1991.

46-11-315. Advice and assistance to grand jury. (1) The grand jury may at all times ask the advice of the judge. Unless advice is asked, the judge may not be present during the sessions of the grand jury.

(2) The prosecutor may at all times appear before the grand jury for the purpose of giving information or advice relative to any matter cognizable by the grand jury and may interrogate witnesses before the grand jury whenever the prosecutor finds it necessary.

(3) Subject to the approval of the district court, the county attorney may employ a special prosecutor, investigators, interpreters, and experts at agreed-upon compensation to be first approved by the court.

History: En. 95-1406 by Sec. 1, Ch. 196, L. 1967; amd. Sec. 15, Ch. 184, L. 1977; R.C.M. 1947, 95-1406(1) thru (4); amd. Sec. 110, Ch. 800, L. 1991.

46-11-316. Recorded proceedings. (1) The grand jury shall either appoint a stenographer to take in shorthand the testimony of witnesses or the testimony must be taken by a recording device, but the record so made must include the testimony of all witnesses on that particular investigation.

(2) The stenographic reporter or operator of a recording device shall, within 30 days after an indictment has been found, certify and file with the clerk of the district court the shorthand notes or the recordings made and an original transcript of the notes or recordings.

(3) An unintentional failure of any recording to reproduce all or any portion of a proceeding may not affect the validity of the prosecution.

History: En. 95-1406 by Sec. 1, Ch. 196, L. 1967; amd. Sec. 15, Ch. 184, L. 1977; R.C.M. 1947, 95-1406(5); amd. Sec. 112, Ch. 800, L. 1991.

46-11-317. Secrecy of proceedings — disclosure. (1) Disclosure of matters occurring before the grand jury other than its deliberations and the vote of any juror may be made to any prosecutor or investigator of this state and prosecutors or investigators from any other state or the federal government for use in the performance of the prosecutor's or investigator's duty.

(2) A grand juror, an interpreter, a stenographer, an operator of a recording device, a typist who transcribes recorded testimony, or the prosecutor may not disclose matters occurring before the grand jury except as otherwise permitted by Title 46. An obligation of secrecy may not be imposed on a person except in accordance with this section. A knowing violation of this section may be punishable as contempt of court.

(3) Disclosure otherwise prohibited by this section of matters occurring before the grand jury may be made:

(a) if directed by the district court prior to or in combination with a judicial proceeding;

(b) when permitted by the district court at the request of the defendant, upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury; or

(c) when permitted by the district court, to a defendant pursuant to a proper discovery motion.

History: En. 95-1409 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-1409; amd. Sec. 113, Ch. 800, L. 1991.

46-11-318. Discharge of grand jury. When the grand jury certifies the completion of business before it and the district court concurs, the grand jury must be discharged by the district court.

History: En. 95-1404 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-1404(part); amd. Sec. 114, Ch. 800, L. 1991.

46-11-319. Expenses of grand jury. (1) Except as provided in subsection (2), all expenses of the grand jury, including expenses for special prosecutors, experts, investigators, and interpreters, if any, must be paid by the treasurer of the county out of the general fund of the county upon warrants drawn by the county auditor or by the clerk of the district court upon a written order of the judge of the district court of the county.

(2) If the county has a district court fund, all expenses of a grand jury must be paid out of that fund.

(3) Subject to the procedures established by law, the state shall reimburse the court for juror and witness fees and witness expenses. The county shall deposit the amount reimbursed in its general fund unless the county has a district court fund. If the county has a district court fund, the amount reimbursed must be deposited in that fund.

History: En. 95-1405 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-1405(f); amd. Sec. 4, Ch. 66, L. 1985; amd. Sec. 12, Ch. 680, L. 1985; amd. Sec. 115, Ch. 800, L. 1991.

46-11-320 through 46-11-330 reserved.

46-11-331. Finding an indictment. (1) The grand jury shall find an indictment when all the evidence before it taken together would in its judgment warrant a conviction by a trial jury. An indictment may be found only upon the concurrence of at least eight grand jurors.

(2) If a complaint or information is pending against the defendant and eight jurors do not concur in finding an indictment, the foreman shall report the decision to the district court judge.

History: (1)En. 95-1408 by Sec. 1, Ch. 196, L. 1967; amd. Sec. 17, Ch. 184, L. 1977; Sec. 95-1408, R.C.M. 1947; (2)En. 95-1410 by Sec. 1, Ch. 196, L. 1967; amd. Sec. 3, Ch. 3, L. 1973; Sec. 95-1410, R.C.M. 1947; R.C.M. 1947, 95-1408(3), 95-1410(a); amd. Sec. 116, Ch. 800, L. 1991.

46-11-332. Presenting the indictment. (1) An indictment, when found by the grand jury, must be signed by and presented by the foreman to the district court in the presence of the grand jury and must be filed with the clerk. The district court shall then issue an arrest warrant or summons for the defendant.

(2) If a complaint or information is pending against the defendant and eight jurors do not concur in finding an indictment, the foreman shall report the decision to the district court judge.

History: En. 95-1410 by Sec. 1, Ch. 196, L. 1967; amd. Sec. 3, Ch. 3, L. 1973; R.C.M. 1947, 95-1410(b); amd. Sec. 117, Ch. 800, L. 1991; amd. Sec. 16, Ch. 262, L. 1993.

46-11-333. Repealed. Sec. 263, Ch. 800, L. 1991.

History: En. 95-1410 by Sec. 1, Ch. 196, L. 1967; amd. Sec. 3, Ch. 3, L. 1973; R.C.M. 1947, 95-1410(c), (d).

Part 4
The Charge

Part Cross-References

Conspiracy, 45-4-102.

Alternate charges — attempt, 45-4-103.

46-11-401. Form of charge. (1) The charge must be in writing and in the name of the state or the appropriate municipality and must specify the court in which the charge is filed. The charge must be a plain, concise, and definite statement of the offense charged, including the name of the offense, whether the offense is a misdemeanor or felony, the name of the person charged, and the time and place of the offense as definitely as can be determined. The charge must state for each count the official or customary citation of the statute, rule, regulation, or other provision of law that the defendant is alleged to have violated.

(2) If the charge is by information or indictment, it must include endorsed on the information or indictment the names of the witnesses for the state, if known.

(3) If the charge is by complaint, it must be signed on oath by a peace officer, by a person having knowledge of the facts, or by the prosecutor.

(4) If the charge is by information, it must be signed by the prosecutor. If the charge is by indictment, it must be signed by the foreman of the grand jury.

(5) The court, on motion of the defendant, may strike surplusage from the indictment or information.

(6) A charge may not be dismissed because of a formal defect that does not tend to prejudice a substantial right of the defendant.

History: En. 95-1503 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-1503(a) thru (e); amd. Sec. 118, Ch. 800, L. 1991; amd. Sec. 17, Ch. 262, L. 1993.

46-11-402. Repealed. Sec. 263, Ch. 800, L. 1991.

History: En. 95-1503 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-1503(f).

46-11-403. Renumbered 46-11-205 by Code Commissioner, 1991.

46-11-404. Joinder of offenses and defendants. (1) Two or more offenses or different statements of the same offense may be charged in the same charging document in a separate count, or alternatively, if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character or are based on the same transactions connected together or constituting parts of a common scheme or plan. Allegations made in one count may be incorporated by reference in another count.

(2) If two or more charging documents are filed in the case, the court may order them to be consolidated.

(3) The prosecution is not required to elect between the different offenses set forth in the charging document, and the defendant may be convicted of any number of the offenses charged except as provided in 46-11-410. Each offense of which the defendant is convicted must be stated in the verdict or the finding of the court.

(4) Two or more defendants may be charged in the same indictment, information, or complaint if they are alleged to have participated in the same transaction constituting an offense or offenses. The defendants may be charged in one or more counts together or separately, and all of the defendants need not be charged in each count.

History: En. 95-1504 by Sec. 1, Ch. 196, L. 1967; amd. Sec. 19, Ch. 184, L. 1977; R.C.M. 1947, 95-1504(1) thru (4); amd. Sec. 119, Ch. 800, L. 1991.

Cross-References

Relief from prejudicial joinder, 46-13-211.

46-11-405. Discharge of codefendant. (1) When two or more persons are included in the same charge, the court may, at any time before the defendants have gone into their defense, on the application of the prosecutor, direct any defendant to be discharged so that the defendant may be a witness for the prosecution.

(2) When two or more persons are included in the same indictment or information and the court is of the opinion that in regard to a particular defendant there is not sufficient evidence to require the defendant to put on a defense, the court must order that defendant to be discharged before the evidence is closed so that the discharged defendant may be a witness for the codefendant.

History: En. Sec. 187, p. 245, Bannack Stat.; re-en. Sec. 308, p. 237, Cod. Stat. 1871; re-en. Sec. 308, 3d Div. Rev. Stat. 1879; re-en. Sec. 309, 3d Div. Comp. Stat. 1887; amd. Secs. 2075, 2076, Pen. C. 1895; re-en. Secs. 9276, 9277, Rev. C. 1907; re-en. Secs. 11974, 11975, R.C.M. 1921; Cal. Pen. C. Secs. 1099, 1100; re-en. Secs. 11974, 11975, R.C.M. 1935; Secs. 94-7206, 94-7207, R.C.M. 1947; redes. 95-1504(d) and (e) by Sec. 29, Ch. 513, L. 1973; amd. Sec. 19, Ch. 184, L. 1977; R.C.M. 1947, 95-1504(5), (6); amd. Sec. 18, Ch. 262, L. 1993.

46-11-406 through 46-11-409 reserved.

46-11-410. Multiple charges. (1) When the same transaction may establish the commission of more than one offense, a person charged with the conduct may be prosecuted for each offense.

(2) A defendant may not, however, be convicted of more than one offense if:

(a) one offense is included in the other;

(b) one offense consists only of a conspiracy or other form of preparation to commit the other;

(c) inconsistent findings of fact are required to establish the commission of the offenses;

(d) the offenses differ only in that one is defined to prohibit a specific instance of the conduct; or

(e) the offense is defined to prohibit a continuing course of conduct and the defendant's course of conduct was interrupted, unless the law provides that the specific periods of the conduct constitute separate offenses.

History: En. 95-1711 by Sec. 6, Ch. 513, L. 1973; amd. Sec. 25, Ch. 184, L. 1977; R.C.M. 1947, 95-1711(2); amd. Sec. 120, Ch. 800, L. 1991; Sec. 46-11-502, MCA 1989; redes. 46-11-410 by Code Commissioner, 1991.

Part 5

Effect of Former Prosecutions

Part Cross-References

Rights of accused — double jeopardy, Art. II, sec. 25, Mont. Const.

46-11-501. Repealed. Sec. 263, Ch. 800, L. 1991.

History: En. 95-1711 by Sec. 6, Ch. 513, L. 1973; amd. Sec. 25, Ch. 184, L. 1977; R.C.M. 1947, 95-1711(1).

46-11-502. Renumbered 46-11-410 by Code Commissioner, 1991.

46-11-503. Prosecution based on same transaction barred by former prosecution. (1) When two or more offenses are known to the prosecutor, are supported by probable cause, and are consummated prior to the original charge and jurisdiction and venue of the offenses lie in a single court, a prosecution is barred if:

(a) the former prosecution resulted in an acquittal. There is an acquittal whenever the prosecution results in a finding of not guilty by the trier of fact or in a determination that there is insufficient evidence to warrant a conviction. A finding of guilty of a lesser included offense that is subsequently set aside is an acquittal of the greater offense that was charged.

(b) the former prosecution resulted in a conviction that has not been set aside, reversed, or vacated;

(c) after a charge had been filed, the prosecution was terminated by a final order or judgment for the defendant that has not been set aside, reversed, or vacated; or

(d) the former prosecution was terminated for reasons not amounting to an acquittal and takes place:

(i) in a jury trial, when the jury is impaneled and sworn; or

(ii) in a nonjury trial, after the first witness is sworn but before a judgment as to guilt or innocence is reached.

(2) A prosecution based upon the same transaction as a former prosecution is not barred under subsection (1)(d) when:

(a) the defendant consents to the termination or waives the right to object to the termination; or

(b) the trial court finds that the termination is necessary because:

(i) it is physically impossible to proceed with the trial in conformity with law;

(ii) there is a legal defect in the proceedings that would make any judgment entered upon a verdict reversible as a matter of law;

(iii) prejudicial conduct makes it impossible to proceed with the trial without manifest injustice to either the defendant or the state;

(iv) the jury is unable to agree upon a verdict; or

(v) false statements of a juror on voir dire prevent a fair trial.

History: En. 95-1711 by Sec. 6, Ch. 513, L. 1973; amd. Sec. 25, Ch. 184, L. 1977; R.C.M. 1947, 95-1711(3); amd. Sec. 121, Ch. 800, L. 1991; amd. Sec. 1, Ch. 110, L. 1999.

Compiler's Comments

1999 Amendment: Chapter 110 in (1)(d)(i) substituted "when the jury is impaneled and sworn" for "after the first witness is sworn but before a verdict is returned"; and made minor changes in style. Amendment effective October 1, 1999.

46-11-504. Former prosecution in another jurisdiction. When conduct constitutes an offense within the jurisdiction of any state or federal court, a prosecution in any jurisdiction is a bar to a subsequent prosecution in this state if:

(1) the first prosecution resulted in an acquittal or in a conviction and the subsequent prosecution is based on an offense arising out of the same transaction; or

(2) the former prosecution was terminated, after the charge had been filed, by an acquittal or by a final order or judgment for the defendant that has not been set aside, reversed, or vacated and the acquittal, final order, or judgment necessarily required a determination inconsistent with a fact that must be established for conviction of the offense for which the defendant is subsequently prosecuted.

History: En. 95-1711 by Sec. 6, Ch. 513, L. 1973; amd. Sec. 25, Ch. 184, L. 1977; R.C.M. 1947, 95-1711(4); amd. Sec. 122, Ch. 800, L. 1991; amd. Sec. 1, Ch. 162, L. 1997.

46-11-505. Former prosecution not a bar. A prosecution is not a bar if:

(1) the former prosecution was before a court that lacked jurisdiction over the defendant or the offense; or

(2) the former prosecution resulted in a judgment of conviction that was held invalid in a postconviction hearing.

History: En. 95-1711 by Sec. 6, Ch. 513, L. 1973; amd. Sec. 25, Ch. 184, L. 1977; R.C.M. 1947, 95-1711(5); amd. Sec. 123, Ch. 800, L. 1991.

Part 6

Ensuring Availability of Material Witness Preserving Testimony

Part Cross-References

Detention of witnesses in criminal proceedings, Art. II, sec. 23, Mont. Const.

Subpoenas and witnesses, Title 46, ch. 15, part 1.

46-11-601. Recognizance by or deposition of witness. (1) If the defendant is held to answer after a preliminary examination, after the defendant has waived a preliminary examination, after the district court has granted leave to file an information, or after an indictment has been returned, the judge may:

(a) require any material witness for the state or defendant to enter into a written undertaking to appear at the trial; and

(b) provide for the forfeiture of a sum certain in the event the witness does not appear at the trial.

(2) Any witness who refuses to enter into a written undertaking may be remanded to custody but may not be held longer than is necessary to take the witness's deposition. After the deposition is taken, the witness must be immediately discharged.

(3) The deposition must be taken in the presence of the prosecutor and the defendant and the defendant's counsel unless either the prosecutor or the defendant and the defendant's counsel fail to attend after reasonable notice of the time and place set for taking the deposition.

History: En. 95-1204 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-1204; amd. Sec. 19, Ch. 262, L. 1993.

Cross-References

Depositions in criminal proceedings, Art. II, sec. 23, Mont. Const.

Clerk of District Court to keep witness book, 3-5-510.

Procedure in reference to witnesses' warrants, 3-5-511.

Witness from another state summoned to testify in this state, 46-15-113.

When depositions taken, 46-15-201.

Procedure for taking depositions, 46-15-202.

Part 7

Pretrial Proceedings — Confidentiality

46-11-701. Pretrial proceedings — exclusion of public and sealing of records. (1) Except as provided in this section, pretrial proceedings and records of those proceedings are open to the public. If, at the pretrial proceedings, testimony or evidence is presented that is likely to threaten the fairness of a trial, the presiding officer shall advise those present of the danger and shall seek the voluntary cooperation of the news media in delaying dissemination of potentially prejudicial information until the impaneling of the jury or until an earlier time consistent with the administration of justice.

(2) The defendant may move that all or part of the proceeding be closed to the public, or with the consent of the defendant, the judge may take action on the judge's own motion.

(3) The judge may close a preliminary hearing, bail hearing, or any other pretrial proceeding, including a hearing on a motion to suppress, and may seal the record only if:

(a) the dissemination of information from the pretrial proceeding and its record would create a clear and present danger to the fairness of the trial; and

(b) the prejudicial effect of the information on trial fairness cannot be avoided by any reasonable alternative means.

(4) Whenever all or part of any pretrial proceeding is held in chambers or otherwise closed to the public under this section, a complete record must be

kept and made available to the public following the completion of the trial or earlier if consistent with trial fairness.

(5) Notwithstanding closure of a proceeding to the public, the judge shall permit a victim of the offense to be present unless the judge determines that exclusion of the victim is necessary to protect either party's right to a fair trial or the safety of the victim. If the victim is present, the judge, at the victim's request, shall permit the presence of an individual to provide support to the victim unless the judge determines that exclusion of the individual is necessary to protect the defendant's right to a fair trial.

(6) When the judge determines that all or part of a document filed in support of a charge or warrant would present a clear and present danger to the defendant's right to a fair trial, the document or portion of the document must be sealed until the trial is completed unless the document or portion of the document must be used for trial fairness.

History: En. Sec. 124, Ch. 800, L. 1991; amd. Sec. 63, Ch. 10, L. 1993; amd. Sec. 20, Ch. 262, L. 1993; amd. Sec. 5, Ch. 125, L. 1995.

CHAPTER 12

ARRAIGNMENT OF DEFENDANT

Part 1 — General Provisions

46-12-101. Repealed.
46-12-102. Place of arraignment.
46-12-103. Repealed.
46-12-104. Bringing defendant into court.
46-12-105. Joint defendants.

Part 2 — Procedure on Arraignment

46-12-201. Manner of conducting arraignment — use of two-way electronic audio-video communication — exception.
46-12-202. Renumbered 46-12-210 by Code Commissioner, 1991.
46-12-203. Time allowed to answer.
46-12-204. Plea alternatives.
46-12-205. Record of arraignment.
46-12-206. Renumbered 46-12-213 by Code Commissioner, 1991.
46-12-207 through 46-12-209 reserved.
46-12-210. Advice to defendant.
46-12-211. Plea agreement procedure — use of two-way electronic audio-video communication.
46-12-212. Determining accuracy of plea.
46-12-213. Harmless error.

Chapter Cross-References

Rights of accused, Art. II, sec. 24, Mont. Const.

Part 1

General Provisions

46-12-101. Repealed. Sec. 263, Ch. 800, L. 1991.

History: En. 95-1601 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-1601.

46-12-102. Place of arraignment. The defendant must be arraigned in the court that has trial jurisdiction of the charge.

History: En. 95-1602 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-1602; amd. Sec. 130, Ch. 800, L. 1991.

46-12-103. Repealed. Sec. 263, Ch. 800, L. 1991.

History: En. 95-1603 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-1603; amd. Sec. 5, Ch. 710, L. 1991.

46-12-104. Bringing defendant into court. The court may direct any official who has custody of the defendant to bring him before the court to be arraigned.

History: En. 95-1604 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-1604.

46-12-105. Joint defendants. Defendants who are jointly charged may be arraigned separately or together in the discretion of the court.

History: En. 95-1605 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-1605.

Part 2

Procedure on Arraignment

46-12-201. Manner of conducting arraignment — use of two-way electronic audio-video communication — exception. (1) Arraignment must be conducted in open court and must consist of reading the charge to the defendant or stating to the defendant the substance of the charge and calling on the defendant to plead to the charge. The defendant must be given a copy of the charging document before being called upon to plead. For purposes of this chapter, an arraignment that is conducted by the use of two-way electronic audio-video communication, allowing all of the participants to be observed and heard in the courtroom by all present, is considered to be an arraignment in open court.

(2) The court shall inquire of the defendant or the defendant's counsel the defendant's true name, and if the defendant's true name is given as any other than that used in the charge, the court shall order the defendant's name to be substituted for the name under which the defendant is charged.

(3) The court shall determine whether the defendant is under any disability that would prevent the court, in its discretion, from proceeding with the arraignment. The arraignment may be continued until the court determines the defendant is able to proceed.

(4) Whenever the law requires that a defendant in a misdemeanor or felony case be taken before a court for an arraignment, this requirement may, in the discretion of the court, be satisfied either by the defendant's physical appearance before the court or by two-way electronic audio-video communication. The audio-video communication must operate so that the defendant and the judge can see each other simultaneously and converse with each other, so that the defendant and the defendant's counsel, if any, can communicate privately, and so that the defendant and the defendant's counsel are both physically present in the same place during the two-way electronic audio-video communication. The defendant may waive the requirement that the defendant's counsel be in the defendant's physical presence during the two-way electronic audio-video communication.

(5) A judge may order a defendant's physical appearance in court for arraignment. In a felony case, a judge may not accept a plea of guilty or nolo contendere from a defendant who is not physically present in the courtroom.

History: En. 95-1606 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-1606(a), (b), (c); amd. Sec. 6, Ch. 710, L. 1991; amd. Sec. 131, Ch. 800, L. 1991; amd. Sec. 7, Ch. 395, L. 1999.

Compiler's Comments

1999 Amendment: Chapter 395 in (5) after "guilty" inserted "or nolo contendere"; and made minor changes in style. Amendment effective October 1, 1999.

46-12-202. Renumbered 46-12-210 by Code Commissioner, 1991.

46-12-203. Time allowed to answer. If on the arraignment the defendant requires it, he must be allowed a reasonable time, not less than 1 day, to answer or otherwise plead to the indictment, information, or complaint. The answer may include appropriate pretrial motions.

History: En. 95-1607 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-1607.

Cross-References

Defendant's right to reasonable time for preparation for trial after plea, 46-16-106.

46-12-204. Plea alternatives. (1) A defendant may plead guilty, not guilty, or, with the consent of the court and the prosecutor, nolo contendere. If a defendant refuses to plead or if a defendant corporation fails to appear, the court shall enter a plea of not guilty.

(2) The court may not accept a plea of guilty or nolo contendere without first determining that the plea is voluntary and not the result of force or threats or of promises apart from the plea agreement. The court shall also inquire as to whether the defendant's willingness to plead guilty or nolo contendere results from prior discussions between the prosecutor and the defendant or the defendant's attorney.

(3) With the approval of the court and the consent of the prosecutor, a defendant may enter a plea of guilty or nolo contendere, reserving the right, on appeal from the judgment, to review the adverse determination of any specified pretrial motion. If the defendant prevails on appeal, the defendant must be allowed to withdraw the plea.

(4) The court may not accept a plea of nolo contendere in a case involving a sexual offense, as defined in 46-23-502.

History: En. 95-1606 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-1606(part); amd. Sec. 2, Ch. 606, L. 1985; amd. Sec. 132, Ch. 800, L. 1991; amd. Sec. 8, Ch. 395, L. 1999.

Compiler's Comments

1999 Amendment: Chapter 395 in (1) in first sentence inserted "or, with the consent of the court and the prosecutor, nolo contendere"; in (2) in two places inserted "or nolo contendere"; in (3) in first sentence inserted "or nolo contendere"; inserted (4) prohibiting a nolo contendere plea in a case involving a sexual offense; and made minor changes in style. Amendment effective October 1, 1999.

Cross-References

Plea of not guilty, 46-16-104.
Plea of guilty, 46-16-105.

46-12-205. Record of arraignment. The court must prepare and keep a written record of all arraignment proceedings. In district courts a verbatim record of all arraignment proceedings must be made, preserved, and filed with the court.

History: En. 95-1606 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-1606(f).

46-12-206. Renumbered 46-12-213 by Code Commissioner, 1991.

46-12-207 through 46-12-209 reserved.

46-12-210. Advice to defendant. (1) Before accepting a plea of guilty or nolo contendere, the court shall determine that the defendant understands the following:

(a) (i) the nature of the charge for which the plea is offered;

(ii) the mandatory minimum penalty provided by law, if any;

(iii) the maximum penalty provided by law, including the effect of any penalty enhancement provision or special parole restriction; and

(iv) when applicable, the requirement that the court may also order the defendant to make restitution of the costs and assessments provided by law;

(b) if the defendant is not represented by an attorney, the fact that the defendant has the right to be represented by an attorney at every stage of the proceeding and that, if necessary, one will be appointed to represent the defendant;

(c) that the defendant has the right:

(i) to plead not guilty or to persist in that plea if it has already been made;

(ii) to be tried by a jury and at the trial has the right to the assistance of counsel;

(iii) to confront and cross-examine witnesses against the defendant; and

(iv) not to be compelled to reveal personally incriminating information;

(d) that if the defendant pleads guilty or nolo contendere in fulfillment of a plea agreement, the court is not required to accept the terms of the agreement and that the defendant may not be entitled to withdraw the plea if the agreement is not accepted pursuant to 46-12-211;

(e) that if the defendant's plea of guilty or nolo contendere is accepted by the courts, there will not be a further trial of any kind, so that by pleading guilty or nolo contendere the defendant waives the right to a trial; and

(f) that if the defendant is not a United States citizen, a guilty or nolo contendere plea might result in deportation from or exclusion from admission to the United States or denial of naturalization under federal law.

(2) The requirements of subsection (1) may be accomplished by the defendant filing a written acknowledgment of the information contained in subsection (1).

History: En. 95-1606 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-1606(part); amd. Sec. 1, Ch. 606, L. 1985; amd. Sec. 1, Ch. 73, L. 1991; amd. Sec. 133, Ch. 800, L. 1991; Sec. 46-12-202, MCA 1989; redes. 46-12-210 by Code Commissioner, 1991; amd. Sec. 21, Ch. 262, L. 1993; amd. Sec. 9, Ch. 395, L. 1999.

Compiler's Comments

1999 Amendment: Chapter 395 in (1) near beginning inserted "or nolo contendere"; in (1)(d) inserted "or nolo contendere"; in (1)(e) in two places inserted "or nolo contendere"; and in (1)(f) inserted "or nolo contendere". Amendment effective October 1, 1999.

Cross-References

Duty of court to advise at initial appearance, 46-7-102.

Court to advise defendant of rights — extradition proceedings, 46-30-217.

46-12-211. Plea agreement procedure — use of two-way electronic audio-video communication. (1) The prosecutor and the attorney for the defendant, or the defendant when acting pro se, may engage in discussions with a view toward reaching an agreement that, upon the entering of a plea of guilty or nolo contendere to a charged offense or to a lesser or related offense, the prosecutor will do any of the following:

(a) move for dismissal of other charges;

(b) agree that a specific sentence is the appropriate disposition of the case; or

(c) make a recommendation, or agree not to oppose the defendant's request, for a particular sentence, with the understanding that the recommendation or request may not be binding upon the court.

(2) Subject to the provisions of subsection (5), if a plea agreement has been reached by the parties, the court shall, on the record, require a disclosure of the agreement in open court or, on a showing of good cause in camera, at the time that the plea is offered. If the agreement is of the type specified in subsection (1)(a) or (1)(b), the court may accept or reject the agreement or may defer its decision as to the acceptance or rejection until there has been an opportunity to consider the presentence report. If the agreement is of the type specified in subsection (1)(c), the court shall advise the defendant that, if the court does not accept the recommendation or request, the defendant nevertheless has no right to withdraw the plea.

(3) If the court accepts a plea agreement, the court shall inform the defendant that it will embody in the judgment and sentence the disposition provided for in the plea agreement.

(4) If the court rejects a plea agreement of the type specified in subsection (1)(a) or (1)(b), the court shall, on the record, inform the parties of this fact and advise the defendant that the court is not bound by the plea agreement, afford the defendant an opportunity to withdraw the plea, and advise the defendant that if the defendant persists in the guilty or nolo contendere plea, the disposition of the case may be less favorable to the defendant than that contemplated by the plea agreement.

(5) For purposes of this section, in cases in which the defendant is charged with a misdemeanor offense, a disclosure of the agreement through the use of two-way electronic audio-video communication, allowing all of the participants to be observed and heard in the courtroom by all present, is considered to be a disclosure in open court. Audio-video communication may be used if neither party objects and the court agrees to its use. The audio-video communication must operate as provided in 46-12-201.

History: En. Sec. 134, Ch. 800, L. 1991; amd. Sec. 22, Ch. 262, L. 1993; amd. Sec. 1, Ch. 163, L. 1997; amd. Sec. 10, Ch. 395, L. 1999.

Compiler's Comments

1999 Amendment: Chapter 395 in (1) in introductory clause near end inserted "or nolo contendere"; and in (4) near end inserted "or nolo contendere". Amendment effective October 1, 1999.

46-12-212. Determining accuracy of plea. (1) The court may not accept a guilty plea without determining that there is a factual basis for the plea in charges of felonies or misdemeanors resulting in incarceration.

(2) A defendant who is unwilling to admit to any element of the offense that would provide a factual basis for a plea of guilty may, with the consent of the court, enter a plea of guilty or may, with the consent of the court and the prosecutor, enter a plea of nolo contendere to the offense if the defendant considers the plea to be in the defendant's best interest and the court determines that there is a factual basis for the plea.

History: En. Sec. 135, Ch. 800, L. 1991; amd. Sec. 11, Ch. 395, L. 1999.

Compiler's Comments

1999 Amendment: Chapter 395 in (2) near middle after "guilty" inserted "or may, with the consent of the court and the prosecutor, enter a plea of nolo contendere"; and made minor changes in style. Amendment effective October 1, 1999.

46-12-213. Harmless error. Any variance from the procedure required by 46-12-211 that does not affect the substantial rights of the defendant must be disregarded.

History: En. 95-1608 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-1608; amd. Sec. 136, Ch. 800, L. 1991; Sec. 46-12-206, MCA 1989; redes. 46-12-213 by Code Commissioner, 1991.

CHAPTER 13

PRETRIAL MOTIONS

Part 1 — General Provisions

46-13-101. Pretrial motions and notices.
46-13-102. Repealed.
46-13-103. Repealed.
46-13-104. Ruling on motions.
46-13-105. Repealed.
46-13-106. Renumbered 46-13-402 by Code Commissioner, 1991.
46-13-107 reserved.
46-13-108. Notice by prosecutor seeking persistent felony offender status.
46-13-109. Notice by prosecutor of other crimes, wrongs, or acts.
46-13-110. Omnibus hearing.

Part 2 — Specific Pretrial Motions

46-13-201. Renumbered 46-13-401 by Code Commissioner, 1991.
46-13-202. Motion for continuance.
46-13-203. Change of place of trial for prejudice.
46-13-204. Transfer of trial.
46-13-205. Return to original place of trial.
46-13-206 through 46-13-209 reserved.
46-13-210. Trial of indictments, informations, complaints, or defendants together.
46-13-211. Relief from prejudicial joinder.

Part 3 — Suppression of Evidence

46-13-301. Suppression of confession or admission.
46-13-302. Suppression of evidence.

Part 4 — Motion for Dismissal

46-13-401. Dismissal at instance of court or prosecution.
46-13-402. Effect of order to dismiss.

Chapter Cross-References

Rights of accused and of state — change of venue, Art. II, sec. 24, Mont. Const.

Repeal of law creating criminal offense — when bar to prosecution, 1-2-205.

Unfair trade practices — immunity from misdemeanor prosecution — suit for injunction, 30-14-222.

Part 1
General Provisions

46-13-101. Pretrial motions and notices. (1) Except for good cause shown, any defense, objection, or request that is capable of determination without trial of the general issue must be raised at or before the omnibus hearing unless otherwise provided by Title 46.

(2) Failure of a party to raise defenses or objections or to make requests that must be made prior to trial, at the time set by the court, constitutes a waiver of the defense, objection, or request.

(3) The court, for cause shown, may grant relief from any waiver provided by this section. Lack of jurisdiction or the failure of a charging document to state an offense is a nonwaivable defect and must be noticed by the court at any time during the pendency of a proceeding.

(4) Unless the court provides otherwise, all pretrial motions must be in writing and must be supported by a statement of the relevant facts upon which the motion is being made. The motion must state with particularity the grounds for the motion and the order or relief sought.

History: En. 95-1701 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-1701; amd. Sec. 168, Ch. 800, L. 1991.

46-13-102. Repealed. Sec. 263, Ch. 800, L. 1991.

History: En. 95-1702 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-1702.

46-13-103. Repealed. Sec. 263, Ch. 800, L. 1991.

History: En. 95-1704 by Sec. 1, Ch. 196, L. 1967; amd. Sec. 22, Ch. 184, L. 1977; R.C.M. 1947, 95-1704.

46-13-104. Ruling on motions. (1) A motion made before trial must be determined before trial unless the court, for good cause, orders it deferred for determination at the trial of the general issue or until after the verdict, but a determination may not be deferred if a party's right to appeal is adversely affected.

(2) Except where mandated by Title 46, the court has discretion to conduct a hearing on the merits of a motion.

(3) The court's final determination of any pretrial motion must state, either in writing or on the record, the court's findings of fact and conclusions of law.

History: En. 95-1705 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-1705; amd. Sec. 169, Ch. 800, L. 1991.

46-13-105. Repealed. Sec. 263, Ch. 800, L. 1991.

History: En. 95-1706 by Sec. 1, Ch. 196, L. 1967; amd. Sec. 23, Ch. 184, L. 1977; R.C.M. 1947, 95-1706(1).

46-13-106. Renumbered 46-13-402 by Code Commissioner, 1991.

46-13-107 reserved.

46-13-108. Notice by prosecutor seeking persistent felony offender status. (1) Except for good cause shown, if the prosecution seeks treatment of the accused as a persistent felony offender, notice of that fact must be given at or before the omnibus hearing pursuant to 46-13-110.

(2) The notice must specify the alleged prior convictions and may not be made known to the jury before the verdict is returned except as allowed by the Montana Rules of Evidence.

(3) If the defendant objects to the allegations contained in the notice, the judge shall conduct a hearing to determine if the allegations in the notice are true.

(4) The hearing must be held before the judge alone. If the judge finds any allegations of the prior convictions are true, the accused must be sentenced as provided by law.

(5) The notice must be filed and sealed until the time of trial or until a plea of guilty or nolo contendere is given by the defendant.

History: En. 95-1506 by Sec. 1, Ch. 196, L. 1967; amd. Sup. Ct. Ord. 11450-2-3-4, Oct. 10, 1968, eff. Dec. 1, 1968; amd. Sec. 20, Ch. 184, L. 1977; R.C.M. 1947, 95-1506; amd. Sec. 171, Ch. 800, L. 1991; Sec. 46-18-503, MCA 1989; redes. 46-13-108 by Code Commissioner, 1991; amd. Sec. 23, Ch. 262, L. 1993; amd. Sec. 12, Ch. 395, L. 1999.

Compiler's Comments

1999 Amendment: Chapter 395 in (5) inserted "or nolo contendere". Amendment effective October 1, 1999.

46-13-109. Notice by prosecutor of other crimes, wrongs, or acts. (1) Except for good cause shown, if the prosecutor intends to use evidence of other crimes, wrongs, or acts pursuant to Rule 404(b), Montana Rules of Evidence, notice must be given at or before the omnibus hearing held pursuant to 46-13-110.

(2) The notice must specify the other crimes, wrongs, or acts and must include a statement as to the purpose for which the evidence is to be offered.

(3) The notice must be filed and sealed until the time of trial or until a plea of guilty or nolo contendere is entered by the defendant.

History: En. Sec. 47, Ch. 262, L. 1993; amd. Sec. 13, Ch. 395, L. 1999.

Compiler's Comments

1999 Amendment: Chapter 395 in (3) inserted "or nolo contendere". Amendment effective October 1, 1999.

46-13-110. Omnibus hearing. (1) Within a reasonable time following the entry of a not guilty plea but not less than 30 days before trial, the court shall hold an omnibus hearing.

(2) The purpose of the hearing is to expedite the procedures leading up to the trial of the defendant.

(3) The presence of the defendant is not required. The prosecutor and the defendant's counsel shall attend the hearing and must be prepared to discuss any pretrial matter appropriate to the case, including but not limited to:

(a) joinder and severance of offenses or defendants, 46-11-404, 46-13-210, and 46-13-211;

(b) double jeopardy, 46-11-410, 46-11-503, and 46-11-504;

(c) the need for exclusion of the public and for sealing records of any pretrial proceedings, 46-11-701;

(d) notification of the existence of a plea agreement, 46-12-211;

(e) disclosure and discovery motions, Title 46, chapter 15, part 3;

(f) notice of reliance on certain defenses, 46-15-323;

(g) notice of seeking persistent felony offender status, 46-13-108;

(h) notice of other crimes, wrongs, or acts, 46-13-109;

(i) motion to suppress, 46-13-301 and 46-13-302;
(j) motion to dismiss, 46-13-401 and 46-13-402;
(k) motion for change of place of trial, 46-13-203 through 46-13-205;
(l) reasonableness of bail, Title 46, chapter 9; and
(m) stipulations.

(4) At the conclusion of the hearing, a court-approved memorandum of the matters settled must be signed by the court and counsel and filed with the court.

(5) Any motions made pursuant to subsections (1) through (3) may be ruled on by the court at the time of the hearing, where appropriate, or may be scheduled for briefing and further hearing as the court considers necessary.

History: En. Sec. 170, Ch. 800, L. 1991; amd. Sec. 24, Ch. 262, L. 1993.

Part 2
Specific Pretrial Motions

46-13-201. Renumbered 46-13-401 by Code Commissioner, 1991.

46-13-202. Motion for continuance. (1) The defendant or the prosecutor may move for a continuance. If the motion is made more than 30 days after arraignment or at any time after trial has begun, the court may require that it be supported by affidavit.

(2) The court may upon the motion of either party or upon the court's own motion order a continuance if the interests of justice so require.

(3) All motions for continuance are addressed to the discretion of the trial court and must be considered in the light of the diligence shown on the part of the movant. This section must be construed to the end that criminal cases are tried with due diligence consonant with the rights of the defendant and the prosecution to a speedy trial.

History: En. 95-1708 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-1708; amd. Sec. 25, Ch. 262, L. 1993.

46-13-203. Change of place of trial for prejudice. (1) The defendant or the prosecution may move for a change of place of trial on the ground that there exists in the county in which the charge is pending such prejudice that a fair trial cannot be had in the county.

(2) If the district court determines that there exists in the county in which the prosecution is pending such prejudice that a fair trial cannot be had, the district court shall:

(a) transfer the cause to any other county in which a fair trial may be had;

(b) direct that a jury be selected in any county where a fair trial may be had and then returned to the county where the prosecution is pending to try the case; or

(c) take any other action designed to ensure that a fair trial may be had.

History: En. 95-1710 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-1710; amd. Sec. 14, Ch. 116, L. 1979; amd. Sec. 1, Ch. 556, L. 1981; amd. Sec. 174, Ch. 800, L. 1991; amd. Sec. 26, Ch. 262, L. 1993.

Cross-References

Rights of accused and of state — change of venue, Art. II, sec. 24, Mont. Const.

46-13-204. Transfer of trial. If the court determines that a motion to dismiss based upon the grounds of lack of jurisdiction or improper place of trial is well-founded, it may, instead of ordering dismissal, order the cause transferred to a court of competent jurisdiction or to a proper place of trial.

History: En. 95-1707 by Sec. 1, Ch. 196, L. 1967; amd. Sec. 24, Ch. 184, L. 1977; R.C.M. 1947, 95-1707.

46-13-205. Return to original place of trial. When a trial occurs after a change of place of trial and a retrial is required, the cause must be returned to the county in which the charge was originally properly filed for further proceedings.

History: En. Sec. 175, Ch. 800, L. 1991.

46-13-206 through 46-13-209 reserved.

46-13-210. Trial of indictments, informations, complaints, or defendants together. The court may order two or more indictments, informations, complaints, or defendants to be tried together if the interests of justice require and the charges or defendants could have been joined in a single indictment, information, or complaint as provided for in 46-11-404.

History: En. Sec. 176, Ch. 800, L. 1991; amd. Sec. 27, Ch. 262, L. 1993.

46-13-211. Relief from prejudicial joinder. (1) If it appears that a defendant or the prosecution is prejudiced by a joinder of charges or defendants in an indictment, information, or complaint or by a joinder for trial together, the court may order separate trials, grant a severance of defendants, or provide whatever other relief justice requires.

(2) In ruling on a motion by a defendant for severance, the court may order the prosecutor to deliver to the court for inspection, in camera, any statements or confessions made by the defendants that the prosecution intends to introduce at trial.

History: En. Sec. 177, Ch. 800, L. 1991.

Cross-References

Joinder of offenses and defendants, 46-11-404.

Part 3

Suppression of Evidence

46-13-301. Suppression of confession or admission. (1) A defendant may move to suppress as evidence any confession or admission given by the defendant on the ground that it was involuntary. The motion must be in writing and state facts showing why the confession or admission was involuntary.

(2) If the allegations of the motion state facts that, if true, show that the confession or admission was involuntary, the court shall conduct a hearing into the merits of the motion. The prosecution must prove by a preponderance of the evidence that the confession or admission was voluntary.

(3) The issue of the admissibility of the confession or admission may not be submitted to the jury. If the confession or admission is determined to be admissible, the circumstances surrounding the making of the confession or admission may be submitted to the jury as bearing upon the credibility or the weight to be given to the confession or admission.

(4) If the motion is granted, the confession or admission is not admissible in evidence against the movant at the trial of the case.

History: En. 95-1805 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-1805; amd. Sec. 1, Ch. 44, L. 1981; amd. Sec. 173, Ch. 800, L. 1991.

46-13-302. Suppression of evidence. (1) A defendant aggrieved by an unlawful search and seizure may move the court to suppress as evidence anything obtained by the unlawful search and seizure.

(2) If the motion states facts that, if true, would show that the evidence should be suppressed, the court shall hear the merits of the motion at the omnibus hearing or at a later date if the court orders.

(3) If the motion is granted, the evidence is not admissible at trial.

History: En. 95-1806 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-1806; amd. Sec. 172, Ch. 800, L. 1991.

Cross-References

Unreasonable search and seizure prohibited, Art. II, sec. 11, Mont. Const.

Part 4
Motion for Dismissal

46-13-401. Dismissal at instance of court or prosecution. (1) The court may, either on its own motion or upon the application of the prosecuting attorney and in furtherance of justice, order a complaint, information, or indictment to be dismissed. However, the court may not order a dismissal of a complaint, information, or indictment, or a count contained in a complaint, information, or indictment, charging a felony, unless good cause for dismissal is shown and the reasons for the dismissal are set forth in an order entered upon the minutes.

(2) After the entry of a plea upon a misdemeanor charge, the court, unless good cause to the contrary is shown, shall order the prosecution to be dismissed, with prejudice, if a defendant whose trial has not been postponed upon the defendant's motion is not brought to trial within 6 months.

History: En. 95-1703 by Sec. 1, Ch. 196, L. 1967; amd. Sec. 1, Ch. 173, L. 1971; R.C.M. 1947, 95-1703; amd. Sec. 3, Ch. 606, L. 1985; amd. Sec. 178, Ch. 800, L. 1991; Sec. 46-13-201, MCA 1989; redes. 46-13-401 by Code Commissioner, 1991.

Cross-References

Right to speedy trial, Art. II, sec. 24, Mont. Const.

46-13-402. Effect of order to dismiss. If the court directs the action to be dismissed, the defendant must, if in custody, be discharged and, if admitted to bail, have bail exonerated or money deposited instead of bail refunded to the defendant.

History: En. 95-1706 by Sec. 1, Ch. 196, L. 1967; amd. Sec. 23, Ch. 184, L. 1977; R.C.M. 1947, 95-1706(2); amd. Sec. 179, Ch. 800, L. 1991; Sec. 46-13-106, MCA 1989; redes. 46-13-402 by Code Commissioner, 1991.

CHAPTER 14

MENTAL COMPETENCY OF ACCUSED

Part 1 — Relevance of Mental Disease or Defect

46-14-101. Mental disease or defect.
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46-14-204. Prosecution's right to examination.
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46-14-206. Report of examination.
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46-14-213. Psychiatric or psychological testimony upon trial.
46-14-214. Form of verdict and judgment.
46-14-215 and 46-14-216 reserved.
46-14-217. Admissibility of statements made during examination or treatment.
46-14-218 through 46-14-220 reserved.
46-14-221. Determination of fitness to proceed — effect of finding of unfitness — expenses.
46-14-222. Proceedings if fitness regained.

Part 3 — Disposition of Defendant

46-14-301. Commitment upon finding of not guilty by reason of lack of mental state — hearing to determine release or discharge.
46-14-302. Discharge or release upon motion of director.
46-14-303. Application for discharge or release by committed person.
46-14-304. Revocation of conditional release.
46-14-305 through 46-14-310 reserved.
46-14-311. Consideration of mental disease or defect in sentencing.
46-14-312. Sentence to be imposed.
46-14-313. Discharge of defendant from supervision.

Part 4 — Privileged Communications

46-14-401. Renumbered 46-14-217 by Code Commissioner, 1991.

Part 1
Relevance of Mental Disease or Defect

46-14-101. Mental disease or defect. As used in this chapter, the term "mental disease or defect" does not include an abnormality manifested only by repeated criminal or other antisocial behavior.

History: En. 95-501 by Sec. 1, Ch. 196, L. 1967; amd. Sec. 3, Ch. 184, L. 1977; R.C.M. 1947, 95-501; amd. Sec. 1, Ch. 713, L. 1979; amd. Sec. 149, Ch. 800, L. 1991; amd. Sec. 199, Ch. 42, L. 1997.

Cross-References

Voluntary act — material element of every offense, 45-2-202.

Criminal responsibility of person in intoxicated or drugged condition, 45-2-203.

Compulsion of threatened bodily injury, 45-2-212.

46-14-102. Evidence of mental disease or defect admissible to prove state of mind. Evidence that the defendant suffered from a mental disease or defect is admissible to prove that the defendant did or did not have a state of mind that is an element of the offense.

History: En. 95-502 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-502; amd. Sec. 150, Ch. 800, L. 1991.

46-14-103. Mental disease or defect excluding fitness to proceed. A person who, as a result of mental disease or defect, is unable to understand the proceedings against the person or to assist in the person's own defense may not be tried, convicted, or sentenced for the commission of an offense so long as the incapacity endures.

History: En. 95-504 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-504; amd. Sec. 151, Ch. 800, L. 1991.

Part 2

Procedure When Mental Disease or Defect an Issue

46-14-201. Renumbered 46-14-214 by Code Commissioner, 1991.

46-14-202. Examination of defendant. (1) If the defendant or the defendant's counsel files a written motion requesting an examination or if the issue of the defendant's fitness to proceed is raised by the district court, prosecution, or defense counsel, the district court shall appoint at least one qualified psychiatrist or licensed clinical psychologist or shall request the superintendent of the Montana state hospital to designate at least one qualified psychiatrist or licensed clinical psychologist, which designation may be or include the superintendent, to examine and report upon the defendant's mental condition.

(2) The court may order the defendant to be committed to a hospital or other suitable facility for the purpose of the examination for a period not exceeding 60 days or a longer period as the court determines to be necessary for the purpose and may direct that a qualified psychiatrist or licensed clinical psychologist retained by the defendant be permitted to witness and participate in the examination.

(3) In the examination, any method may be employed that is accepted by the medical or psychological profession for the examination of those alleged to be suffering from mental disease or defect.

(4) If the defendant is indigent or the examination occurs at the request of the prosecution, the cost of the examination must be paid by the county or the state, or both, according to procedures established under 3-5-902(1).

History: En. 95-505 by Sec. 1, Ch. 196, L. 1967; amd. Sec. 88, Ch. 120, L. 1974; R.C.M. 1947, 95-505(1), (2); amd. Sec. 3, Ch. 713, L. 1979; amd. Sec. 1, Ch. 616, L. 1981; amd. Sec. 2, Ch. 361, L. 1983; amd. Sec. 13, Ch. 680, L. 1985; amd. Sec. 1, Ch. 127, L. 1987; amd. Sec. 152, Ch. 800, L. 1991.

Cross-References

Consideration of mental disease or defect in sentencing, 46-14-311.

46-14-203. Renumbered 46-14-206 by Code Commissioner, 1991.

46-14-204. Prosecution's right to examination. (1) When the defense discloses the report of the examination to the prosecution or files a notice of the intention to rely on a defense of mental disease or defect, the prosecution is entitled to have the defendant examined by a qualified psychiatrist or licensed clinical psychologist.

(2) The report of the examination must be disclosed to the defense within 10 days of its receipt by the prosecution.

History: En. Sec. 153, Ch. 800, L. 1991.

46-14-205. Access to defendant for examination. If either the defendant or the prosecution wishes the defendant to be examined by a qualified psychiatrist or licensed clinical psychologist selected by the one proposing the examination in order to determine the defendant's fitness to proceed or whether the defendant had, at the time the offense was committed, a particular state of mind that is an essential element of the offense, the examiner shall be permitted to have reasonable access to the defendant for the purpose of the examination.

History: En. 95-507 by Sec. 1, Ch. 196, L. 1967; amd. Sec. 90, Ch. 120, L. 1974; amd. Sec. 4, Ch. 184, L. 1977; R.C.M. 1947, 95-507(2); amd. Sec. 5, Ch. 713, L. 1979; amd. Sec. 2, Ch. 127, L. 1987; amd. Sec. 154, Ch. 800, L. 1991; Sec. 46-14-212, MCA 1989; redes. 46-14-205 by Code Commissioner, 1991.

46-14-206. Report of examination. (1) A report of the examination must include the following:

(a) a description of the nature of the examination;

(b) a diagnosis of the mental condition of the defendant, including an opinion as to whether the defendant suffers from a mental disorder and may require commitment or is seriously developmentally disabled, as defined in 53-20-102;

(c) if the defendant suffers from a mental disease or defect, an opinion as to the defendant's capacity to understand the proceedings against the defendant and to assist in the defendant's own defense;

(d) when directed by the court, an opinion as to the capacity of the defendant to have a particular state of mind that is an element of the offense charged; and

(e) when directed by the court, an opinion as to the capacity of the defendant, because of a mental disease or defect, to appreciate the criminality of the defendant's behavior or to conform the defendant's behavior to the requirement of the law.

(2) If the examination cannot be conducted by reason of the unwillingness of the defendant to participate in the examination, the report must state that fact and must include, if possible, an opinion as to whether the unwillingness of the defendant was the result of mental disease or defect.

History: En. 95-505 by Sec. 1, Ch. 196, L. 1967; amd. Sec. 88, Ch. 120, L. 1974; R.C.M. 1947, 95-505(3) thru (5); amd. Sec. 4, Ch. 713, L. 1979; amd. Sec. 155, Ch. 800, L. 1991; Sec. 46-14-203, MCA 1989; redes. 46-14-206 by Code Commissioner, 1991; amd. Sec. 1, Ch. 397, L. 1993; amd. Sec. 12, Ch. 490, L. 1997.

46-14-207 through 46-14-210 reserved.

46-14-211. Repealed. Sec. 15, Ch. 713, L. 1979.

History: En. 95-507 by Sec. 1, Ch. 196, L. 1967; amd. Sec. 90, Ch. 120, L. 1974; amd. Sec. 4, Ch. 184, L. 1977; R.C.M. 1947, 95-507(1).

46-14-212. Renumbered 46-14-205 by Code Commissioner, 1991.

46-14-213. Psychiatric or psychological testimony upon trial. (1) Upon trial, any psychiatrist or licensed clinical psychologist who reported under 46-14-202 or 46-14-206 may be called as a witness by the prosecutor or by the defense. Both the prosecution and the defense may summon any other qualified psychiatrist or licensed clinical psychologist to testify, but no one who has not examined the defendant is competent to testify to an expert opinion with respect to the mental condition of the defendant, as distinguished from the validity of the procedure followed by or the general scientific propositions stated by another witness.

(2) When a psychiatrist or licensed clinical psychologist who has examined the defendant testifies concerning the defendant's mental condition, the psychiatrist or licensed clinical psychologist may make a statement as to the nature of the examination and the medical or psychological diagnosis of the mental condition of the defendant. The expert may make any explanation reasonably serving to clarify the expert's examination and diagnosis, and the expert may be cross-examined as to any matter bearing on the expert's competency or credibility or the validity of the expert's examination or medical or psychological diagnosis. A psychiatrist or licensed clinical psychologist may not offer an opinion to the jury on the ultimate issue of whether the defendant did or did not have a particular state of mind that is an element of the offense charged.

History: En. 95-507 by Sec. 1, Ch. 196, L. 1967; amd. Sec. 90, Ch. 120, L. 1974; amd. Sec. 4, Ch. 184, L. 1977; R.C.M. 1947, 95-507(3), (4); amd. Sec. 6, Ch. 713, L. 1979; amd. Sec. 3, Ch. 361, L. 1983; amd. Sec. 3, Ch. 127, L. 1987; amd. Sec. 156, Ch. 800, L. 1991.

46-14-214. Form of verdict and judgment. When the defendant is found not guilty of the charged offense or offenses or any lesser included offense for the reason that due to a mental disease or defect the defendant did not have a particular state of mind that is an essential element of the offense charged, the verdict and the judgment must state that reason.

History: En. 95-503 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-503; amd. Sec. 2, Ch. 713, L. 1979; amd. Sec. 1, Ch. 593, L. 1981; amd. Sec. 157, Ch. 800, L. 1991; Sec. 46-14-201, MCA 1989; redes. 46-14-214 by Code Commissioner, 1991.

Cross-References

Notice of certain defenses, 46-15-323.

46-14-215 and 46-14-216 reserved.

46-14-217. Admissibility of statements made during examination or treatment. A statement made for the purposes of psychiatric or psychological examination or treatment provided for in this section by a person subjected to examination or treatment is not admissible in evidence against the person at trial on any issue other than that of the person's mental condition. It is admissible on the issue of the person's mental condition, whether or not it would otherwise be considered a privileged communication, only when and after the defendant presents evidence that due to a mental disease or defect the defendant did not have a particular state of mind that is an element of the offense charged.

History: En. 95-509 by Sec. 1, Ch. 196, L. 1967; amd. Sec. 5, Ch. 184, L. 1977; R.C.M. 1947, 95-509; amd. Sec. 13, Ch. 713, L. 1979; amd. Sec. 158, Ch. 800, L. 1991; Sec. 46-14-401, MCA 1989; redes. 46-14-217 by Code Commissioner, 1991.

Cross-References

Doctor-patient privilege, 26-1-805.

Psychologist-client privilege, 26-1-807.

46-14-218 through 46-14-220 reserved.

46-14-221. Determination of fitness to proceed — effect of finding of unfitness — expenses. (1) The issue of the defendant's fitness to proceed may be raised by the court, by the defendant or the defendant's counsel, or by the prosecutor. When the issue is raised, it must be determined by the court. If neither the prosecutor nor the defendant's counsel contests the finding of the report filed under 46-14-206, the court may make the determination on the basis of the report. If the finding is contested, the court shall hold a hearing on the issue. If the report is received in evidence upon the hearing, the parties have the right to subpoena and cross-examine the psychiatrists or licensed clinical psychologists who joined in the report and to offer evidence upon the issue.

(2) (a) If the court determines that the defendant lacks fitness to proceed, the proceeding against the defendant must be suspended, except as provided in subsection (4), and the court shall commit the defendant to the custody of the director of the department of public health and human services to be placed in an appropriate institution of the department of public health and human services for so long as the unfitness endures.

(b) The institution shall develop an individualized treatment plan to assist the defendant to gain fitness to proceed. The treatment plan may include a physician's prescription of reasonable and appropriate medication that is consistent with accepted medical standards. If the defendant refuses to comply with the treatment plan, the institution may petition the court for an order requiring compliance. The defendant has a right to a hearing on the petition. The court shall enter into the record a detailed statement of the facts upon which an order is made, and if compliance with the individualized treatment plan is ordered, the court shall also enter into the record specific findings that the state has proven an overriding justification for the order and that the treatment being ordered is medically appropriate.

(c) The committing court shall, within 90 days of commitment, review the defendant's fitness to proceed. If the court finds that the defendant is still unfit to proceed and that it does not appear that the defendant will become fit to proceed within the reasonably foreseeable future, the proceeding against the defendant must be dismissed, except as provided in subsection (4), and the prosecutor shall petition the court in the manner provided in chapter 20 or 21 of Title 53, whichever is appropriate, to determine the disposition of the defendant pursuant to those provisions.

(3) If the court determines that the defendant lacks fitness to proceed because the defendant has a developmental disability as provided in 53-20-102(5), the proceeding against the defendant must be dismissed and the prosecutor shall petition the court in the manner provided in chapter 20 of Title 53.

(4) The fact that the defendant is unfit to proceed does not preclude any legal objection to the prosecution that is susceptible to fair determination prior to trial and that is made without the personal participation of the defendant.

(5) The expenses of sending the defendant to the custody of the director of the department of public health and human services to be placed in an appropriate institution of the department of corrections, of keeping the defendant there, and of bringing the defendant back are chargeable to the state and payable according to procedures established under 3-5-902(1).

History: En. 95-506 by Sec. 1, Ch. 196, L. 1967; amd. Sec. 3, Ch. 513, L. 1973; amd. Sec. 89, Ch. 120, L. 1974; amd. Sec. 6, Ch. 568, L. 1977; R.C.M. 1947, 95-506(part); amd. Sec. 7, Ch. 713, L. 1979; amd. Sec. 2, Ch. 616, L. 1981; amd. Sec. 1, Ch. 352, L. 1983; amd. Sec. 14, Ch. 680, L. 1985; amd. Sec. 4, Ch. 127, L. 1987; amd. Sec. 1, Ch. 262, L. 1991; amd. Sec. 159, Ch. 800, L. 1991; amd. Sec. 1, Ch. 211, L. 1995; amd. Sec. 21, Ch. 255, L. 1995; amd. Sec. 204, Ch. 546, L. 1995.

46-14-222. Proceedings if fitness regained. When the court, on its own motion or upon the application of the director of the department of public health and human services, the prosecution, or the defendant or the defendant's legal representative, determines, after a hearing if a hearing is requested, that the defendant has regained fitness to proceed, the proceeding must be resumed. If, however, the court is of the view that so much time has elapsed since the commitment of the defendant that it would be unjust to resume the criminal proceedings, the court may dismiss the charge and may order the defendant to be discharged or, subject to the law governing the civil commitment of persons suffering from serious mental illness, order the defendant committed to an appropriate institution of the department of public health and human services.

History: En. 95-506 by Sec. 1, Ch. 196, L. 1967; amd. Sec. 3, Ch. 513, L. 1973; amd. Sec. 89, Ch. 120, L. 1974; amd. Sec. 6, Ch. 568, L. 1977; R.C.M. 1947, 95-506(part); amd. Sec. 8, Ch. 713, L. 1979; amd. Sec. 1, Ch. 262, L. 1991; amd. Sec. 160, Ch. 800, L. 1991; amd. Sec. 205, Ch. 546, L. 1995.

Part 3

Disposition of Defendant

46-14-301. Commitment upon finding of not guilty by reason of lack of mental state — hearing to determine release or discharge. (1) When a defendant is found not guilty for the reason that due to a mental disease or defect the defendant could not have a particular state of mind that is an essential element of the offense charged, the court shall order a predisposition investigation in accordance with 46-18-112 and 46-18-113, which must include an investigation of the present mental condition of the defendant. If the trial was by jury, the court shall hold a hearing to determine the appropriate disposition of the defendant. If the trial was by the court, the court may hold a hearing to obtain any additional testimony it considers necessary to determine the appropriate disposition of the defendant. In either case, the testimony and evidence presented at the trial must be considered by the court in making its determination.

(2) The court shall evaluate the nature of the offense with which the defendant was charged. If the offense:

(a) involved a substantial risk of serious bodily injury or death, actual bodily injury, or substantial property damage, the court may find that the defendant suffers from a mental disease or defect that renders the defendant a danger to the defendant or others. If the court finds that the defendant presents a danger to the defendant or others, the defendant may be committed to the custody of the director of the department of public health and human services to be placed in an appropriate mental health facility for custody, care, and treatment. However, if the court finds that the defendant is seriously developmentally disabled, as defined in 53-20-102, the prosecutor shall petition the court in the manner provided in Title 53, chapter 20.

(b) charged did not involve a substantial risk of serious bodily injury or death, actual bodily injury, or substantial property damage, the court shall release the defendant. The prosecutor may petition the court in the manner provided in Title 53, chapter 20 or 21.

(3) A person committed to the custody of the director of the department of public health and human services must have a hearing within 180 days of confinement to determine the person's present mental condition and whether the person must be discharged or released or whether the commitment may be extended because the person continues to suffer from a mental disease or defect that renders the person a danger to the person or others. The hearing must be conducted by the court that ordered the commitment unless that court transfers jurisdiction to the district court in the district in which the person has been placed. The court shall cause notice of the hearing to be served upon the person, the person's counsel, the prosecutor, and the court that originally ordered the commitment. The hearing is a civil proceeding, and the burden is upon the state to prove by clear and convincing evidence that the person may not be safely released because the person continues to suffer from a mental disease or defect that causes the person to present a substantial risk of:

(a) serious bodily injury or death to the person or others;

(b) an imminent threat of physical injury to the person or others; or

(c) substantial property damage.

(4) According to the determination of the court upon the hearing, the person must be discharged or released on conditions the court determines to be necessary or must be committed to the custody of the director of the department of public health and human services to be placed in an appropriate mental health facility for custody, care, and treatment.

(5) A professional person shall review the status of the person each year. At the time of the annual review, the director of the department of public health and human services or the person or the representative of the person may petition for discharge or release of the person. Upon request for a hearing, a hearing must be held pursuant to the provisions of subsection (3).

History: En. 95-508 by Sec. 1, Ch. 196, L. 1967; amd. Sec. 1, Ch. 210, L. 1973; amd. Sec. 91, Ch. 120, L. 1974; R.C.M. 1947, 95-508(1); amd. Sec. 9, Ch. 713, L. 1979; amd. Sec. 2, Ch. 593, L. 1981; amd. Sec. 4, Ch. 361, L. 1983; amd. Sec. 161, Ch. 800, L. 1991; amd. Sec. 2, Ch. 397, L. 1993; amd. Sec. 206, Ch. 546, L. 1995.

46-14-302. Discharge or release upon motion of director. (1) If the director of the department of public health and human services believes that a person committed to the director's custody under 46-14-301 may be discharged or released on condition without danger to the person or others because the person no longer suffers from a mental disease or defect that causes the person to present a substantial risk of serious bodily injury or death to the person or others, a substantial risk of an imminent threat of physical injury to the person or others, or a substantial risk of substantial property damage, the director shall make application for the discharge or release of the person in a report to the district court by which the person was committed unless that court transfers jurisdiction to the court in the district in which the person has been placed and shall send a copy of the application and report to the prosecutor of the county from which the person was committed.

(2) Either the director of the department of public health and human services or the person may also make application to the court for discharge or release as part of the person's annual treatment review.

(3) The court shall then appoint at least one person who is either a qualified psychiatrist or licensed clinical psychologist to examine the person

and to report as to the person's mental condition within 60 days or a longer period that the court determines to be necessary for the purpose. To facilitate the examinations and the proceedings on the examinations, the court may have the person confined in any mental health facility located near the place where the court sits that may be designated by the director of the department of public health and human services as suitable for the temporary detention of persons suffering from mental disease or defect.

(4) The committed person or the person's attorney may secure a professional person of the committed person's choice to examine the committed person and to testify at the hearing. If the person wishing to secure the testimony of a professional person is unable to do so because of financial reasons, the court shall appoint an additional professional person to perform the examination. Whenever possible, the court shall allow the committed person or the person's attorney a reasonable choice of an available professional person qualified to perform the requested examination. The professional person must be compensated by the department of public health and human services.

(5) If the court is satisfied by the report filed under subsection (1) and the testimony of the reporting psychiatrist or licensed clinical psychologist that the committed person may be discharged or released on condition because the person no longer suffers from a mental disease or defect that causes the person to present a substantial risk of serious bodily injury or death to the person or others, a substantial risk of an imminent threat of physical injury to the person or others, or a substantial risk of substantial property damage, the court shall order the person's discharge.

(6) (a) If the court is not satisfied, it shall promptly order a hearing to determine whether the person may safely be discharged or released on the grounds that the person no longer suffers from a mental disease or defect that causes the person to present a substantial risk of:

(i) serious bodily injury or death to the person or others;

(ii) an imminent threat of physical injury to the person or others; or

(iii) substantial property damage.

(b) A hearing is considered a civil proceeding, and the burden is upon the state to prove by clear and convincing evidence that the person may not be safely discharged or released because the person continues to suffer from a mental disease or defect that causes the person to present a substantial risk of:

(i) serious bodily injury or death to the person or others;

(ii) an imminent threat of physical injury to the person or others; or

(iii) substantial property damage.

(c) According to the determination of the court upon the hearing, the committed person must then be discharged or released on conditions that the court determines to be necessary or must be recommitted to the custody of the director of the department of public health and human services, subject to discharge or release only in accordance with the procedures provided in this section and 46-14-303.

History: En. 95-508 by Sec. 1, Ch. 196, L. 1967; amd. Sec. 1, Ch. 210, L. 1973; amd. Sec. 91, Ch. 120, L. 1974; R.C.M. 1947, 95-508(2), (3); amd. Sec. 15, Ch. 116, L. 1979; amd. Sec. 5, Ch. 361, L. 1983; amd. Sec. 5, Ch. 127, L. 1987; amd. Sec. 162, Ch. 800, L. 1991; amd. Sec. 3, Ch. 397, L. 1993; amd. Sec. 207, Ch. 546, L. 1995.

46-14-303. Application for discharge or release by committed person. A committed person may make application for discharge or release to the district court by which the person was committed unless that court transfers jurisdiction to the court in the district in which the person has been placed, and the procedure to be followed upon the application is the same as that prescribed in 46-14-302 in the case of an application by the director of the department of public health and human services. However, an application by a committed person need not be considered until the person has been confined for a period of not less than 6 months from the date of the order of commitment, and if the determination of the court is adverse to the application, the person may not be permitted to file a further application until 1 year has elapsed from the date of any preceding hearing on an application for the person's release or discharge.

History: En. 95-508 by Sec. 1, Ch. 196, L. 1967; amd. Sec. 1, Ch. 210, L. 1973; amd. Sec. 91, Ch. 120, L. 1974; R.C.M. 1947, 95-508(5); amd. Sec. 6, Ch. 361, L. 1983; amd. Sec. 163, Ch. 800, L. 1991; amd. Sec. 4, Ch. 397, L. 1993; amd. Sec. 208, Ch. 546, L. 1995.

46-14-304. Revocation of conditional release. (1) The court may order revocation of a person's conditional release if the court determines after hearing evidence that:

(a) the conditions of release have not been fulfilled; and

(b) based on the violations of the conditions and the person's past mental health history, there is a substantial likelihood that the person continues to suffer from a mental disease or defect that causes the person to present a substantial risk of:

(i) serious bodily injury or death to the person or others;

(ii) an imminent threat of physical injury to the person or others; or

(iii) substantial property damage.

(2) The court may retain jurisdiction to revoke a conditional release for no longer than 5 years.

(3) If the court finds that the conditional release should be revoked, the court shall immediately order the person to be recommitted to the custody of the director of the department of public health and human services, subject to discharge or release only in accordance with the procedures provided in 46-14-302 and 46-14-303.

History: En. 95-508 by Sec. 1, Ch. 196, L. 1967; amd. Sec. 1, Ch. 210, L. 1973; amd. Sec. 91, Ch. 120, L. 1974; R.C.M. 1947, 95-508(4); amd. Sec. 16, Ch. 116, L. 1979; amd. Sec. 7, Ch. 361, L. 1983; amd. Sec. 164, Ch. 800, L. 1991; amd. Sec. 5, Ch. 397, L. 1993; amd. Sec. 209, Ch. 546, L. 1995.

46-14-305 through 46-14-310 reserved.

46-14-311. Consideration of mental disease or defect in sentencing. Whenever a defendant is convicted on a verdict of guilty or a plea of guilty or nolo contendere and claims that at the time of the commission of the offense of which convicted the defendant was suffering from a mental disease or defect that rendered the defendant unable to appreciate the criminality of the defendant's behavior or to conform the defendant's behavior to the requirements of law, the sentencing court shall consider any relevant evidence presented at the trial and shall require additional evidence as it considers necessary for the determination of the issue, including examination of the defendant and a report of the examination as provided in 46-14-202 and 46-14-206.

History: En. Sec. 10, Ch. 713, L. 1979; amd. Sec. 165, Ch. 800, L. 1991; amd. Sec. 14, Ch. 395, L. 1999.

Compiler's Comments

1999 Amendment: Chapter 395 near beginning inserted "or nolo contendere"; and made minor changes in style. Amendment effective October 1, 1999.

Cross-References

Admissibility of statements made during examination or treatment, 46-14-217.

46-14-312. Sentence to be imposed. (1) If the court finds that the defendant at the time of the commission of the offense of which the defendant was convicted did not suffer from a mental disease or defect as described in 46-14-311, the court shall sentence the defendant as provided in Title 46, chapter 18.

(2) If the court finds that the defendant at the time of the commission of the offense suffered from a mental disease or defect as described in 46-14-311, any mandatory minimum sentence prescribed by law for the offense need not apply and the court shall sentence the defendant to be committed to the custody of the director of the department of public health and human services to be placed, after consideration of the recommendations of the professionals providing treatment to the defendant, in an appropriate correctional or mental health facility for custody, care, and treatment for a definite period of time not to exceed the maximum term of imprisonment that could be imposed under subsection (1). The director may, after considering the recommendations of the professionals providing treatment to the defendant, subsequently transfer the defendant to another correctional or mental health facility that will better serve the defendant's custody, care, and treatment needs. The authority of the court with regard to sentencing is the same as authorized in Title 46, chapter 18, if the treatment of the individual and the protection of the public are provided for.

(3) Either the director or a defendant whose sentence has been imposed under subsection (2) may petition the sentencing court for review of the sentence if the professional person certifies that:

(a) the defendant no longer suffers from a mental disease or defect;

(b) the defendant's mental disease or defect no longer renders the defendant unable to appreciate the criminality of the defendant's conduct or to conform the defendant's conduct to the requirements of law;

(c) the defendant suffers from a mental disease or defect but is not a danger to the defendant or others; or

(d) the defendant suffers from a mental disease or defect that makes the defendant a danger to the defendant or others, but:

(i) there is no treatment available for the mental disease or defect;

(ii) the defendant refuses to cooperate with treatment; or

(iii) the defendant will no longer benefit from active inpatient treatment for the mental disease or defect.

(4) The sentencing court may make any order not inconsistent with its original sentencing authority, except that the length of confinement or supervision must be equal to that of the original sentence. The professional person shall review the defendant's status each year.

History: **En. Sec. 11, Ch. 713, L. 1979; amd. Sec. 1, Ch. 267, L. 1987; amd. Sec. 1, Ch. 262, L. 1991; amd. Sec. 166, Ch. 800, L. 1991; amd. Sec. 28, Ch. 262, L. 1993; amd. Sec. 6, Ch. 397, L. 1993; amd. Sec. 1, Ch. 256, L. 1995; amd. Sec. 210, Ch. 546, L. 1995.**

46-14-313. Discharge of defendant from supervision. At the expiration of the period of commitment or period of treatment specified by the court under 46-14-312, the defendant must be discharged from custody and further supervision, subject only to the law regarding the civil commitment of persons suffering from serious mental illness.

History: **En. Sec. 12, Ch. 713, L. 1979; amd. Sec. 167, Ch. 800, L. 1991.**

Part 4
Privileged Communications

46-14-401. Renumbered 46-14-217 by Code Commissioner, 1991.

CHAPTER 15
PRODUCTION OF EVIDENCE

Part 1 — Subpoenas and Witnesses

46-15-101. Subpoenas.
46-15-102. Renumbered 46-15-107 by Code Commissioner, 1991.
46-15-103. Renumbered 46-15-115 by Code Commissioner, 1991.
46-15-104. Renumbered 46-15-116 by Code Commissioner, 1991.
46-15-105. Persons imprisoned in state prison or in another county.
46-15-106. Subpoenas for production of evidence.
46-15-107. Service of subpoenas.
46-15-108 through 46-15-110 reserved.
46-15-111. Repealed.
46-15-112. Subpoena of witness in this state to testify in another state.
46-15-113. Subpoena of witness in another state to testify in this state.
46-15-114. Renumbered 46-15-120 by Code Commissioner, 1991.
46-15-115. Subpoena for witness when defendant unable to pay.
46-15-116. Fees, costs, and expenses.
46-15-117 through 46-15-119 reserved.
46-15-120. Exemption from arrest and service of process.

Part 2 — Depositions

46-15-201. When depositions may be taken.
46-15-202. Procedure for taking depositions.
46-15-203. Repealed.
46-15-204. Use of depositions at trial.

Part 3 — Discovery—Immunity for Witnesses

46-15-301. Repealed.
46-15-302. Repealed.
46-15-303. Repealed.
46-15-304 through 46-15-310 reserved.
46-15-311. Renumbered 46-15-331 by Code Commissioner, 1985.
46-15-312. Renumbered 46-15-332 by Code Commissioner, 1985.
46-15-313 through 46-15-320 reserved.
46-15-321. Repealed.
46-15-322. Disclosure by prosecution.
46-15-323. Disclosure by defendant.
46-15-324. Materials not subject to disclosure.

46-15-325. Failure to call a witness or raise a defense.
46-15-326. Use of materials.
46-15-327. Continuing duty to disclose.
46-15-328. Excision and protective orders.
46-15-329. Sanctions.
46-15-330. Investigation not to be impeded.
46-15-331. Compelling testimony or production of evidence — immunity.
46-15-332. Privileged matters.

Part 4 — Evidence in Cases Involving Sexual Offenses

46-15-401. Repealed.
46-15-402. Procedure at videotaping.
46-15-403. Court order to protect privacy of victim.
46-15-404 through 46-15-410 reserved.
46-15-411. Payment for medical evidence.

Part 1

Subpoenas and Witnesses

Part Cross-References

Rights of accused — compulsory process, Art. II, sec. 24, Mont. Const.

Criminal process on United States land, Title 2, ch. 1, part 2; 2-1-307.

Mileage of witnesses, 2-18-503.

Clerk of District Court to keep witness book, 3-5-510.

Procedure in reference to witnesses' warrants, 3-5-511.

Sections granting immunity to witnesses, 5-5-105, 7-3-4365, 13-36-208, 25-14-106, 26-2-302, 33-1-316, 40-6-111, 69-14-113.

Witness fees — courts of record, 26-2-501.

Investigative subpoenas, Title 46, ch. 4, part 3.

Recognizance by or deposition of witness, 46-11-601.

46-15-101. Subpoenas. (1) After the filing of charges and upon the request of the prosecuting attorney, the defendant, or the defendant's attorney, the clerk of the court shall issue subpoenas with the name of the person to whom each subpoena is directed, commanding the person to appear and to give testimony. The court shall maintain a list of the names of the persons to whom subpoenas are issued.

(2) A subpoena must state the name of the court and the title, if any, of the proceeding and must command each person to whom it is directed to attend and give testimony at the time and place specified in the subpoena. The time and place may be modified by mutual written agreement of the parties or by an amended subpoena issued by the clerk of the court.

(3) The court, upon a timely motion, may quash or modify a subpoena if compliance would be unreasonable or oppressive.

(4) A subpoena remains in effect unless quashed or until judgment, dismissal, or other final determination of the action by the court in which the action was filed or to which the action was transferred.

History: En. 95-1801 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-1801(a); amd. Sec. 180, Ch. 800, L. 1991; amd. Sec. 29, Ch. 262, L. 1993; amd. Sec. 2, Ch. 138, L. 1995.

Cross-References

Right to process to compel attendance of witnesses, Art. II, sec. 24, Mont. Const.

Subpoena defined, 26-2-101.

Deposition of prospective witness, Title 46, ch. 15, part 2.

46-15-102. Renumbered 46-15-107 by Code Commissioner, 1991.

46-15-103. Renumbered 46-15-115 by Code Commissioner, 1991.

46-15-104. Renumbered 46-15-116 by Code Commissioner, 1991.

46-15-105. Persons imprisoned in state prison or in another county. When it is necessary to have a person imprisoned in the state prison brought before any court or a person imprisoned in a county jail brought before a court sitting in another county, an order for that purpose may be made by the court and executed by the sheriff of the county where it is made.

History: En. Sec. 2900, Pen. C. 1895; re-en. Sec. 9714, Rev. C. 1907; re-en. Sec. 12432, R.C.M. 1921; Cal. Pen. C. Sec. 1567; re-en. Sec. 12432, R.C.M. 1935; Sec. 94-701-1, R.C.M. 1947; redes. 95-1812 by Sec. 29, Ch. 513, L. 1973; R.C.M. 1947, 95-1812.

Cross-References

Securing testimony of witness who is prisoner, Title 26, ch. 2, part 2.

46-15-106. Subpoenas for production of evidence. (1) A subpoena may command the person to whom it is directed to produce the books, papers, documents, or other objects designated in the subpoena.

(2) The court may direct that the books, papers, documents, or other objects designated in the subpoena be produced before the court at a time prior to the trial or prior to the time when they are to be offered into evidence and may upon their production permit the books, papers, documents, or objects, or portions thereof, to be inspected by the parties and their attorneys.

(3) The court, upon a timely motion, may quash or modify a subpoena if compliance would be unreasonable or oppressive.

History: En. Sec. 181, Ch. 800, L. 1991.

46-15-107. Service of subpoenas. (1) A subpoena may be served by a peace officer or by any other person who is not a party and who is not less than 18 years of age. A peace officer shall serve any subpoena delivered to the peace officer for service in the peace officer's county either on the part of the prosecution or of the defendant.

(2) Service of a subpoena must be made by delivering a copy of the subpoena to the person named and, if ordered by the court, by tendering to those residing outside the county of trial the fee for 1 day's attendance and the mileage allowed by law. The person making the service shall without delay make a written return of the service subscribed by the person, stating the time and place of service.

(3) A subpoena requiring attendance of a witness at a hearing or trial may be served anywhere within the state of Montana.

History: En. 95-1801 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-1801(e), (f); amd. Sec. 182, Ch. 800, L. 1991; Sec. 46-15-102, MCA 1989; redes. 46-15-107 by Code Commissioner, 1991.

Cross-References

Witness fees, Title 26, ch. 2, part 5.

46-15-108 through 46-15-110 reserved.

46-15-111. Repealed. Sec. 263, Ch. 800, L. 1991.

History: En. 95-1808 by Sec. 8, Ch. 513, L. 1973; R.C.M. 1947, 95-1808.

46-15-112. Subpoena of witness in this state to testify in another state. (1) If a judge of a court of record in any state, which by its laws has made provision for commanding persons within that state to attend and testify in this state, certifies under the seal of the court that there is a criminal prosecution pending in the court or that a grand jury investigation is commenced or is about to commence, that a person being within this state is a material witness in the prosecution or a grand jury investigation, and that the person's presence will be required for a specified number of days, upon presentation of the certificate to any judge of a court of record in the county in which the person is located, the judge shall fix a time and place for a hearing and shall make an order directing the witness to appear at a time and place certain for the hearing.

(2) If at a hearing the judge determines that the witness is material and necessary, that it will not cause undue hardship to the witness to be compelled to attend and testify in the prosecution or a grand jury investigation in the other state, and that the laws of the state in which the prosecution is pending or a grand jury investigation is commenced or is about to commence will give the witness protection from arrest and the service of civil and criminal process, the judge shall issue a subpoena with a copy of the certificate attached directing the witness to attend and testify in the court where the prosecution is pending or where a grand jury investigation is commenced or is about to commence at a time and place specified in the subpoena. In the hearing, the certificate is prima facie evidence of all the facts stated in the certificate.

(3) If the certificate recommends that the witness be taken into immediate custody and delivered to an officer of the requesting state to assure the witness's attendance in the requesting state, the judge may, in lieu of notification of the hearing, direct that the witness be brought before the judge for the hearing. At the hearing, the judge may, in lieu of issuing a subpoena, order that the witness be taken into custody and delivered to an officer of the requesting state.

History: En. Sec. 2, Ch. 188, L. 1937; Sec. 94-9002, R.C.M. 1947; redes. 95-1809 by Sec. 29, Ch. 513, L. 1973; R.C.M. 1947, 95-1809; amd. Sec. 183, Ch. 800, L. 1991.

Cross-References

Punishment for disobeying summons, 46-6-212.

46-15-113. Subpoena of witness in another state to testify in this state. (1) Whenever a person in any state that by its laws has made provision for commanding persons within its borders to attend and testify in criminal prosecutions or grand jury investigations in this state is a material witness in a prosecution pending in a court of record in this state or in a grand jury investigation that is commenced or is about to commence, a judge of the court may issue a certificate under the seal of the court stating these facts and specifying the number of days the witness will be required. The certificate must be presented to a judge of a court of record in the county in which the witness is found.

(2) If the certificate recommends that the witness be taken into immediate custody and delivered to an officer of this state to assure the witness's attendance in this state, it is prima facie proof of the desirability of the custody and delivery, and the judge may direct that the witness be brought before the judge immediately. If the judge is satisfied as to the desirability of custody and delivery, the judge may order that the witness be immediately taken into custody and delivered to an officer of this state. The order is sufficient authority

for the officer to take the witness into custody and hold the witness unless and until the witness is released by bail, recognizance, or order of the judge issuing the certificate.

(3) A witness who has appeared in accordance with the provisions of the subpoena may not be required to remain within this state for a longer period of time than the period mentioned in the certificate unless otherwise ordered by the court.

(4) If the witness fails without good cause to attend and testify as directed, the witness must be punished in the manner provided for the punishment of any witness who disobeys an order issued from a court of record in this state in accordance with Title 3, chapter 1, part 5, or in accordance with 45-7-309.

History: En. Sec. 3, Ch. 188, L. 1937; amd. Sec. 1, Ch. 117, L. 1949; Sec. 94-9003, R.C.M. 1947; redes. 95-1810 by Sec. 29, Ch. 513, L. 1973; amd. Sec. 27, Ch. 184, L. 1977; R.C.M. 1947, 95-1810; amd. Sec. 184, Ch. 800, L. 1991.

Cross-References

Punishment for disobeying summons, 46-6-212.

46-15-114. Renumbered 46-15-120 by Code Commissioner, 1991.

46-15-115. Subpoena for witness when defendant unable to pay. (1) The court shall order at any time that a subpoena be issued for service on a named witness upon the ex parte application of the defendant and upon a satisfactory showing that the defendant is financially unable to pay the costs incurred for the witness and that the presence of the witness is necessary to an adequate defense.

(2) If a defendant is indigent, a court order must be obtained if more than six witnesses are to be subpoenaed.

History: En. 95-1801 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-1801(b); amd. Sec. 185, Ch. 800, L. 1991; Sec. 46-15-103, MCA 1989; redes. 46-15-115 by Code Commissioner, 1991.

46-15-116. Fees, costs, and expenses. (1) When a person attends before a judge, grand jury, or court as a witness in a criminal case upon a subpoena, the witness shall receive the witness fee prescribed by Title 26, chapter 2, part 5. The court, on motion by either party, may allow additional fees for expert witnesses.

(2) The court may determine the reasonable and necessary expenses of subpoenaed witnesses and order the clerk of the court to pay the expenses from the appropriate city or county treasury.

(3) When a person is subpoenaed in this state to testify in another state or is subpoenaed from another state to testify in this state, the person must be paid for lodging, mileage or travel, and per diem, the sum equal to that allowed by Title 2, chapter 18, part 5, for each day that the person is required to travel and attend as a witness. If the state where the witness is found has by statutory enactment required that the subpoenaed witness be paid an amount in excess of the amount specified in this section, the witness may be paid the amount required by that state.

(4) According to procedures required by the supreme court administrator, under 3-5-902, the clerk of the district court shall submit to the administrator a detailed statement containing a list of witnesses and the amount of expenses paid to each witness by the county. Upon receipt and verification of the

statement, the administrator shall promptly reimburse the designated county for all or a portion of the witness expenses. The county shall deposit the amount reimbursed in its general fund unless the county has a district court fund. If the county has a district court fund, the amount reimbursed must be deposited in the district court fund.

History: **En. 95-1801 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-1801(c); amd. Sec. 15, Ch. 680, L. 1985; amd. Sec. 9, Ch. 1, Sp. L. 1985; amd. Sec. 8, Ch. 704, L. 1991; amd. Sec. 186, Ch. 800, L. 1991; Sec. 46-15-104, MCA 1989; redes. 46-15-116 by Code Commissioner, 1991; amd. Sec. 30, Ch. 262, L. 1993; amd. Sec. 4, Ch. 330, L. 1993.**

Cross-References

Mileage of witnesses, 2-18-503.

Witness fees — courts of record, 26-2-501.

46-15-117 through 46-15-119 reserved.

46-15-120. Exemption from arrest and service of process. (1) If a person comes into this state in obedience to a subpoena directing the person to attend and testify in this state, the person may not, while in this state pursuant to the subpoena or order, be subject to arrest or the service of process, civil or criminal, in connection with matters that arose before the person's entrance into this state under the subpoena.

(2) If a person passes through this state while going to another state in obedience to a subpoena or order to attend and testify in that state, the person may not, while passing through this state, be subject to arrest or the service of process, civil or criminal, in connection with matters that arose before the person's entrance into this state under the subpoena.

History: **En. Sec. 4, Ch. 188, L. 1937; Sec. 94-9004, R.C.M. 1947; redes. 95-1811 by Sec. 29, Ch. 513, L. 1973; R.C.M. 1947, 95-1811; amd. Sec. 187, Ch. 800, L. 1991; Sec. 46-15-114, MCA 1989; redes. 46-15-120 by Code Commissioner, 1991.**

Cross-References

Witness protected from arrest when attending, going, and returning, 26-2-402.

Persons exempt from arrest, 46-6-102.

Part 2

Depositions

46-15-201. When depositions may be taken. (1) In district or municipal court cases, a deposition may be taken if it appears that a prospective witness:

(a) is likely to be either unable to attend or otherwise prevented from attending a trial or hearing;

(b) is likely to be absent from the state at the time of the trial or hearing; or

(c) is unwilling to provide relevant information to a requesting party and the witness's testimony is material and necessary in order to prevent a failure of justice. The court shall, upon motion of any party and proper notice, order that the testimony of the witness be taken by deposition and that any designated books, papers, documents, or tangible objects, not privileged, be introduced at the time the deposition is taken.

(2) The witness whose deposition is to be taken may be required by subpoena to attend at any place designated by the court, taking into account the convenience of the parties and of the witness.

(3) If the defendant is charged with a felony and it appears upon the affidavit of counsel for a party that good cause exists to believe that a witness will not respond to a subpoena and the administration of justice requires, any district judge may issue an arrest warrant commanding the arrest of a material witness. The arrest warrant must further order a deposition to be taken without unnecessary delay. A person may not be imprisoned for the purpose of securing testimony in any criminal proceeding longer than is necessary to take the person's deposition.

History: En. 95-1802 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-1802(a); amd. Sec. 146, Ch. 800, L. 1991; amd. Sec. 31, Ch. 262, L. 1993.

Cross-References

Detention for purpose of securing testimony, Art. II, sec. 23, Mont. Const.

Recognizance by or deposition of witness, 46-11-601.

46-15-202. Procedure for taking depositions. (1) The party at whose instance a deposition is to be taken shall give to every other party reasonable written notice of the time and place for taking the deposition. The notice must state the name and address of each person to be examined. On motion of the party upon whom the notice is served, the municipal or district court for cause shown may extend or shorten the time or change the place for taking the deposition.

(2) A deposition must be taken in the manner provided in civil actions. The court, upon request, may direct that a deposition be taken on written interrogatories in the manner provided in civil actions. However, a deposition may not be taken of a party defendant without the defendant's consent, and the scope and manner of examination and cross-examination must be restricted as would be allowed in the trial itself.

(3) The deposition must be filed with the court making the order and held until the trial. Either party shall make available to the other party or the other party's counsel for examination and use at the taking of the deposition any relevant, nonprivileged statement of the witness being deposed that is in the possession of either party.

(4) Objections to deposition testimony or evidence or parts of the testimony or evidence may be reserved for subsequent determination by the court.

(5) Unless a defendant in custody has waived, in writing, the right to be present at the taking of a deposition, the officer having custody of the defendant must be notified of the time and place set for the deposition. The officer having custody shall produce the defendant and keep the defendant in the presence of a witness during the deposition.

(6) A defendant not in custody who fails to appear, without good cause, at the taking of a deposition after being notified of the time and place set for the deposition will be considered to have waived the right to be present as provided in 46-16-122. The waiver includes a waiver of any objection to the taking and use of the deposition based upon that right.

(7) Whenever a deposition is taken at the instance of the prosecution or whenever a deposition is taken at the instance of a defendant who is unable to bear the expense of taking a deposition, the court shall direct that the expense of travel and subsistence of the defendant and the defendant's counsel for attendance at the examination and the cost of the transcript of the deposition

be paid by the city for a municipal court proceeding or by the state for a district court proceeding.

History: En. 95-1802 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-1802(b) thru (d); amd. Sec. 147, Ch. 800, L. 1991; amd. Sec. 32, Ch. 262, L. 1993.

Cross-References

How depositions taken, Rules 26 and 28 through 32, M.R.Civ.P. (see Title 25, ch. 20).

46-15-203. Repealed. Sec. 263, Ch. 800, L. 1991.

History: En. 95-1802 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-1802(g).

46-15-204. Use of depositions at trial. Any deposition may be used by any party for any purpose allowed by the Montana Rules of Evidence.

History: En. 95-1802 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-1802(e), (f); amd. Sec. 148, Ch. 800, L. 1991.

Cross-References

Objections to receiving deposition in evidence, Rules 30(c) and 32, M.R.Civ.P. (see Title 25, ch. 20).

Part 3

Discovery — Immunity for Witnesses

46-15-301. Repealed. Sec. 11, Ch. 202, L. 1985.

History: En. 95-1803 by Sec. 1, Ch. 196, L. 1967; amd. Sec. 26, Ch. 184, L. 1977; R.C.M. 1947, 95-1803(1), (3); amd. Sec. 14, Ch. 713, L. 1979; amd. Sec. 1, Ch. 557, L. 1981.

46-15-302. Repealed. Sec. 11, Ch. 202, L. 1985.

History: (1), (2)En. 95-1801 by Sec. 1, Ch. 196, L. 1967; Sec. 95-1801, R.C.M. 1947; (3)En. 95-1803 by Sec. 1, Ch. 196, L. 1967; amd. Sec. 26, Ch. 184, L. 1977; Sec. 95-1803, R.C.M. 1947; R.C.M. 1947, 95-1801(d), 95-1803(2); amd. Sec. 1, Ch. 496, L. 1979.

46-15-303. Repealed. Sec. 11, Ch. 202, L. 1985.

History: En. 95-1804 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-1804.

46-15-304 through 46-15-310 reserved.

46-15-311. Renumbered 46-15-331 by Code Commissioner, 1985.

46-15-312. Renumbered 46-15-332 by Code Commissioner, 1985.

46-15-313 through 46-15-320 reserved.

46-15-321. Repealed. Sec. 263, Ch. 800, L. 1991.

History: En. Sec. 1, Ch. 202, L. 1985.

46-15-322. Disclosure by prosecution. (1) Upon request, the prosecutor shall make available to the defendant for examination and reproduction the following material and information within the prosecutor's possession or control:

(a) the names, addresses, and statements of all persons whom the prosecutor may call as witnesses in the case in chief;

(b) all written or oral statements of the defendant and of any person who will be tried with the defendant;

(c) all written reports or statements of experts who have personally examined the defendant or any evidence in the particular case, together with the results of physical examinations, scientific tests, experiments, or comparisons;

(d) all papers, documents, photographs, or tangible objects that the prosecutor may use at trial or that were obtained from or purportedly belong to the defendant; and

(e) all material or information that tends to mitigate or negate the defendant's guilt as to the offense charged or that would tend to reduce the defendant's potential sentence.

(2) At the same time, the prosecutor shall inform the defendant of, and make available to the defendant for examination and reproduction, any written or recorded material or information within the prosecutor's control regarding:

(a) whether there has been any electronic surveillance of any conversations to which the defendant was a party;

(b) whether an investigative subpoena has been executed in connection with the case; and

(c) whether the case has involved an informant and, if so, the informant's identity if the defendant is entitled to know either or both of these facts under Rule 502 of the Montana Rules of Evidence and 46-15-324(3).

(3) The prosecutor may impose reasonable conditions, including an appropriate stipulation concerning chain of custody, to protect physical evidence produced under subsection (1)(d).

(4) The prosecutor's obligation of disclosure extends to material and information in the possession or control of members of the prosecutor's staff and of any other persons who have participated in the investigation or evaluation of the case.

(5) Upon motion showing that the defendant has substantial need in the preparation of the case for additional material or information not otherwise provided for and that the defendant is unable, without undue hardship, to obtain the substantial equivalent by other means, the court, in its discretion, may order any person to make it available to the defendant. The court may, upon the request of any person affected by the order, vacate or modify the order if compliance would be unreasonable or oppressive. The prosecutor may not be required to prepare or disclose summaries of witnesses' testimony.

(6) The prosecutor shall furnish to the defendant no later than 5 days before trial or at a later time as the court may for good cause permit, together with their statements, a list of the names and addresses of all persons whom the prosecutor intends to call as rebuttal witnesses to evidence of good character or the defenses of alibi, compulsion, entrapment, justifiable use of force, or mistaken identity or the defense that the defendant did not have a particular state of mind that is an element of the offense charged.

History: En. Sec. 2, Ch. 202, L. 1985; amd. Sec. 137, Ch. 800, L. 1991; amd. Sec. 33, Ch. 262, L. 1993.

46-15-323. Disclosure by defendant. (1) At any time after the filing in district court of an indictment or information, the defendant, in connection with the particular crime charged, shall upon written request of the prosecutor and approval of the court:

(a) appear in a lineup;

(b) speak for identification by witnesses;

(c) be fingerprinted, palm printed, footprinted, or voiceprinted;

(d) pose for photographs not involving reenactment of an event;

(e) try on clothing;

(f) permit the taking of samples of the defendant's hair, blood, saliva, urine, or other specified materials that involve no unreasonable bodily intrusions;

(g) provide handwriting samples; or

(h) submit to a reasonable physical or medical inspection; however, the inspection does not include psychiatric or psychological examination.

(2) Within 30 days after the arraignment or at a later time as the court may for good cause permit, the defendant shall provide the prosecutor with a written notice of the defendant's intention to introduce evidence at trial of good character or the defenses of alibi, compulsion, entrapment, justifiable use of force, or mistaken identity.

(3) Within 10 days after receiving a report of the defendant's mental condition from a psychiatrist or psychologist or at a later time as the court may for good cause permit, the defendant shall provide the prosecutor with a written notice of the defendant's intention to introduce evidence at trial of the defense that due to a mental disease or defect, the defendant did not have a particular state of mind that is an essential element of the offense charged.

(4) The notice must specify for each defense the names and addresses of the persons, other than the defendant, whom the defendant may call as witnesses in support of the defense, together with all written reports or statements made by them, including all reports and statements concerning the results of physical examinations, scientific tests, experiments, or comparisons, except that the defendant need not include a privileged report or statement unless the defendant intends to use the privileged report or statement, or the witness who made it, at trial.

(5) Prior to trial the defendant may, upon motion and showing of good cause, add to the list of witnesses the names of any additional witnesses and disclose their reports or statements as required by this section. After the trial commences, no witnesses may be called by the defendant in support of these defenses unless the name of the witness is included on the list and the witness's report or statement has been disclosed as required by this section, except for good cause shown.

(6) Within 30 days after the arraignment or at a later time as the court may for good cause permit, the defendant shall make available to the prosecutor for testing, examination, or reproduction:

(a) the names, addresses, and statements of all persons, other than the defendant, whom the defendant may call as witnesses in the defense case in chief, together with their statements;

(b) the names and addresses of experts whom the defendant may call at trial, together with the results of their physical examinations, scientific tests, experiments, or comparisons, including all written reports and statements made by these experts in connection with the particular case; and

(c) all papers, documents, photographs, and other tangible objects that the defendant may use at trial.

(7) The defendant's obligation under this section extends to material and information within the possession or control of the defendant, defense counsel, and defense counsel's staff or investigators.

(8) Upon motion of the prosecutor showing that the prosecutor has substantial need in the preparation of the case for additional material or

information not otherwise provided for, that the prosecutor is unable, without undue hardship, to obtain the substantial equivalent by other means, and that disclosure of the material or information will not violate the defendant's constitutional rights, the court, in its discretion, may order any person to make the material or information available to the prosecutor. The court may, upon request of any person affected by the order, vacate or modify the order if compliance would be unreasonable or oppressive. The defense counsel may not be required to prepare or disclose summaries of witnesses' testimony.

History: En. Sec. 3, Ch. 202, L. 1985; amd. Sec. 138, Ch. 800, L. 1991; amd. Sec. 1, Ch. 182, L. 1993; amd. Sec. 34, Ch. 262, L. 1993.

Cross-References

Self-incrimination and double jeopardy, Art. II, sec. 25, Mont. Const.

Not guilty by reason of mental disease or defect — form of verdict and judgment, 46-14-214.

46-15-324. Materials not subject to disclosure. (1) Except as provided in this section, disclosure is not required for the superseded notes or work product of the prosecuting or defense attorney.

(2) If exculpatory information is contained in the superseded notes or work product of the prosecution, that information must be disclosed.

(3) Disclosure of the existence of an informant or the identity of an informant who will not be called to testify is not required if:

(a) disclosure would result in substantial risk to the informant or to the informant's operational effectiveness; and

(b) the failure to disclose will not infringe the constitutional rights of the accused.

History: En. Sec. 4, Ch. 202, L. 1985; amd. Sec. 139, Ch. 800, L. 1991; amd. Sec. 35, Ch. 262, L. 1993.

46-15-325. Failure to call a witness or raise a defense. The fact that a witness's name is on a list furnished pursuant to this part but the witness does not testify or that a matter contained in a pretrial notice is not raised may not be commented upon at trial unless the court, on motion of a party, allows comment after finding that the inclusion of the witness's name or the pretrial notice constituted an abuse of the applicable disclosure requirement or that other good cause is shown.

History: En. Sec. 5, Ch. 202, L. 1985; amd. Sec. 140, Ch. 800, L. 1991.

46-15-326. Use of materials. Except as provided in 46-11-401, any materials, including witness lists, furnished to an attorney pursuant to 46-15-322 through 46-15-329 may not be disclosed to the public but may be disclosed to others only to the extent necessary for the proper conduct of the case.

History: En. Sec. 6, Ch. 202, L. 1985; amd. Sec. 261, Ch. 800, L. 1991.

46-15-327. Continuing duty to disclose. If at any time after a disclosure has been made any party discovers additional information or material that would be subject to disclosure had it been known at the time of disclosure, the party shall promptly notify all other parties of the existence of the additional information or material and make an appropriate disclosure.

History: En. Sec. 7, Ch. 202, L. 1985; amd. Sec. 141, Ch. 800, L. 1991.

46-15-328. Excision and protective orders. (1) Upon a motion of any party showing good cause, the court may at any time order that any disclosure be deferred or regulated when it finds:

(a) that the disclosure would result in a risk or harm outweighing any usefulness of the unrestricted disclosure to any party; and

(b) that the risk cannot be eliminated by a less substantial restriction of discovery rights.

(2) Whenever the court finds, on motion of any party, that only a portion of a document or other material is discoverable, it may authorize the party disclosing it to excise that portion of the material that is nondiscoverable and disclose the remainder.

(3) On motion of the party seeking a protective or excision order or in submitting for the court's determination the discoverability of any material or information, the court may permit that party to present the material or information for the inspection of the judge alone. Counsel for all other parties are entitled to be present when the presentation is made.

(4) If the court enters an order that any material or any portion of the material is not discoverable, the entire text of the material must be sealed and preserved in the record in the event of an appeal.

History: En. Sec. 8, Ch. 202, L. 1985; amd. Sec. 143, Ch. 800, L. 1991.

46-15-329. Sanctions. If at any time during the course of the proceeding it is brought to the attention of the court that a party has failed to comply with any of the provisions of this part or any order issued pursuant to this part, the court may impose any sanction that it finds just under the circumstances, including but not limited to:

(1) ordering disclosure of the information not previously disclosed;

(2) granting a continuance;

(3) holding a witness, party, or counsel in contempt for an intentional violation;

(4) precluding a party from calling a witness, offering evidence, or raising a defense not disclosed; or

(5) declaring a mistrial when necessary to prevent a miscarriage of justice.

History: En. Sec. 9, Ch. 202, L. 1985; amd. Sec. 144, Ch. 800, L. 1991.

Cross-References

Failure to comply with order — sanctions, Rule 37(b), M.R.Civ.P. (see Title 25, ch. 20).

46-15-330. Investigation not to be impeded. Except as to matters to which discovery is restricted and except as to the defendant's counsel advising the defendant, a party or agent of a party may not discourage or obstruct communication between any person and any party or otherwise obstruct a party's investigation of the case.

History: En. Sec. 142, Ch. 800, L. 1991.

46-15-331. Compelling testimony or production of evidence — immunity. (1) Before or during trial in any judicial proceeding, a judge of the district or municipal court, upon request by the prosecutor or defense counsel, may require a person to answer any question or produce any evidence, even though personally incriminating, following a grant of immunity.

(2) If a person is required to give testimony or produce evidence in accordance with this section in any investigation or proceeding, compelled testimony or evidence and any information directly or indirectly derived from such testimony or evidence may not be used against the witness in any criminal prosecution.

(3) Nothing in this section prohibits a prosecutor from granting immunity from prosecution for or on account of any transaction, matter, or thing concerning which a witness is compelled to testify if in the prosecutor's sole discretion it is determined that the ends of justice would be served.

(4) Immunity may not extend to prosecution or punishment for false statements given in any testimony required under this section.

History: En. 95-1807 by Sec. 7, Ch. 513, L. 1973; R.C.M. 1947, 95-1807; amd. Sec. 4, Ch. 577, L. 1983; Sec. 46-15-311, MCA 1983; redes. 46-15-331 by Code Commissioner, 1985; amd. Sec. 145, Ch. 800, L. 1991.

46-15-332. Privileged matters. All matters which are privileged upon the trial are privileged against disclosure through any discovery procedure.

History: En. 95-1803 by Sec. 1, Ch. 196, L. 1967; amd. Sec. 26, Ch. 184, L. 1977; R.C.M. 1947, 95-1803(4); Sec. 46-15-312, MCA 1983; redes. 46-15-332 by Code Commissioner, 1985.

Part 4

Evidence in Cases Involving Sexual Offenses

Part Cross-References

Provisions generally applicable to sexual crimes, 45-5-511.

46-15-401. Repealed. Sec. 263, Ch. 800, L. 1991.

History: En. 95-1814 by Sec. 1, Ch. 384, L. 1977; R.C.M. 1947, 95-1814; amd. Sec. 1, Ch. 151, L. 1979; amd. Sec. 1, Ch. 8, L. 1983; amd. Sec. 1, Ch. 85, L. 1989.

46-15-402. Procedure at videotaping. (1) The procedural and evidentiary rules of the state of Montana which are applicable to criminal trials within the state of Montana shall apply to the videotape proceedings authorized by this part.

(2) The district court judge, the prosecuting attorney, the victim, the defendant, the defendant's attorney, and such persons as are deemed necessary by the court to make the recordings authorized under this part shall be allowed to attend the videotape proceedings.

History: En. 95-1815 by Sec. 2, Ch. 384, L. 1977; R.C.M. 1947, 95-1815.

46-15-403. Court order to protect privacy of victim. Videotapes which are part of the court record are subject to a protective order of the court for the purpose of protecting the privacy of the victim.

History: En. 95-1816 by Sec. 3, Ch. 384, L. 1977; R.C.M. 1947, 95-1816.

Cross-References

Right of privacy, Art. II, sec. 10, Mont. Const.

46-15-404 through 46-15-410 reserved.

46-15-411. Payment for medical evidence. (1) The local law enforcement agency within whose jurisdiction an alleged incident of sexual intercourse without consent, sexual assault, or incest occurs shall pay for the medical examination of a victim of the alleged offense when the examination is directed by the agency or when evidence obtained by the examination is used for the investigation, prosecution, or resolution of an offense.

(2) This section does not require a law enforcement agency to pay any costs of treatment for injuries resulting from the alleged offense.

History: En. 95-1813 by Sec. 1, Ch. 128, L. 1977; R.C.M. 1947, 95-1813; amd. Sec. 4, Ch. 186, L. 1997.

Cross-References

Sexual intercourse without consent, 45-5-503.

CHAPTER 16

TRIAL

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Rights of accused, Art. II, sec. 24, Mont. Const.

Trial by jury, Art. II, sec. 26, Mont. Const.

Records of Attorney General, 2-15-501.

Courts and judicial officers, Title 3, ch. 1.

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District Court Clerk's duties — record of witnesses, 3-5-510.

County Attorney's records of criminal actions, 7-4-2715.

Criminal contempt, 45-7-309.

46-16-101. Who given precedence on calendar. Prosecutions against defendants held in custody must be disposed of in advance of prosecutions against defendants on bail unless for good cause the court shall direct an action to be tried out of its order.

History: En. 95-1906 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-1906.

46-16-102. Renumbered 46-16-110 by Code Commissioner, 1991.

46-16-103. Who decides questions of law and fact. (1) All prosecutions deciding issues of fact must be tried by the court and jury, except on a plea of guilty or nolo contendere.

(2) Questions of law must be decided by the court and questions of fact by the jury, except that on a trial for criminal defamation, the jury shall determine

both questions of law and of fact. Questions of law and fact must be decided by the court when a trial by jury is waived under 46-16-110(3).

History: En. 95-1901 by Sec. 1, Ch. 196, L. 1967; amd. Sec. 1, Ch. 4, L. 1973; R.C.M. 1947, 95-1901(a), (b); amd. Sec. 17, Ch. 116, L. 1979; amd. Sec. 262, Ch. 800, L. 1991; amd. Sec. 15, Ch. 395, L. 1999.

Compiler's Comments

1999 Amendment: Chapter 395 in (1) inserted "or nolo contendere". Amendment effective October 1, 1999.

Cross-References

Jury decides questions of law and fact in suits for libel and slander, Art. II, sec. 7, Mont. Const.

Province of court and jury, Title 26, ch. 1, part 2.

46-16-104. Plea of not guilty. The plea of not guilty puts in issue every material allegation of the indictment, information, or complaint.

History: En. 95-1901 by Sec. 1, Ch. 196, L. 1967; amd. Sec. 1, Ch. 4, L. 1973; R.C.M. 1947, 95-1901(e).

Cross-References

Plea alternatives, 46-12-204.

46-16-105. Plea of guilty — use of two-way electronic audio-video communication. (1) Before or during trial, a plea of guilty or nolo contendere may be accepted when:

(a) subject to the provisions of subsection (3), the defendant enters a plea of guilty or nolo contendere in open court; and

(b) the court has informed the defendant of the consequences of the plea and of the maximum penalty provided by law that may be imposed upon acceptance of the plea.

(2) At any time before or after judgment, the court may, for good cause shown, permit the plea of guilty or nolo contendere to be withdrawn and a plea of not guilty substituted.

(3) For purposes of this section, in cases in which the defendant is charged with a misdemeanor offense, an entry of a plea of guilty or nolo contendere through the use of two-way electronic audio-video communication, allowing all of the participants to be observed and heard in the courtroom by all present, is considered to be an entry of a plea of guilty or nolo contendere in open court. Audio-video communication may be used if neither party objects and the court agrees to its use. The audio-video communication must operate as provided in 46-12-201.

History: En. 95-1902 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-1902; amd. Sec. 2, Ch. 163, L. 1997; amd. Sec. 16, Ch. 395, L. 1999.

Compiler's Comments

1999 Amendment: Chapter 395 throughout section after "plea of guilty" inserted "or nolo contendere". Amendment effective October 1, 1999.

Cross-References

Plea alternatives, 46-12-204.

46-16-106. Time to prepare for trial. After plea, the defendant shall be entitled to a reasonable time to prepare for trial.

History: En. 95-1907 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-1907.

Cross-References

Time allowed to answer, 46-12-203.

46-16-107. Repealed. Sec. 49, Ch. 262, L. 1993.

History: En. 95-1903 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-1903.

46-16-108. Repealed. Sec. 263, Ch. 800, L. 1991.

History: En. 95-1904 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-1904(part).

46-16-109 reserved.

46-16-110. Right to jury trial — waiver. (1) The parties in a felony case have a right to trial by a jury of 12 persons.

(2) The parties may agree in writing at any time before the verdict, with the approval of the court, that the jury shall consist of any number less than that to which they are entitled.

(3) Upon written consent of the parties, a trial by jury may be waived.

History: En. 95-1901 by Sec. 1, Ch. 196, L. 1967; amd. Sec. 1, Ch. 4, L. 1973; R.C.M. 1947, 95-1901(c), (d); amd. Sec. 188, Ch. 800, L. 1991; Sec. 46-16-102, MCA 1989; redes. 46-16-110 by Code Commissioner, 1991; amd. Sec. 1, Ch. 7, L. 1995.

Cross-References

Rights of accused, Art. II, sec. 24, Mont. Const.

Trial by jury, Art. II, sec. 26, Mont. Const.

Number of a trial jury, 3-15-106.

Trial juries in District Court, Title 3, ch. 15, part 5.

Jury trial of right, Rule 38, M.R.Civ.P. (see Title 25, ch. 20).

Juries in misdemeanor cases, 46-17-201.

46-16-111. Formation of trial jury. (1) Trial juries in criminal cases are formed in the same manner as trial juries in civil cases.

(2) The qualifications of jurors and excuses from jury duty are prescribed in Title 3, chapter 15, part 3.

History: (1)En. 95-1905 by Sec. 1, Ch. 196, L. 1967; Sec. 95-1905, R.C.M. 1947; (2)En. 95-1909 by Sec. 1, Ch. 196, L. 1967; amd. Sec. 1, Ch. 131, L. 1974; Sec. 95-1909, R.C.M. 1947; amd. Sec. 28, Ch. 184, L. 1977; R.C.M. 1947, 95-1905, 95-1909(2)(a); amd. Sec. 5, Ch. 51, L. 1981; amd. Sec. 2, Ch. 92, L. 1989; amd. Sec. 189, Ch. 800, L. 1991; Sec. 46-16-301, MCA 1989; redes. 46-16-111 by Code Commissioner, 1991.

Cross-References

Formation of jury, Title 3, ch. 15, parts 3 through 5; Title 25, ch. 7, part 2; Rule 47, M.R.Civ.P. (see Title 25, ch. 20).

46-16-112. Motion to discharge jury panel. (1) Any objection to the manner in which a jury panel has been selected or drawn must be raised by a motion to discharge the jury panel. Except for good cause shown, the motion must be made at least 5 days prior to the term for which the jury is drawn.

(2) The motion must be in writing supported by affidavit and must state facts that show that the jury panel was improperly selected or drawn.

(3) If the motion states facts that show that the jury panel has been improperly selected or drawn, it is the duty of the court to conduct a hearing. The burden of proof is on the movant.

(4) If the court finds that the jury panel was improperly selected or drawn, the court shall order the jury panel discharged and the selection or drawing of a new panel in the manner provided by law.

History: En. 95-1908 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-1908; amd. Sec. 190, Ch. 800, L. 1991; Sec. 46-16-302, MCA 1989; redes. 46-16-112 by Code Commissioner, 1991.

46-16-113 reserved.

46-16-114. Examination of prospective jurors. (1) The clerk of court shall make available to the parties a list of prospective jurors with their questionnaires when the names have been drawn.

(2) The prosecutor and the defendant or the defendant's attorney shall conduct the examination of prospective jurors. The judge may conduct an

additional examination. The judge may limit the examination by the defendant, the defendant's attorney, or the prosecutor if the examination is improper.

History: En. 95-1909 by Sec. 1, Ch. 196, L. 1967; amd. Sec. 1, Ch. 131, L. 1974; amd. Sec. 28, Ch. 184, L. 1977; R.C.M. 1947, 95-1909(1), (3); amd. Sec. 191, Ch. 800, L. 1991; Sec. 46-16-303, MCA 1989; redes. 46-16-114 by Code Commissioner, 1991.

46-16-115. Challenges for cause. (1) Each party may challenge jurors for cause, and each challenge must be tried by the court.

(2) A challenge for cause may be taken for all or any of the following reasons or for any other reason that the court determines:

(a) having consanguinity or relationship to the defendant or to the person who is alleged to be injured by the offense charged or on whose complaint the prosecution was instituted;

(b) standing in the relation of guardian and ward, attorney and client, master and servant, landlord and tenant, or debtor and creditor with or being a member of the family or in the employment of the defendant or the person who is alleged to be injured by the offense charged or on whose complaint the prosecution was instituted;

(c) being a party adverse to the defendant in a civil action or having complained against or been accused by the defendant in a criminal prosecution;

(d) having served on the grand jury that found the indictment or on a coroner's jury that inquired into the death of a person whose death is the subject of the indictment or information;

(e) having served on a trial jury that tried another person for the offense charged or a related offense;

(f) having been a member of a jury formerly sworn to try the same charge, the verdict of which was set aside or which was discharged without verdict after the case was submitted to it;

(g) having served as a juror in a civil action brought against the defendant for the act charged as an offense;

(h) if the offense charged is punishable with death, having any conscientious opinions concerning the punishment as would preclude finding the defendant guilty, in which case the person must neither be permitted nor compelled to serve as a juror;

(i) having a belief that the punishment fixed by law is too severe for the offense charged; or

(j) having a state of mind in reference to the case or to either of the parties that would prevent the juror from acting with entire impartiality and without prejudice to the substantial rights of either party.

(3) An excuse from service on a jury is not a cause of challenge but the privilege of the person excused.

History: En. 95-1909 by Sec. 1, Ch. 196, L. 1967; amd. Sec. 1, Ch. 131, L. 1974; amd. Sec. 28, Ch. 184, L. 1977; R.C.M. 1947, 95-1909(2)(b), (4); amd. Sec. 6, Ch. 51, L. 1981; amd. Sec. 192, Ch. 800, L. 1991; Sec. 46-16-304, MCA 1989; redes. 46-16-115 by Code Commissioner, 1991.

46-16-116. Peremptory challenges. (1) Each defendant is allowed eight peremptory challenges in capital cases and six in all other cases tried in the district court before a 12-person jury. There may not be additional challenges for separate counts charged in the indictment or information.

(2) If the indictment or information charges a capital offense as well as lesser offenses in separate counts, the maximum number of challenges is eight.

(3) The state is allowed the same number of peremptory challenges as all of the defendants.

(4) In a criminal case tried before a six-person jury, the prosecution and all the defendants are allowed three peremptory challenges each.

(5) When the parties in a criminal case in the district court agree upon a jury consisting of a number of persons other than 6 or 12, they shall also agree in writing upon the number of peremptory challenges to be allowed.

History: En. 95-1909 by Sec. 1, Ch. 196, L. 1967; amd. Sec. 1, Ch. 131, L. 1974; amd. Sec. 28, Ch. 184, L. 1977; R.C.M. 1947, 95-1909(6); amd. Sec. 193, Ch. 800, L. 1991; Sec. 46-16-305, MCA 1989; redes. 46-16-116 by Code Commissioner, 1991; amd. Sec. 36, Ch. 262, L. 1993.

46-16-117. Time for challenges. All challenges must be interposed before the jury is sworn unless the cause of challenge is discovered after the jury is sworn and before the introduction of any evidence, in which case the court, in its discretion, may allow the challenge to be interposed.

History: En. 95-1909 by Sec. 1, Ch. 196, L. 1967; amd. Sec. 1, Ch. 131, L. 1974; amd. Sec. 28, Ch. 184, L. 1977; R.C.M. 1947, 95-1909(5); Sec. 46-16-306, MCA 1989; redes. 46-16-117 by Code Commissioner, 1991.

46-16-118. Alternate jurors. (1) The court may direct that one or more alternate jurors be selected in the same manner as principal jurors. The alternate jurors shall take the same oath as the principal jurors.

(2) Each party shall have one additional peremptory challenge for each alternate juror.

(3) Alternate jurors, in the order in which they are called, shall replace jurors who, prior to the time the jury arrives at its verdict, become unable or disqualified to perform their duties. An alternate juror may not join the jury in its deliberation unless called upon by the court to replace a member of the jury. An alternate juror's conduct during the period in which the jury is considering its verdict is regulated by instructions of the trial court. An alternate juror who does not replace a principal juror must be discharged after the jury arrives at its verdict.

History: En. 95-1909 by Sec. 1, Ch. 196, L. 1967; amd. Sec. 1, Ch. 131, L. 1974; amd. Sec. 28, Ch. 184, L. 1977; R.C.M. 1947, 95-1909(7); amd. Sec. 194, Ch. 800, L. 1991; Sec. 46-16-307, MCA 1989; redes. 46-16-118 by Code Commissioner, 1991.

Cross-References

Alternate jurors — civil proceedings, Rule 47(c), M.R.Civ.P. (see Title 25, ch. 20).

46-16-119 reserved.

46-16-120. Misdemeanor offenses. In all cases in which the defendant is charged with a misdemeanor offense, the defendant may appear by counsel only, although the court may require the personal attendance of the defendant at any time.

History: En. Sec. 125, Ch. 800, L. 1991.

46-16-121. Felony offenses. (1) Except as otherwise provided in Title 46, the defendant in all cases in which a felony is charged must be present at the initial appearance, arraignment, entry of plea, preliminary examination, trial, and sentencing or when otherwise required by the court.

(2) The defendant may be present at all other proceedings.

(3) The presence of the defendant is not required before the supreme court.

History: **En. Sec. 126, Ch. 800, L. 1991.**

46-16-122. Absence of defendant from trial. (1) In a misdemeanor case, if the defendant fails to appear in person, either at the time set for the trial or at any time during the course of the trial and if the defendant's counsel is authorized to act on the defendant's behalf, the court shall proceed with the trial unless good cause for continuance exists.

(2) If the defendant's counsel is not authorized to act on the defendant's behalf as provided in subsection (1) or if the defendant is not represented by counsel, the court, in its discretion, may do one or more of the following:

(a) order a continuance;

(b) order bail forfeited;

(c) issue an arrest warrant; or

(d) proceed with the trial after finding that the defendant had knowledge of the trial date and is voluntarily absent.

(3) After the trial of a felony offense has commenced in the defendant's presence, the absence of the defendant during the trial may not prevent the trial from continuing up to and including the return of a verdict if the defendant:

(a) has been removed from the courtroom for disruptive behavior after receiving a warning that removal will result if the defendant persists in conduct that is so disruptive that the trial cannot be carried on with the defendant in the courtroom; or

(b) is voluntarily absent and the offense is not one that is punishable by death.

(4) Nothing in this section limits the right of the court to order the defendant to be personally present at the trial for purposes of identification unless defense counsel stipulates to the issue of identity.

History: **En. Sec. 127, Ch. 800, L. 1991; amd. Sec. 37, Ch. 262, L. 1993.**

46-16-123. Absence of defendant on receiving verdict or at sentencing. (1) In all misdemeanor cases, the verdict may be returned and the sentence imposed without the defendant being present.

(2) In all felony cases, the defendant shall appear in person when the verdict is returned or the sentence is imposed unless, after the exercise of due diligence to procure the defendant's presence, the court finds that it is in the interest of justice that the verdict be returned and the sentence be pronounced in the defendant's absence.

History: **En. Sec. 128, Ch. 800, L. 1991.**

46-16-124 through 46-16-129 reserved.

46-16-130. Pretrial diversion. (1) (a) Prior to the filing of a charge, the prosecutor and a defendant who has counsel or who has voluntarily waived counsel may agree to the deferral of a prosecution for a specified period of time based on one or more of the following conditions:

(i) that the defendant may not commit any offense;

(ii) that the defendant may not engage in specified activities, conduct, and associations bearing a relationship to the conduct upon which the charge against the defendant is based;

(iii) that the defendant shall participate in a supervised rehabilitation program, which may include treatment, counseling, training, or education;

(iv) that the defendant shall make restitution in a specified manner for harm or loss caused by the offense; or

(v) any other reasonable conditions.

(b) The agreement must be in writing, must be signed by the parties, and must state that the defendant waives the right to speedy trial for the period of deferral. The agreement may include stipulations concerning the admissibility of evidence, specified testimony, or dispositions if the deferral of the prosecution is terminated and there is a trial on the charge.

(c) The prosecution must be deferred for the period specified in the agreement unless there has been a violation of its terms.

(d) The agreement must be terminated and the prosecution automatically dismissed with prejudice upon expiration and compliance with the terms of the agreement.

(2) After a charge has been filed, a deferral of prosecution may be entered into only with the approval of the court.

(3) A prosecution for a violation of 61-8-401, 61-8-406, or 61-8-410 may not be deferred.

History: En. Sec. 129, Ch. 800, L. 1991; amd. Sec. 38, Ch. 262, L. 1993; amd. Sec. 4, Ch. 447, L. 1995.

Part 2
Rules of Evidence for Criminal Cases

Part Cross-References

Rights of accused — self-incrimination, Art. II, sec. 25, Mont. Const.

Evidence, Title 26.

Nonapplicability of privileges — abused, neglected, and dependent children, 41-3-404.

Extrajudicial confession — evidence of death, 45-5-111.

Inference of mental state, 45-5-112.

Evidence in trial for promoting prostitution, 45-5-604.

Evidence in trial for endangering welfare of children, 45-5-622.

Perjured testimony, 45-7-201.

Perjury and false swearing — evidence required for conviction, 45-7-201, 45-7-202.

Tampering with physical evidence, 45-7-207.

Evidence in prosecution for obscenity, 45-8-201.

Criminal defamation — evidence required for conviction, 45-8-212.

Blood, breath, and urine tests as evidence — driving while intoxicated, 61-8-403, 61-8-404.

46-16-201. Applicability of rules of evidence and civil rules. The Montana Rules of Evidence and the statutory rules of evidence in civil actions are applicable also to criminal actions, except as otherwise provided.

History: En. Sec. 2078, Pen. C. 1895; re-en. Sec. 9279, Rev. C. 1907; re-en. Sec. 11977, R.C.M. 1921; Cal. Pen. C. Sec. 1102; re-en. Sec. 11977, R.C.M. 1935; Sec. 94-7209, R.C.M. 1947; redes. 95-3001 by Sec. 29, Ch. 513, L. 1973; R.C.M. 1947, 95-3001; amd. Sec. 195, Ch. 800, L. 1991.

Cross-References

Evidence, Title 26.

Spousal privilege inapplicable in criminal action by one against the other, 26-1-802.

46-16-202. Evidence on trial for treason. Upon a trial for treason, the defendant cannot be convicted unless upon the testimony of two witnesses to the same overt act or upon confession in open court, nor can evidence be admitted of an overt act not expressly charged in the indictment or information, nor can the defendant be convicted unless one or more overt acts be expressly alleged therein.

History: En. Sec. 169, p. 243, Bannack Stat.; re-en. Sec. 294, p. 235, Cod. Stat. 1871; re-en. Sec. 294, 3d Div. Rev. Stat. 1879; re-en. Sec. 295, 3d Div. Comp. Stat. 1887; en. Sec. 2079, Pen. C. 1895; re-en. Sec. 9280, Rev. C. 1907; re-en. Sec. 11978, R.C.M. 1921; Cal. Pen. C. Sec. 1103; re-en. Sec. 11978, R.C.M. 1935; Sec. 94-7210, R.C.M. 1947; redes. 95-3002 by Sec. 29, Ch. 513, L. 1973; R.C.M. 1947, 95-3002.

Cross-References

Treason — of what it consists, Art. II, sec. 30, Mont. Const.

46-16-203. Renumbered 45-5-111 and 45-5-112 by Code Commissioner, 1983.

46-16-204. Defendant presumed innocent — reasonable doubt. A defendant in a criminal action is presumed to be innocent until the contrary is proved, and in case of a reasonable doubt whether the defendant's guilt is satisfactorily shown, the defendant must be found not guilty.

History: En. Sec. 186, p. 245, Bannack Stat.; re-en. Sec. 307, p. 237, Cod. Stat. 1871; re-en. Sec. 307, 3d Div. Rev. Stat. 1879; re-en. Sec. 308, 3d Div. Comp. Stat. 1887; en. Sec. 2072, Pen. C. 1895; re-en. Sec. 9273, Rev. C. 1907; re-en. Sec. 11971, R.C.M. 1921; Cal. Pen. C. Sec. 1096; re-en. Sec. 11971, R.C.M. 1935; Sec. 94-7203, R.C.M. 1947; redes. 95-2901 by Sec. 29, Ch. 513, L. 1973; R.C.M. 1947, 95-2901; amd. Sec. 196, Ch. 800, L. 1991; Sec. 46-16-601, MCA 1989; redes. 46-16-204 by Code Commissioner, 1991.

Cross-References

Instructions to jury on standard of proof to meet burden of persuasion, 26-1-403.

Disputable presumption of innocence, 26-1-602.

46-16-205 through 46-16-210 reserved.

46-16-211. Who are competent witnesses. The rules for determining the competency of witnesses in civil actions are applicable also to criminal actions and proceedings, except as otherwise provided in this code.

History: En. Sec. 2440, Pen. C. 1895; re-en. Sec. 9482, Rev. C. 1907; re-en. Sec. 12175, R.C.M. 1921; Cal. Pen. C. Sec. 1321; re-en. Sec. 12175, R.C.M. 1935; Sec. 94-8801, R.C.M. 1947; redes. 95-3010 by Sec. 29, Ch. 513, L. 1973; R.C.M. 1947, 95-3010.

Cross-References

Competency of witnesses, Art. VI, M.R.Ev. (see Title 26, ch. 10).

46-16-212. Competency of spouses. (1) Neither spouse may testify to the communications or conversations between spouses that occur during their marriage unless:

(a) consent of the defendant-spouse is obtained;

(b) the defendant-spouse has been charged with an act of criminal violence against the other; or

(c) the defendant-spouse has been charged with abuse, abandonment, or neglect of the other spouse or either spouse's children.

(2) Except as provided in subsection (1), a spouse is a competent witness for or against the other spouse.

History: En. Sec. 2441, Pen. C. 1895; re-en. Sec. 9483, Rev. C. 1907; amd. Sec. 1, Ch. 111, L. 1915; re-en. Sec. 12176, R.C.M. 1921; Cal. Pen. C. Sec. 1322; re-en. Sec. 12176, R.C.M. 1935; Sec. 94-8802, R.C.M. 1947; redes. 95-3011 by Sec. 29, Ch. 513, L. 1973; amd. Sec. 50, Ch. 184, L. 1977; R.C.M. 1947, 95-3011; amd. Sec. 197, Ch. 800, L. 1991.

Cross-References

Spousal privilege, 26-1-802.

46-16-213. Testimony of person legally accountable. A person may not be found guilty of an offense on the testimony of one responsible or legally accountable for the same offense, as defined in 45-2-301, unless the testimony is corroborated by other evidence that in itself and without the aid of the testimony of the one responsible or legally accountable for the same offense tends to connect the defendant with the commission of the offense.

History: En. 95-3012 by Sec. 13, Ch. 513, L. 1973; amd. Sec. 51, Ch. 184, L. 1977; R.C.M. 1947, 95-3012; amd. Sec. 198, Ch. 800, L. 1991.

46-16-214 reserved.

46-16-215. Use of confession. Before an extrajudicial confession of the defendant to the crime charged may be admitted into evidence, the prosecution shall introduce independent evidence tending to establish the commission of the crime charged.

History: En. Sec. 199, Ch. 800, L. 1991.

46-16-216. Videotaped testimony. (1) For any prosecution commenced under 45-5-502(3), 45-5-503, 45-5-505, or 45-5-507 or for prosecution of any offense against the person provided for in Title 45, chapter 5, involving a victim who is under 16 years of age, the testimony of the victim, at the request of the victim and with the concurrence of the prosecutor, may be recorded by means of videotape for presentation at trial. The recorded testimony may be presented at trial and must be received into evidence. The victim need not be physically present in the courtroom when the videotape is admitted into evidence.

(2) The procedural and evidentiary rules of the state that are applicable to criminal trials within the state apply to the videotape proceedings authorized by this section.

(3) The district court judge, the prosecutor, the victim, the defendant, the defendant's attorney, and other persons as are considered necessary by the court to make the recordings authorized under this section must be allowed to attend the videotape proceedings.

(4) Videotapes that are part of the court record are subject to a protective order of the court for the purpose of protecting the privacy of the victim.

History: En. Sec. 200, Ch. 800, L. 1991; amd. Sec. 2, Ch. 288, L. 1991.

Part 3
Selecting the Jury (Renumbered by Code Commissioner, 1991)

Part Compiler's Comments

Sections Renumbered:

46-16-301.	Renumbered 46-16-111.
46-16-302.	Renumbered 46-16-112.
46-16-303.	Renumbered 46-16-114.
46-16-304.	Renumbered 46-16-115.
46-16-305.	Renumbered 46-16-116.
46-16-306.	Renumbered 46-16-117.
46-16-307.	Renumbered 46-16-118.

Part 4
Order of Trial

46-16-401. Order of trial. (1) After the jury is sworn but before the introduction of any evidence, the court may give the jury general instructions concerning the conduct of the trial. The court shall give the jury such cautionary instructions as may be required during the course of the trial.

(2) The prosecutor may make an opening statement and shall offer evidence in support of the prosecution. The defendant may make an opening statement prior to the prosecutor's offer of evidence or at the close of the prosecution's case but prior to the defendant's offer of evidence.

(3) The prosecutor and the defendant may, respectively, offer rebutting testimony only. However, the court, for good cause, may permit either party to offer evidence upon the original case at any time before the close of evidence.

(4) Prior to final arguments, the court shall inform the parties as to the instructions that will be given and read them to the jury.

(5) A written copy of the instructions, both general and special, must be delivered to the jury for its consideration during deliberations following the final arguments.

History: En. 95-1910 by Sec. 1, Ch. 196, L. 1967; amd. Sec. 18, Ch. 420, L. 1975; R.C.M. 1947, 95-1910; amd. Sec. 201, Ch. 800, L. 1991.

46-16-402. When order may be departed from. For good cause shown and in the discretion of the court, the order prescribed in 46-16-401 may be departed from.

History: En. 95-1911 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-1911; amd. Sec. 202, Ch. 800, L. 1991.

46-16-403. Evidence insufficient to go to jury. When, at the close of the prosecution's evidence or at the close of all the evidence, the evidence is insufficient to support a finding or verdict of guilty, the court may, on its own motion or on the motion of the defendant, dismiss the action and discharge the defendant. However, prior to dismissal, the court may allow the case to be reopened for good cause shown.

History: En. 95-1909 by Sec. 1, Ch. 196, L. 1967; amd. Sec. 1, Ch. 131, L. 1974; amd. Sec. 28, Ch. 184, L. 1977; R.C.M. 1947, 95-1909(9); amd. Sec. 203, Ch. 800, L. 1991.

46-16-404 through 46-16-409 reserved.

46-16-410. Settlement of jury instructions. (1) Any party may request special jury instructions. All requests for instructions must conform to the Uniform District Court Rules, and all instructions must be settled by the court out of the presence of the jury.

(2) A record must be made at the settlement of instructions.

(3) A party may not assign as error any portion of the instructions or omission from the instructions unless an objection was made specifically stating the matter objected to, and the grounds for the objection, at the settlement of instructions.

(4) The presence of the defendant is not required during the settlement of instructions.

History: En. Sec. 204, Ch. 800, L. 1991.

Cross-References

Jury instructions and verdict forms, Rule 7, M.U.D.C.R. (see Title 25, ch. 19).

Part 5
Conduct of Jury

46-16-501. Conduct of jury during trial. (1) The jurors sworn to try an action may at any time, in the discretion of the court, be permitted to separate or be ordered to remain sequestered in the charge of a proper officer. If sequestered, the officer must be sworn to keep the jurors together, to allow no person to communicate with the jury or to personally communicate with the jury on any subject connected with the trial, and to return the jury into court as directed.

(2) Whether permitted to separate or sequestered, at each adjournment of the court, the jurors must be admonished that it is their duty not to converse among themselves or with anyone else on any subject connected with the trial or to form or express any opinion on the trial until the cause is finally submitted to them.

(3) In all cases appealed to the supreme court, it must be conclusively considered that the court or judge gave the proper admonition in accordance with the provision of subsection (2) unless the record affirmatively shows the contrary.

History: En. 95-1904, 95-1913 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-1904(part), 95-1913(a), (e); amd. Sec. 205, Ch. 800, L. 1991.

46-16-502. View of relevant place or property. When the court considers it proper that the jury view any place or personal property pertinent to the case, it will order the jury to be conducted in a body under the custody of the sheriff or bailiff to view the place or personal property in the presence of the court, the prosecutor, the defendant, and the defendant's counsel. The place or personal property will be shown them by a person appointed by the court for that purpose, and they may personally inspect the place or personal property. The sheriff or bailiff must be sworn to allow no person to speak or otherwise communicate with the jury or to personally communicate with the jury on any subject connected with the trial and to return them into the courtroom without unnecessary delay or at a specified time, as the court may direct.

History: En. 95-1912 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-1912; amd. Sec. 206, Ch. 800, L. 1991.

Cross-References

View by jury of premises, 25-7-401.

46-16-503. Conduct of jury after retirement — advice from court. (1) When the jury retires to consider its verdict, an officer of the court must be appointed to keep the jurors together and to prevent conversations between the jurors and others.

(2) After the jury has retired for deliberation, if there is any disagreement among the jurors as to the testimony or if the jurors desire to be informed on any point of law arising in the cause, they shall notify the officer appointed to keep them together, who shall then notify the court. The information requested may be given, in the discretion of the court, after consultation with the parties.

History: En. 95-1913 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-1913(b), (d); amd. Sec. 18, Ch. 116, L. 1979; amd. Sec. 207, Ch. 800, L. 1991.

Cross-References

Conduct of jury after case submitted to it, 25-7-403.

Jury's request for further information, 25-7-405.

46-16-504. Items that may be taken into jury room. Upon retiring for deliberation, the jurors may take with them the written jury instructions read by the court, notes of the proceedings taken by themselves, and all exhibits that have been received as evidence in the cause that in the opinion of the court will be necessary.

History: En. 95-1913 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-1913(c); amd. Sec. 208, Ch. 800, L. 1991.

Cross-References

Papers that may be taken into jury room, 25-7-404.

46-16-505. Activity of court during jury's absence. While the jury is absent, the court may adjourn or conduct other business, but it must be open for every purpose connected with the cause submitted to the jury until a verdict is returned or the jury discharged.

History: En. 95-1914 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-1914; amd. Sec. 209, Ch. 800, L. 1991.

Part 6

Verdict — Disposition of Defendant

Part Cross-References

Treason — requirements for conviction, Art. II, sec. 30, Mont. Const.

Evidence sufficient for conviction — Montana Alcoholic Beverage Code, 16-6-205.

Requirements for conviction — criminal defamation, 45-8-212.

46-16-601. Renumbered 46-16-204 by Code Commissioner, 1991.

46-16-602. Renumbered 46-16-606 by Code Commissioner, 1991.

46-16-603. Form of verdict. (1) The jury shall return a verdict as instructed by the court. The verdict must be unanimous in all criminal actions. The verdict must be signed by the foreman and returned by the jury to the judge in open court.

(2) If there are two or more defendants, the jury, at any time during its deliberations, may return a verdict or verdicts with respect to a defendant or defendants as to whom it has agreed. If the jury cannot agree with respect to all, the defendant or defendants as to whom it does not agree may be tried again.

History: Ap. p. Sec. 1, Ch. 196, L. 1967; amd. Sec. 1, Ch. 131, L. 1974; amd. Sec. 28, Ch. 184, L. 1977; Sec. 95-1909, R.C.M. 1947; Ap. p. Sec. 1, Ch. 196, L. 1967; Sup. Ct. Ord. 11450-2-3-4, Oct. 10, 1968, eff. Dec. 1, 1968; amd. Sec. 2, Ch. 4, L. 1973; amd. Sec. 29, Ch. 184, L. 1977; Sec. 95-1915, R.C.M. 1947; R.C.M. 1947, 95-1909(8), 95-1915(1) thru (3); amd. Sec. 210, Ch. 800, L. 1991.

Cross-References

Right to unanimous verdicts, Art. II, sec. 26, Mont. Const.

46-16-604. Poll of jury. When a verdict is returned, the jury shall be polled at the request of any party or upon the court's own motion. If upon the poll there is not the required concurrence, the jury may be directed to retire for further deliberations or may be discharged.

History: En. 95-1915 by Sec. 1, Ch. 196, L. 1967; Sup. Ct. Ord. 11450-2-3-4, Oct. 10, 1968, eff. Dec. 1, 1968; amd. Sec. 2, Ch. 4, L. 1973; amd. Sec. 29, Ch. 184, L. 1977; R.C.M. 1947, 95-1915(4).

Cross-References

Return of verdict — poll of jury, 25-7-501.

46-16-605. Verdict of not guilty — when defendant discharged. If a verdict of not guilty is returned and the defendant is not detained for any other legal cause, the defendant must be discharged as soon as the judgment is given.

History: **En. 95-1916 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-1916; amd. Sec. 211, Ch. 800, L. 1991.**

46-16-606. Reasonable doubt as to which offense convicts only of least offense. When it appears beyond a reasonable doubt that the defendant has committed an offense but there is reasonable doubt as to whether he is guilty of a given offense or one or more lesser included offenses, he may only be convicted of the greatest included offense about which there is no reasonable doubt.

History: **En. Sec. 186, p. 245, Bannack Stat.; re-en. Sec. 307, p. 237, Cod. Stat. 1871; re-en. Sec. 308, 3d Div. Comp. Stat. 1887; en. Sec. 2073, Pen. C. 1895; re-en. Sec. 9274, Rev. C. 1907; re-en. Sec. 11972, R.C.M. 1921; Cal. Pen. C. Sec. 1097; re-en. Sec. 11972, R.C.M. 1935; Sec. 94-7204, R.C.M. 1947; redes. 95-2902 by Sec. 29, Ch. 513, L. 1973; amd. Sec. 48, Ch. 184, L. 1977; R.C.M. 1947, 95-2902; Sec. 46-16-602, MCA 1989; redes. 46-16-606 by Code Commissioner, 1991.**

Cross-References

Instructions to jury on standard of proof required to meet burden of persuasion, 26-1-403.

46-16-607. Conviction of lesser included offense. (1) The defendant may be found guilty of an offense necessarily included in the offense charged or of an attempt to commit either the offense charged or an offense necessarily included in the offense charged.

(2) A lesser included offense instruction must be given when there is a proper request by one of the parties and the jury, based on the evidence, could be warranted in finding the defendant guilty of a lesser included offense.

(3) When a lesser included offense instruction is given, the court shall instruct the jury that it must reach a verdict on the crime charged before it may proceed to a lesser included offense. Upon request of the defendant at the settling of instructions, the court shall instruct the jury that it may consider the lesser included offense if it is unable after reasonable effort to reach a verdict on the greater offense.

History: **En. Sec. 212, Ch. 800, L. 1991.**

Part 7

Motion for a New Trial

46-16-701. Effect of new trial. The granting of a new trial places the parties in the same position as if there had been no trial.

History: **En. 95-2101 by Sec. 1, Ch. 196, L. 1967; amd. Sec. 35, Ch. 184, L. 1977; R.C.M. 1947, 95-2101(1); amd. Sec. 213, Ch. 800, L. 1991.**

Cross-References

Order of trial — instruction, 46-16-401.

46-16-702. Motion for a new trial. (1) Following a verdict or finding of guilty, the court may grant the defendant a new trial if required in the interest of justice. A new trial may be ordered by the court without a motion or may be granted after motion and hearing.

(2) The motion for a new trial must be in writing and must specify the grounds for a new trial. The motion must be filed by the defendant within 30 days following a verdict or finding of guilty and be served upon the prosecution.

(3) On hearing the motion for a new trial, if justified by law and the weight of the evidence, the court may:

(a) deny the motion;

(b) grant a new trial; or

(c) modify or change the verdict or finding by finding the defendant guilty of a lesser included offense or finding the defendant not guilty.

History: **En. 95-2101 by Sec. 1, Ch. 196, L. 1967; amd. Sec. 35, Ch. 184, L. 1977; R.C.M. 1947, 95-2101(2); amd. Sec. 19, Ch. 116, L. 1979; amd. Sec. 214, Ch. 800, L. 1991; amd. Sec. 1, Ch. 301, L. 1999.**

Compiler's Comments

1999 Amendment: Chapter 301 in (1) inserted second sentence concerning ordering new trial without motion or after motion and hearing. Amendment effective October 1, 1999.

Cross-References

New trial — general provisions, Title 25, ch. 11, part 1.

Scope of appeal by state, 46-20-103.

CHAPTER 17

LOWER COURT PROCEEDINGS

Part 1 — Preliminary Matters—Justices' and City Courts

46-17-101. Repealed.
46-17-102. Record of proceedings.
46-17-103. Repealed.

Part 2 — The Trial—Justices' and City Courts

46-17-201. Juries in misdemeanor cases.
46-17-202. Formation of trial jury for justices', municipal, and city courts.
46-17-203. Plea of guilty — use of two-way electronic audio-video communication.
46-17-204. Repealed.
46-17-205. Repealed.
46-17-206 through 46-17-210 reserved.
46-17-211. Repealed.

Part 3 — Procedure After Trial—Justices' and City Courts

46-17-301. Repealed.
46-17-302. Execution of judgment.
46-17-303. Deposit of fines.
46-17-304. Disposition of fines for city ordinance violations when appealed.
46-17-305 through 46-17-310 reserved.
46-17-311. Appeal from justices', municipal, and city courts.

Part 4 — Procedure in Municipal Court

46-17-401. Applicability of district court rules.
46-17-402. Fees and fines.
46-17-403. Jury trial.
46-17-404. Appeals.

Chapter Cross-References

Justices' Courts, Title 3, ch. 10.

City Courts, Title 3, ch. 11.

Part 1
Preliminary Matters — Justices' and City Courts

Part Cross-References

Duty of Police Chief in regard to City Court, 7-32-4105.

46-17-101. Repealed. Sec. 49, Ch. 262, L. 1993.

History: En. 95-2001 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-2001; amd. Sec. 2, Ch. 62, L. 1981.

46-17-102. Record of proceedings. A docket must be kept by the justice of the peace or city judge, in which must be entered each action and the proceedings of the court therein.

History: En. 95-2002 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-2002.

46-17-103. Repealed. Sec. 49, Ch. 262, L. 1993.

History: En. 95-2003 by Sec. 1, Ch. 196, L. 1967; amd. Sec. 19, Ch. 420, L. 1975; R.C.M. 1947, 95-2003.

Part 2
The Trial — Justices' and City Courts

Part Cross-References

General rules governing proceedings, Title 3, ch. 1, part 3.

Trial jury defined, 3-15-104.

Number of jury — Justices' Courts, 3-15-107.

Jury fees — courts not of record, 3-15-203.

Jurors — competency and exemptions, Title 3, ch. 15, part 3.

Jurors — penalty for nonappearance, 3-15-321.

Juries in courts of limited jurisdiction — summoning and impaneling, Title 3, ch. 15, part 7.

Witness fees — courts not of record, 26-2-503.

46-17-201. Juries in misdemeanor cases. (1) The parties in a misdemeanor case are entitled to a jury of six qualified persons but may agree to a number less than six at any time before the verdict.

(2) Upon consent of the parties, a trial by jury may be waived.

History: En. 95-2004 by Sec. 1, Ch. 196, L. 1967; amd. Sec. 30, Ch. 184, L. 1977; R.C.M. 1947, 95-2004(1); amd. Sec. 215, Ch. 800, L. 1991; amd. Sec. 2, Ch. 7, L. 1995; amd. Sec. 2, Ch. 129, L. 1997; amd. Sec. 2, Ch. 346, L. 1999.

Compiler's Comments

1999 Amendment: Chapter 346 in (1) at beginning deleted "Subject to subsection (3)"; deleted former (3) that read: "(3) A defendant in a misdemeanor case filed in justice's or city court is limited to one jury trial, either in justice's or city court or on appeal to the district court. The defendant shall either elect a jury trial in justice's or city court or reserve jury trial for the district court in the event of conviction and subsequent appeal to the district court. The defendant's election or reservation must be noted by the court on the face of the charging document"; and made minor changes in style. Amendment effective April 19, 1999.

Cross-References

Right to trial by jury, Art. II, sec. 26, Mont. Const.

Right to jury trial in felony cases — waiver, 46-16-110.

46-17-202. Formation of trial jury for justices', municipal, and city courts. (1) At the time of preparing the district court jury list, the county commissioners and clerk and recorder shall prepare a jury list for each justice's, municipal, and city court within the county. Each list must consist of residents of the appropriate county, city, or town. The lists must be selected in any reasonable manner that ensures fairness, and each list must include a number of names sufficient to meet the annual jury requirements of the respective court. Additional lists may be prepared if required. The lists must be filed in the office of the clerk of the district court. The appropriate list must be posted in a public place in each county, city, or town, and the list must comprise the trial jury list for the ensuing year for the county, city, or town.

(2) Trial jurors must be summoned from the jury list by notifying each one orally that the person is summoned and of the time and place at which attendance is required.

History: En. 95-2005 by Sec. 1, Ch. 196, L. 1967; amd. Sup. Ct. Ord. 11450-2-3-4, Oct. 10, 1968, eff. Dec. 1, 1968; amd. Sec. 20, Ch. 420, L. 1975; amd. Sec. 31, Ch. 184, L. 1977; R.C.M. 1947, 95-2005; amd. Sec. 18, Ch. 379, L. 1983; amd. Sec. 216, Ch. 800, L. 1991.

Cross-References

Trial jury defined, 3-15-104.

Number of jury — Justices' Courts, 3-15-107.

Jurors — competency and exemptions, Title 3, ch. 15, part 3.

Jurors — penalty for nonappearance, 3-15-321.

Juries in courts of limited jurisdiction — summoning and impaneling, Title 3, ch. 15, part 7.

46-17-203. Plea of guilty — use of two-way electronic audio-video communication. (1) Before or during trial, a plea of guilty or nolo contendere may be accepted when:

(a) subject to the provisions of subsection (3), the defendant enters a plea of guilty or nolo contendere in open court; and

(b) the court has informed the defendant of the consequences of the plea and of the maximum penalty provided by law that may be imposed upon acceptance of the plea.

(2) A plea of guilty or nolo contendere in a justice's court, city court, or other court of limited jurisdiction waives the right of trial de novo in district court. A defendant must be informed of the waiver before the plea is accepted, and the justice or judge shall question the defendant to ensure that the plea and waiver are entered voluntarily.

(3) For purposes of this section, in cases in which the defendant is charged with a misdemeanor offense, an entry of a plea of guilty or nolo contendere through the use of two-way electronic audio-video communication, allowing all of the participants to be observed and heard in the courtroom by all present, is considered to be an entry of a plea of guilty or nolo contendere in open court. Audio-video communication may be used if neither party objects and the court agrees to its use. The audio-video communication must operate as provided in 46-12-201.

History: En. 95-2004 by Sec. 1, Ch. 196, L. 1967; amd. Sec. 30, Ch. 184, L. 1977; R.C.M. 1947, 95-2004(2); amd. Sec. 3, Ch. 277, L. 1989; amd. Sec. 3, Ch. 163, L. 1997; amd. Sec. 17, Ch. 395, L. 1999.

Compiler's Comments

1999 Amendment: Chapter 395 throughout section after "plea of guilty" inserted "or nolo contendere". Amendment effective October 1, 1999.

46-17-204. Repealed. Sec. 49, Ch. 262, L. 1993.

History: En. 95-2004 by Sec. 1, Ch. 196, L. 1967; amd. Sec. 30, Ch. 184, L. 1977; R.C.M. 1947, 95-2004(4).

46-17-205. Repealed. Sec. 49, Ch. 262, L. 1993.

History: En. 95-2004 by Sec. 1, Ch. 196, L. 1967; amd. Sec. 30, Ch. 184, L. 1977; R.C.M. 1947, 95-2004(3).

46-17-206 through 46-17-210 reserved.

46-17-211. Repealed. Sec. 49, Ch. 262, L. 1993.

History: En. 95-2006 by Sec. 1, Ch. 196, L. 1967; amd. Sec. 3, Ch. 4, L. 1973; rep. and re-en. 95-2006 by Sec. 30, Ch. 513, L. 1973; amd. Sec. 32, Ch. 184, L. 1977; R.C.M. 1947, 95-2006.

Part 3

Procedure After Trial — Justices' and City Courts

Part Cross-References

Procedure on appeal — Montana Alcoholic Beverage Code, 16-6-202.

Forfeiture of motor vehicle for third drug-related or alcohol-related conviction, 61-8-714, 61-8-722.

46-17-301. Repealed. Sec. 49, Ch. 262, L. 1993.

History: En. 95-2007 by Sec. 1, Ch. 196, L. 1967; amd. Sec. 1, Ch. 348, L. 1973; amd. Sec. 33, Ch. 184, L. 1977; R.C.M. 1947, 95-2007.

46-17-302. Execution of judgment. (1) The judgment must be executed by the sheriff, constable, marshal, or policeman of the jurisdiction in which the conviction was had.

(2) When a judgment of imprisonment is entered, a certified copy thereof must be delivered to the sheriff or other officer, which is a sufficient warrant for its execution.

(3) If a judgment is rendered imposing a fine only without imprisonment for nonpayment and the defendant is not detained for any other legal cause, he must be discharged as soon as the judgment is given.

(4) A judgment that the defendant pay a fine may also direct that he be imprisoned until the fine be satisfied in the proportion of 1 day's imprisonment for every $25 of the fine. When the judgment is rendered, the defendant must be held in custody the time specified in the judgment unless the fine is paid.

(5) Any officer charged with the collection of fines under the provisions of this chapter must return the execution to the judge within 30 days from its delivery to him and pay over to the judge the money collected, deducting his fees for the collection.

History: En. 95-2008 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-2008(part); amd. Sec. 1, Ch. 270, L. 1989.

46-17-303. Deposit of fines. (1) Except as provided in subsection (2), all fines imposed and collected by a city court must be paid to the treasurer of the county, city, or town, as the case may be, within 30 days of receipt. The city judge shall file a copy of any receipt given for a collected fine with the county, city, or town clerk, as the case may be.

(2) (a) If a final judgment is entered for a fine and the fine is immediately due, the city court may contract with a private person or entity for the collection of the fine.

(b) In the event that a private person or entity is retained to collect a fine, the city court is authorized to assign the judgment for the fine to the private person or entity and the private person or entity may, as an assignee, institute suit or other lawful collection procedure in its own name.

(c) The city court, after deducting the charges provided for in 46-18-236, is authorized to pay to the private person or entity a reasonable fee for collecting the fine.

History: **En. 95-2008 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-2008(part); amd. Sec. 29, Ch. 557, L. 1987; amd. Sec. 2, Ch. 63, L. 1999.**

Compiler's Comments

1999 Amendment: Chapter 63 at beginning of (1) inserted exception clause and in second sentence substituted "shall file copy of any receipt given for a collected fine" for "must take duplicate receipts therefor, one of which he must deposit"; inserted (2)(a) authorizing city court to contract for collection of fine if final judgment entered and fine immediately due; inserted (2)(b) authorizing assignment to and collection of fine by private person or entity if retained by city court; inserted (2)(c) authorizing city court to pay private person or entity for fine collection after deduction of charges; and made minor changes in style. Amendment effective October 1, 1999.

Cross-References

Collection and disposition of fines, penalties, forfeitures, and fees, 3-10-601.

46-17-304. Disposition of fines for city ordinance violations when appealed. All fines obtained from a judgment in a higher court on an appeal from a city court for violation of a city ordinance, tried de novo in the higher court, shall be paid to the county treasurer, who shall, before 31 days after receipt of the sum, forward one-half of the amount to the treasurer of the city in which the action originated.

History: **En. Sec. 1, Ch. 32, L. 1967; R.C.M. 1947, 95-2008.1.**

46-17-305 through 46-17-310 reserved.

46-17-311. Appeal from justices', municipal, and city courts. (1) Except as provided in subsection (4) and except for cases in which legal issues are preserved for appeal pursuant to 46-12-204, all cases on appeal from a justice's or city court must be tried anew in the district court and may be tried before a jury of six selected in the same manner as for other criminal cases. An appeal from a municipal court to the district court is governed by 3-6-110.

(2) The defendant may appeal to the district court by filing written notice of intention to appeal within 10 days after a judgment is rendered following trial. In the case of an appeal by the prosecution, the notice must be filed within 10 days of the date that the order complained of is given. The prosecution may appeal only in the cases provided for in 46-20-103.

(3) Within 30 days of filing the notice of appeal, the court shall transfer the entire record of the court of limited jurisdiction to the district court.

(4) A defendant may appeal a justice's court or city court revocation of a suspended sentence to the district court. The district court judge shall determine whether the suspended sentence will be revoked. A jury trial is not available in a sentence revocation procedure.

History: **En. 95-2009 by Sec. 1, Ch. 196, L. 1967; amd. Sec. 34, Ch. 184, L. 1977; amd. Sec. 55, Ch. 344, L. 1977; R.C.M. 1947, 95-2009; amd. Sec. 20, Ch. 116, L. 1979; amd. Sec. 1, Ch. 333, L. 1985; amd. Sec. 4, Ch. 277, L. 1989; amd. Sec. 217, Ch. 800, L. 1991; amd. Sec. 39, Ch. 262, L. 1993; amd. Sec. 3, Ch. 129, L. 1997; amd. Sec. 1, Ch. 149, L. 1997; amd. Sec. 3, Ch. 346, L. 1999.**

Compiler's Comments

1999 Amendment: Chapter 346 in (1) after "other criminal cases" deleted "if the defendant has not previously exercised the right of jury trial in a justice's or city court, as provided in 46-17-201. If the defendant received a jury trial in justice's or city court, the case must be tried anew in the district court without a jury." Amendment effective April 19, 1999.

Cross-References

Appellate jurisdiction of District Court, 3-5-303.

City Attorney to prosecute appeals to District Court, 3-11-301.

Part 4
Procedure in Municipal Court

46-17-401. Applicability of district court rules. Except as otherwise provided by Title 3, chapter 6, and this part, the proceedings and practice in municipal court shall be the same as in district court.

History: En. Sec. 20, Ch. 177, L. 1935; re-en. Sec. 5094.19, R.C.M. 1935; R.C.M. 1947, 11-1719(part).

Cross-References

Montana Uniform District Court Rules, Title 25, ch. 19.

46-17-402. Fees and fines. (1) The fees and fines in municipal court must be the same as the fees and fines provided by law or ordinance, and except as provided in subsection (2), all fees and fines collected by the court must be paid into the city treasury.

(2) (a) If a final judgment is entered for a fine and the fine is immediately due, the municipal court may contract with a private person or entity for the collection of the fine.

(b) In the event that a private person or entity is retained to collect a fine, the municipal court is authorized to assign the judgment for the fine to the private person or entity and the private person or entity may, as an assignee, institute suit or other lawful collection procedure in its own name.

(c) The municipal court, after deducting the charges provided for in 46-18-236, is authorized to pay to the private person or entity a reasonable fee for collecting the fine.

History: En. Sec. 18, Ch. 177, L. 1935; re-en. Sec. 5094.18, R.C.M. 1935; amd. Sec. 10, Ch. 429, L. 1977; R.C.M. 1947, 11-1718; amd. Sec. 3, Ch. 63, L. 1999.

Compiler's Comments

1999 Amendment: Chapter 63 in (1) inserted "except as provided in subsection (2)"; inserted (2)(a) authorizing municipal court to contract for collection of fine if final judgment entered and fine immediately due; inserted (2)(b) authorizing assignment to and collection of fine by private person or entity if retained by municipal court; inserted (2)(c) authorizing municipal court to pay private person or entity for fine collection after deduction of charges; and made minor changes in style. Amendment effective October 1, 1999.

46-17-403. Jury trial. In criminal causes arising under the state law, either party shall be entitled to a jury trial, as provided in justices' courts, except that the police officer shall perform the duties thereto prescribed to the sheriff or constable.

History: En. Sec. 15, Ch. 177, L. 1935; re-en. Sec. 5094.15, R.C.M. 1935; R.C.M. 1947, 11-1715(part).

Cross-References

Trial by jury, Art. II, sec. 26, Mont. Const.

46-17-404. Appeals. (1) A party may appeal to district court from a judgment of municipal court.

(2) Appeal from a municipal court may be limited by requiring by ordinance that a minimum amount in controversy, not to exceed $200, be met before the district court has jurisdiction to hear the appeal, except:

(a) if the judgment of the municipal court includes incarceration, no minimum amount in controversy may be required for appeal; and

(b) upon petition by an aggrieved party, the district court may, in the interests of justice, accept appeal jurisdiction notwithstanding the amount in controversy.

History: **En. Sec. 17, Ch. 177, L. 1935; re-en. Sec. 5094.17, R.C.M. 1935; amd. Sec. 9, Ch. 429, L. 1977; R.C.M. 1947, 11-1717(1), (2).**

CHAPTER 18

SENTENCE AND JUDGMENT

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Part 1
Policy and Preliminary Procedure

Part Cross-References

Criminal justice policy — rights of convicted, Art. II, sec. 28, Mont. Const.

46-18-101. Correctional and sentencing policy. (1) It is the purpose of this section to establish the correctional and sentencing policy of the state of Montana. Laws for the punishment of crime are drawn to implement the policy established by this section.

(2) The correctional and sentencing policy of the state of Montana is to:

(a) punish each offender commensurate with the nature and degree of harm caused by the offense;

(b) protect the public by incarcerating violent offenders and serious repeat offenders;

(c) provide restitution, reparation, and restoration to the victim of the offense; and

(d) encourage and provide opportunities for the offender's self-improvement.

(3) To achieve the policy outlined in subsection (2), the state of Montana adopts the following principles:

(a) Sentencing and punishment must be certain, timely, consistent, and understandable.

(b) Sentences should be commensurate with the punishment imposed on other persons committing the same offenses.

(c) Sentencing practices must be neutral with respect to the offender's race, gender, religion, national origin, or social or economic status.

(d) Sentencing practices must permit judicial discretion to consider aggravating and mitigating circumstances.

(e) Sentencing practices must include punishing violent and serious repeat felony offenders with incarceration.

(f) Sentencing practices must provide alternatives to imprisonment for the punishment of those nonviolent felony offenders who do not have serious criminal records.

(g) Sentencing and correctional practices must emphasize that the offender is responsible for obeying the law and must hold the offender accountable for the offender's actions.

(h) Sentencing practices must emphasize restitution to the victim by the offender. A sentence must require an offender who is financially able to do so to pay restitution, costs as provided in 46-18-232, costs of court-appointed counsel as provided in 46-8-113, and, if the offender is a sex offender, costs of any chemical treatment.

History: En. 95-2201 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-2201; amd. Sec. 1, Ch. 533, L. 1983; amd. Sec. 2, Ch. 794, L. 1991; amd. Sec. 64, Ch. 10, L. 1993; amd. Sec. 6, Ch. 125, L. 1995; amd. Sec. 211, Ch. 546, L. 1995; amd. Sec. 3, Ch. 189, L. 1997; amd. Sec. 1, Ch. 474, L. 1997.

46-18-102. Rendering judgment and pronouncing sentence — use of two-way electronic audio-video communication. (1) The judgment must be rendered in open court. For purposes of this section, in cases in which the defendant is charged with a misdemeanor offense, a judgment rendered through the use of two-way electronic audio-video communication, allowing all of the participants to be observed and heard in the courtroom by all present, is considered to be a judgment rendered in open court. Audio-video communication may be used if neither party objects and the court agrees to its use. The audio-video communication must operate as provided in 46-12-201.

(2) If the verdict or finding is not guilty, judgment must be rendered immediately and the defendant must be discharged from custody or from the obligation of a bail bond.

(3) (a) Except as provided in 46-18-301, if the verdict or finding is guilty, sentence must be pronounced and judgment rendered within a reasonable time.

(b) When the sentence is pronounced, the judge shall clearly state for the record the reasons for imposing the sentence.

History: En. 95-2202 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-2202; amd. Sec. 1, Ch. 46, L. 1983; amd. Sec. 4, Ch. 163, L. 1997; amd. Sec. 1, Ch. 378, L. 1997.

46-18-103. Sentence to be imposed by judge. All sentences under this chapter shall be imposed exclusively by the judge of the court.

History: En. 95-2212 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-2212.

46-18-104. Definitions. As used in 46-18-101, 46-18-105, 46-18-201, 46-18-225, and this section, unless the context requires otherwise, the following definitions apply:

(1) "Community corrections" or "community corrections facility or program" means a community corrections facility or program as defined in 53-30-303.

(2) "Crime of violence" means:

(a) a crime in which an offender uses or possesses and threatens to use a deadly weapon during the commission or attempted commission of a crime;

(b) a crime in which the offender causes a serious bodily injury or death to a person other than the offender; or

(c) any sexual offense in which the offender causes bodily injury to the victim or uses threat, intimidation, or force against the victim.

(3) "Nonviolent felony offender" means a person who has entered a plea of guilty or nolo contendere to a felony offense other than a crime of violence or who has been convicted of a felony offense other than a crime of violence.

History: **En. Sec. 1, Ch. 794, L. 1991; amd. Sec. 7(2), Ch. 794, L. 1991; amd. Sec. 18, Ch. 395, L. 1999.**

Compiler's Comments

1999 Amendment: Chapter 395 in (3) inserted "or nolo contendere"; and made minor changes in style. Amendment effective October 1, 1999.

46-18-105. Community corrections facilities or programs. The department of corrections may provide community corrections facilities or programs for the rehabilitation of nonviolent felony offenders, as authorized under Title 53, chapter 30, part 3.

History: **En. Sec. 5, Ch. 794, L. 1991; amd. Sec. 1, Ch. 262, L. 1991; amd. Sec. 212, Ch. 546, L. 1995.**

46-18-106 through 46-18-110 reserved.

46-18-111. Presentence investigation — when required. (1) Upon the acceptance of a plea or upon a verdict or finding of guilty to one or more felony offenses, the district court shall direct the probation officer to make a presentence investigation and report. The district court shall consider the presentence investigation report prior to sentencing. If the defendant was convicted of an offense under 45-5-502, 45-5-503, 45-5-504, 45-5-505, 45-5-507, 45-5-625, or 45-5-627, the investigation must include a psychosexual evaluation of the defendant and a recommendation as to treatment of the offender in the least restrictive environment, considering the risk the offender presents to the community and offender needs, unless the defendant was sentenced under 46-18-219. The evaluation must be completed by a sex offender therapist who is a member of the Montana sex offender treatment association or has comparable credentials acceptable to the professional and occupational licensing bureau of the department of commerce. The psychosexual evaluation must be made available to the county attorney's office, the defense attorney, the probation and parole officer, and the sentencing judge. All costs related to the evaluation must be paid by the defendant. If the defendant is determined by the district court to be indigent, all costs related to the evaluation are the responsibility of the district court and must be paid by the county or the state, or both, under Title 3, chapter 5, part 9.

(2) The court shall order a presentence report unless the court makes a finding that a report is unnecessary. Unless the court makes such a finding, a defendant convicted of any offense not enumerated in subsection (1) that may result in incarceration for 1 year or more may not be sentenced before a written presentence investigation report by a probation officer is presented to and considered by the district court. The district court may, in its discretion, order a presentence investigation for a defendant convicted of a misdemeanor.

History: **En. 95-2203 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-2203; amd. Sec. 1, Ch. 173, L. 1985; amd. Sec. 2, Ch. 192, L. 1991; amd. Sec. 1, Ch. 262, L. 1991; amd. Sec. 218, Ch. 800, L. 1991; amd. Sec. 40, Ch. 262, L. 1993; amd. Secs. 1, 2, Ch. 347, L. 1993; amd. Sec. 12, Ch. 482, L. 1995; amd. Sec. 213, Ch. 546, L. 1995; amd. Sec. 4, Ch. 189, L. 1997.**

46-18-112. Content of presentence investigation report. (1) Whenever an investigation is required, the probation officer shall promptly inquire into and report upon:

(a) the defendant's characteristics, circumstances, needs, and potentialities;

(b) the defendant's criminal record and social history;

(c) the circumstances of the offense;

(d) the time of the defendant's detention for the offenses charged;

(e) the harm caused, as a result of the offense, to the victim, the victim's immediate family, and the community; and

(f) the victim's pecuniary loss, if any. The officer shall make a reasonable effort to confer with the victim to ascertain whether the victim has sustained a pecuniary loss. If the victim is not available or declines to confer, the officer shall record that information in the report.

(2) All local and state mental and correctional institutions, courts, and law enforcement agencies shall furnish, upon request of the officer preparing a presentence investigation, the defendant's criminal record and other relevant information.

(3) The court may, in its discretion, require that the presentence investigation report include a physical and mental examination of the defendant.

History: En. 95-2204 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-2204; amd. Sec. 219, Ch. 800, L. 1991; amd. Sec. 41, Ch. 262, L. 1993; amd. Sec. 7, Ch. 125, L. 1995.

46-18-113. Availability of presentence investigation report. (1) All presentence investigation reports must be a part of the court record but may not be opened for public inspection. A copy of the presentence investigation report must be provided to the prosecution, the defendant and the defendant's attorney, the probation and parole officer, and the agency or institution to which the defendant is committed. The prosecutor may disclose the contents of the presentence report to a victim of the offense.

(2) The court having jurisdiction of the case may permit other access to the presentence investigation report as it considers necessary.

History: En. 95-2205 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-2205; amd. Sec. 220, Ch. 800, L. 1991; amd. Sec. 8, Ch. 125, L. 1995; amd. Sec. 5, Ch. 189, L. 1997.

46-18-114 reserved.

46-18-115. Sentencing hearing — use of two-way electronic audio-video communication. Before imposing sentence or making any other disposition upon acceptance of a plea or upon a verdict or finding of guilty, the court shall conduct a sentencing hearing, without unreasonable delay, as follows:

(1) The court shall afford the parties an opportunity to be heard on any matter relevant to the disposition, including the applicability of sentencing enhancement provisions, mandatory minimum sentences, persistent felony offender status, or an exception to these matters.

(2) If there is a possibility of imposing the death penalty, the court shall hold a hearing as provided by 46-18-301.

(3) Except as provided in 46-11-701 and 46-16-120 through 46-16-123, the court shall address the defendant personally to ascertain whether the

defendant wishes to make a statement and to present any information in mitigation of punishment or reason why the defendant should not be sentenced. If the defendant wishes to make a statement, the court shall afford the defendant a reasonable opportunity to do so. For purposes of this section, in cases in which the defendant is charged with a misdemeanor offense, the requirement that the court address the defendant personally may be satisfied by the use of two-way electronic audio-video communication. Audio-video communication may be used if neither party objects and the court agrees to its use. The audio-video communication must operate as provided in 46-12-201.

(4) (a) The court shall permit the victim to present a statement concerning the effects of the crime on the victim, the circumstances surrounding the crime, the manner in which the crime was perpetrated, and the victim's opinion regarding appropriate sentence. At the victim's option, the victim may present the statement in writing before the sentencing hearing or orally under oath at the sentencing hearing, or both.

(b) The court shall give copies of any written statements of the victim to the prosecutor and the defendant prior to imposing sentence.

(c) The court shall consider the victim's statement along with other factors. However, if the victim's statement includes new material facts upon which the court intends to rely, the court shall allow the defendant adequate opportunity to respond and may continue the sentencing hearing if necessary.

(5) The court shall impose sentence or make any other disposition authorized by law.

(6) In felony cases, the court shall specifically state all reasons for the sentence, including restrictions, conditions, or enhancements imposed, in open court on the record and in the written judgment.

History: En. Sec. 221, Ch. 800, L. 1991; amd. Sec. 9, Ch. 125, L. 1995; amd. Sec. 5, Ch. 163, L. 1997.

46-18-116. Judgment. The judgment must set forth the plea, verdict or finding, and the adjudication. If the defendant is convicted, it must set forth the sentence or other disposition. The judgment must be signed and entered on the record.

History: En. Sec. 222, Ch. 800, L. 1991.

46-18-117. Correction of sentence. The court may correct an erroneous sentence or disposition at any time and may correct a sentence imposed in an illegal manner within 120 days after the sentence is imposed or after remand from an appellate court.

History: En. Sec. 223, Ch. 800, L. 1991; amd. Sec. 42, Ch. 262, L. 1993.

46-18-118 through 46-18-129 reserved.

46-18-130. Terminated. Sec. 5, Ch. 306, L. 1995.

History: En. Sec. 1, Ch. 306, L. 1995.

46-18-131. Terminated. Sec. 5, Ch. 306, L. 1995.

History: En. Sec. 2, Ch. 306, L. 1995.

46-18-132. Terminated. Sec. 5, Ch. 306, L. 1995.

History: En. Sec. 3, Ch. 306, L. 1995.

Part 2
Form of Sentence

Part Cross-References

Excessive sanctions — cruel and unusual punishment, Art. II, sec. 22, Mont. Const.

Punishments allowed — military courts, 10-1-401.

Determination of what sentence may be imposed, 45-1-201.

Rehabilitation instead of prosecution for addicts, 45-9-202.

Registration of sexual and violent offenders, Title 46, ch. 23, part 5.

46-18-201. Sentences that may be imposed. (1) (a) Whenever a person has been found guilty of an offense upon a verdict of guilty or a plea of guilty or nolo contendere, a sentencing judge may defer imposition of sentence, except as otherwise specifically provided by statute, for a period:

(i) not exceeding 1 year for a misdemeanor or for a period not exceeding 3 years for a felony; or

(ii) not exceeding 2 years for a misdemeanor or for a period not exceeding 6 years for a felony if a financial obligation is imposed as a condition of sentence for either the misdemeanor or the felony, regardless of whether any other conditions are imposed.

(b) Except as provided in 46-18-222, imposition of sentence in a felony case may not be deferred in the case of an offender who has been convicted of a felony on a prior occasion, whether or not the sentence was imposed, imposition of the sentence was deferred, or execution of the sentence was suspended.

(2) Whenever a person has been found guilty of an offense upon a verdict of guilty or a plea of guilty or nolo contendere, a sentencing judge may suspend execution of sentence, except as otherwise specifically provided by statute, for a period up to the maximum sentence allowed or for a period of 6 months, whichever is greater, for each particular offense.

(3) Whenever a person has been found guilty of an offense upon a verdict of guilty or a plea of guilty or nolo contendere, a sentencing judge may impose a sentence that may include:

(a) a fine as provided by law for the offense;

(b) payment of costs, as provided in 46-18-232, or payment of costs of court-appointed counsel as provided in 46-8-113;

(c) a term of incarceration at a county detention center or state prison, as provided in Title 45, for the offense;

(d) commitment of:

(i) an offender not referred to in subsection (3)(d)(ii) to the department of corrections, with a recommendation for placement in an appropriate correctional facility or program; however, all but the first 5 years of the commitment to the department of corrections must be suspended; or

(ii) a youth transferred to district court under 41-5-206 and found guilty in the district court of an offense enumerated in 41-5-206 to the department of corrections for a period determined by the court for placement in an appropriate correctional facility or program;

(e) with the approval of the facility or program, placement of the offender in a community corrections facility or program as provided in 53-30-321;

(f) with the approval of the prerelease center or prerelease program and confirmation by the department of corrections that space is available, placement of the offender in a prerelease center or prerelease program for a period not to exceed 1 year;

(g) chemical treatment of sex offenders, as provided in 45-5-512, if applicable, that is paid for by and for a period of time determined by the department of corrections, but not exceeding the period of state supervision of the person; or

(h) any combination of subsections (2) through (3)(g).

(4) When deferring imposition of sentence or suspending all or a portion of execution of sentence, the sentencing judge may impose upon the offender any reasonable restrictions or conditions during the period of the deferred imposition or suspension of sentence. Reasonable restrictions or conditions imposed under subsection (1)(a) or (2) may include but are not limited to:

(a) limited release during employment hours as provided in 46-18-701;

(b) incarceration in a detention center not exceeding 180 days;

(c) conditions for probation;

(d) payment of the costs of confinement;

(e) payment of a fine as provided in 46-18-231;

(f) payment of costs as provided in 46-18-232 and 46-18-233;

(g) payment of costs of court-appointed counsel as provided in 46-8-113;

(h) with the approval of the facility or program, an order that the offender be placed in a community corrections facility or program as provided in 53-30-321;

(i) with the approval of the prerelease center or prerelease program and confirmation by the department of corrections that space is available, an order that the offender be placed in a prerelease center or prerelease program for a period not to exceed 1 year;

(j) community service;

(k) home arrest as provided in Title 46, chapter 18, part 10;

(l) payment of expenses for use of a judge pro tempore or special master as provided in 3-5-116;

(m) with the approval of the department of corrections and with a signed statement from an offender that the offender's participation in the boot camp incarceration program is voluntary, an order that the offender complete the boot camp incarceration program established pursuant to 53-30-403;

(n) any other reasonable restrictions or conditions considered necessary for rehabilitation or for the protection of the victim or society; or

(o) any combination of the restrictions or conditions listed in subsections (4)(a) through (4)(n).

(5) In addition to any penalties imposed pursuant to subsection (1), if the sentencing judge finds that the victim of the offense has sustained a pecuniary loss, the sentencing judge shall require payment of full restitution to the victim as provided in 46-18-241 through 46-18-249.

(6) In imposing a sentence on an offender convicted of a sexual or violent offense, as defined in 46-23-502, the sentencing judge may not waive the registration requirement provided in Title 46, chapter 23, part 5.

(7) If a felony sentence includes probation, the department of corrections shall supervise the offender unless the court specifies otherwise.

History: **En. 95-2206 by Sec. 1, Ch. 196, L. 1967; rep. and re-en. by Sec. 31, Ch. 513, L. 1973; amd. Sec. 36, Ch. 184, L. 1977; amd. Sec. 1, Ch. 436, L. 1977; amd. Sec. 1, Ch. 580,**

L. 1977; amd. Sec. 12, Ch. 584, L. 1977; R.C.M. 1947, 95-2206(1), (2), (4); amd. Sec. 21, Ch. 116, L. 1979; amd. Sec. 2, Ch. 322, L. 1979; amd. Sec. 2, Ch. 587, L. 1979; amd. Sec. 6, Ch. 198, L. 1981; amd. Sec. 1, Ch. 207, L. 1981; amd. Sec. 7, Ch. 415, L. 1981; amd. Sec. 1, Ch. 189, L. 1983; amd. Sec. 9, Ch. 581, L. 1983; amd. Sec. 1, Ch. 205, L. 1985; amd. Sec. 1, Ch. 524, L. 1985; amd. Sec. 104, Ch. 370, L. 1987; amd. Sec. 7, Ch. 610, L. 1987; amd. Sec. 1, Ch. 626, L. 1987; amd. Sec. 10, Ch. 293, L. 1989; amd. Sec. 2, Ch. 575, L. 1989; amd. Sec. 2, Ch. 42, L. 1991; amd. Sec. 10, Ch. 105, L. 1991; amd. Sec. 17, Ch. 554, L. 1991; amd. Sec. 2, Ch. 564, L. 1991; amd. Sec. 3, Ch. 794, L. 1991; amd. Sec. 5, Ch. 802, L. 1991; amd. Sec. 65, Ch. 10, L. 1993; amd. Sec. 43, Ch. 262, L. 1993; amd. Sec. 1, Ch. 365, L. 1993; amd. Sec. 3, Ch. 579, L. 1993; amd. Sec. 10, Ch. 125, L. 1995; amd. Sec. 5, Ch. 394, L. 1995; amd. Sec. 1, Ch. 407, L. 1995; amd. Sec. 13, Ch. 482, L. 1995; amd. Sec. 214, Ch. 546, L. 1995; amd. Sec. 1, Ch. 181, L. 1997; amd. Sec. 6, Ch. 189, L. 1997; amd. Sec. 1, Ch. 322, L. 1997; amd. Sec. 1, Ch. 341, L. 1997; amd. Sec. 3, Ch. 375, L. 1997; amd. Sec. 1, Ch. 525, L. 1997; amd. Sec. 2, Ch. 52, L. 1999; amd. Sec. 19, Ch. 395, L. 1999; amd. Sec. 16, Ch. 432, L. 1999; amd. Sec. 1, Ch. 505, L. 1999.

Compiler's Comments

1999 Amendments — Composite Section: Chapter 52 throughout section substituted references to sentencing judge for references to court; in (1)(a) substituted "except as otherwise specifically provided by statute, for a period" for "except as provided in 61-8-734 for sentences for driving under the influence of alcohol or drugs or as provided in 61-6-304, for a period, except as otherwise provided"; inserted (1)(a)(ii) allowing longer deferral period if financial obligation imposed; inserted (1)(b) disallowing deferral when offender has been convicted of prior felony; at end of former (1)(a) deleted former language that read: "The sentencing judge may impose upon the defendant any reasonable restrictions or conditions during the period of the deferred imposition. Reasonable restrictions or conditions may include:

(i) jail base release;

(ii) jail time not exceeding 180 days;

(iii) conditions for probation;

(iv) payment of the costs of confinement;

(v) payment of a fine as provided in 46-18-231;

(vi) payment of costs as provided in 46-18-232 and 46-18-233;

(vii) payment of costs of court-appointed counsel as provided in 46-8-113;

(viii) with the approval of the facility or program, an order that the offender be placed in a community corrections facility or program as provided in 53-30-321;

(ix) with the approval of the prerelease center or prerelease program and confirmation by the department of corrections that space is available, an order that the offender be placed in a prerelease center or prerelease program for a period not to exceed 1 year;

(x) community service;

(xi) home arrest as provided in Title 46, chapter 18, part 10;

(xii) any other reasonable conditions considered necessary for rehabilitation or for the protection of society;

(xiii) payment of expenses for use of a judge pro tempore or special master as provided in 3-5-116; or

(xiv) any combination of the restrictions or conditions in subsections (1)(a)(i) through (1)(a)(xiii)"; in (2) at beginning inserted "Whenever a person has been found guilty of an offense upon a verdict or a plea of guilty, a sentencing judge may", after "execution of sentence" inserted "except as otherwise specifically provided by statute", and deleted former second and third sentences that read: "The sentencing judge may impose on the defendant any reasonable restrictions or conditions during the period of suspended sentence. Reasonable restrictions or conditions may include any of those listed in subsection (1)(a)"; in (3) at beginning of introductory clause inserted "Whenever a person has been found guilty of an offense upon a verdict or a plea of guilty, a sentencing judge may impose a sentence that may include"; in (3)(b) before first "payment" deleted "require"; in (3)(c) substituted "a term of incarceration at a" for "impose a" and after "state prison" deleted "sentence"; in (3)(d) substituted "commitment of the offender" for "commit the defendant" and after "5 years" inserted "with a recommendation"; inserted (3)(g) allowing chemical treatment of sex offenders; inserted (4) outlining restrictions or conditions allowed as part of a deferred or suspended sentence; deleted former (3) through (8) that read: "(3) If a financial obligation is imposed as a condition under subsection (1)(a), sentence may be deferred for a period not exceeding 2 years for a misdemeanor or for a period not exceeding 6 years for a felony, regardless of whether any other conditions are imposed.

(4) If any restrictions or conditions imposed under subsection (1)(a) or (1)(b) are violated, the court shall consider any elapsed

time and either expressly allow part or all of it as a credit against the sentence or reject all or part as a credit. The court shall state its reasons in the order. Credit, however, must be allowed for jail or home arrest time already served.

(5) Except as provided in 45-9-202 and 46-18-222, the imposition or execution of the first 2 years of a sentence of imprisonment imposed under the following sections may not be deferred or suspended: 45-5-103, 45-5-202(3) relating to aggravated assault, 45-5-302(2), 45-5-303(2), 45-5-401(2), 45-5-502(3), 45-5-503(2) and (3), 45-9-101(2), (3), and (5)(d), 45-9-102(4), and 45-9-103(2).

(6) Except as provided in 46-18-222, the imposition or execution of the first 10 years of a sentence of imprisonment imposed under 45-5-102 may not be deferred or suspended.

(7) Except as provided in 46-18-222, imposition of sentence in a felony case may not be deferred in the case of a defendant who has been convicted of a felony on a prior occasion, whether or not the sentence was imposed, imposition of the sentence was deferred, or execution of the sentence was suspended.

(8) If the victim was less than 16 years old, the imposition or execution of the first 30 days of a sentence of imprisonment imposed under 45-5-503, 45-5-504, 45-5-505, or 45-5-507 may not be deferred or suspended. Section 46-18-222 does not apply to the first 30 days of the imprisonment"; in (6) after "sentence on" substituted "an offender" for "a defendant"; deleted former (10) and (11) that read: "(10) A person convicted of a sexual offense, as defined in 46-23-502, and sentenced to imprisonment in the state prison shall enroll in and complete the educational phase of the prison's sexual offender program. If the person is subject to the provisions of 45-5-512, the person shall also, as provided in 45-5-512, undergo medically safe medroxyprogesterone acetate treatment or its chemical equivalent or other medically safe drug treatment that reduces sexual fantasies, sex drive, or both, paid for by and for a period of time determined by the department of corrections. The period may not exceed the period of state supervision of the person.

(11) In sentencing a nonviolent felony offender, the court shall first consider alternatives to imprisonment of the offender in the state prison, including placement of the offender in a community corrections facility or program or a prerelease center or prerelease program. In considering alternatives to imprisonment, the court shall examine the sentencing criteria contained in 46-18-225. If the court subsequently sentences the offender to a state prison, the court shall state the reasons why it did not select an alternative to imprisonment, based on the criteria contained in 46-18-225"; in (7) after "supervise the" substituted "offender" for "defendant"; deleted former (13) that read: "(13) Except as provided in 46-18-222, a provision of this section that conflicts with 46-18-219 does not apply to a person sentenced under 46-18-219"; and made minor changes in style. Amendment effective October 1, 1999.

The amendment to this section made by Ch. 390, L. 1999, was rendered void by sec. 2, Ch. 390, L. 1999, and sec. 11, Ch. 505, L. 1999, coordination sections.

Chapter 395 in (1)(a) near beginning after "verdict" inserted "of guilty" and after "plea of guilty" inserted "or nolo contendere". Amendment effective October 1, 1999.

The amendment made by Ch. 395 inserting a reference to a plea of nolo contendere in (1)(a) has been repeated in (2) and (3) pursuant to sec. 14, Ch. 52, L. 1999, a codification instruction.

Chapter 432 in (5) (now 46-18-205(2)) after "45-5-202" deleted "(3) relating to aggravated assault". Amendment effective October 1, 1999.

The amendment to (5) made by Ch. 432 was transferred to 46-18-205(2)(b) pursuant to sec. 14, Ch. 52, L. 1999, a codification instruction.

Chapter 505 in (3)(c) and (4)(a) substituted "detention center" for "jail"; in (3)(d)(i) substituted "commit:

(i) an offender not referred to in subsection (3)(d)(ii)" for "commit the defendant", after "corrections" deleted "for a period not to exceed 5 years", and after "program" inserted language requiring all but first 5 years of commitment to be suspended; inserted (3)(d)(ii) authorizing court to commit youth transferred to district court and found guilty of enumerated offense to department for placement in correctional facility or program; in third sentence in (4) (now 46-18-203(7)(b)) substituted "time served in a detention center" for "jail"; in (4)(b) substituted "incarceration in a detention center" for "jail time"; inserted (4)(m) authorizing restrictions or conditions to include order that offender complete boot camp incarceration program; and made minor changes in style. Amendment effective April 28, 1999.

The amendment to (4) made by Ch. 505 was transferred to 46-18-203(7)(b) pursuant to sec. 14, Ch. 52, L. 1999, a codification instruction.

A composite section was prepared by the code commissioner for (4)(a) because the changes to (4)(a) made by Ch. 505 were rendered void by the changes made by Ch. 52.

Applicability: Section 13(1), Ch. 505, L. 1999, provided: "[Section 1] [46-18-201] applies to all persons sentenced on or after [the effective date of this act]." Effective April 28, 1999.

Cross-References

Use of judges pro tempore and special masters, 3-5-113.

Appointment of judges pro tempore or special masters, 3-5-122.

Determination of what sentence may be imposed, 45-1-201.

Alternative sentencing authority, 45-9-202.

Community corrections facility or program defined, 46-18-104, 53-30-303.

Community corrections facilities or programs, 46-18-105.

Death as sentence that may be imposed, Title 46, ch. 18, part 3.

Sentencing of persistent felony offender, 46-18-502.

Limited release during employment hours, 46-18-701.

Registration of sexual and violent offenders, Title 46, ch. 23, part 5.

Probation defined, 46-23-1001.

Duty of Department of Corrections to contract for prerelease centers, 53-1-203.

Rates for residential community correctional program board, room, and services, 53-1-501.

Authority of judge to utilize community corrections facilities or programs — restrictions, 53-30-321.

Defendant to bear expense of alternative imprisonment — alcohol-related offenses, 61-8-734.

46-18-202. Additional restrictions on sentence. (1) The sentencing judge may also impose any of the following restrictions or conditions on the sentence provided for in 46-18-201 that the judge considers necessary to obtain the objectives of rehabilitation and the protection of the victim and society:

(a) prohibition of the offender's holding public office;

(b) prohibition of the offender's owning or carrying a dangerous weapon;

(c) restrictions on the offender's freedom of association;

(d) restrictions on the offender's freedom of movement;

(e) a requirement that the defendant provide a biological sample for DNA testing for purposes of Title 44, chapter 6, part 1, if an agreement to do so is part of the plea bargain;

(f) any other limitation reasonably related to the objectives of rehabilitation and the protection of the victim and society.

(2) Whenever the sentencing judge imposes a sentence of imprisonment in a state prison for a term exceeding 1 year, the sentencing judge may also impose the restriction that the offender is ineligible for parole and participation in the supervised release program while serving that term. If the restriction is to be imposed, the sentencing judge shall state the reasons for it in writing. If the sentencing judge finds that the restriction is necessary for the protection of society, the judge shall impose the restriction as part of the sentence and the judgment must contain a statement of the reasons for the restriction.

(3) An offender convicted of a sexual offense, as defined in 46-23-502, and sentenced to imprisonment in a state prison shall enroll in and complete the educational phase of the prison's sexual offender program.

History: En. 95-2206 by Sec. 1, Ch. 196, L. 1967; rep. and re-en. by Sec. 31, Ch. 513, L. 1973; amd. Sec. 36, Ch. 184, L. 1977; amd. Sec. 1, Ch. 436, L. 1977; amd. Sec. 1, Ch. 580, L. 1977; amd. Sec. 12, Ch. 584, L. 1977; R.C.M. 1947, 95-2206(3); amd. Sec. 22, Ch. 116, L. 1979; amd. Sec. 10, Ch. 583, L. 1981; amd. Sec. 2, Ch. 392, L. 1987; amd. Sec. 44, Ch. 262, L. 1993; amd. Sec. 11, Ch. 125, L. 1995; amd. Sec. 17, Ch. 350, L. 1995; amd. Sec. 6, Ch. 550, L. 1995; amd. Sec. 4, Ch. 52, L. 1999; amd. Sec. 5, Ch. 147, L. 1999.

Compiler's Comments

1999 Amendments — Composite Section: Chapter 52 throughout section substituted references to sentencing judge for references to district court and substituted references to offender for references to defendant; inserted (3) requiring enrollment in the prison sexual offender program; deleted former (3) and (4) that read: "(3) When the court imposes a sentence of probation, as defined in 46-23-1001, any probation agreement signed by the defendant may contain a clause waiving extradition.

(4) Whenever the district court imposes a sentence of imprisonment in the state prison for a violation of 45-5-502(3), 45-5-503, 45-5-504(2)(c), 45-5-507 (unless the act occurred between two consenting persons 16 years of age or older), or 45-5-625, the court may also impose the restriction that the defendant be ineligible for a good time allowance while serving that term. If such a restriction is to be imposed, the court shall state the reasons for it in writing. If the court finds that the restriction is necessary for the protection of society, it shall impose the restriction as part of the sentence and the judgment must contain a statement of the reasons for the restriction"; and made minor changes in style. Amendment effective October 1, 1999.

Chapter 147 inserted (1)(e) concerning requirement for biological sample as part of plea bargain; and made minor changes in style. Amendment effective March 23, 1999.

Cross-References

Effect of conviction — civil disabilities, 46-18-801.

Parole eligibility, 46-23-201.

Registration of sexual and violent offenders, Title 46, ch. 23, part 5.

46-18-203. Revocation of suspended or deferred sentence. (1) Upon the filing of a petition for revocation showing probable cause that the offender has violated any condition of a sentence or any condition of a deferred imposition of sentence, the judge may issue an order for a hearing on revocation. The order must require the offender to appear at a specified time and place for the hearing and be served by delivering a copy of the petition and order to the offender personally. The judge may also issue an arrest warrant directing any peace officer or a probation officer to arrest the offender and bring the offender before the court.

(2) The petition for a revocation must be filed with the sentencing court during the period of suspension or deferral. Expiration of the period of suspension or deferral after the petition is filed does not deprive the court of its jurisdiction to rule on the petition.

(3) The provisions pertaining to bail, as set forth in Title 46, chapter 9, are applicable to persons arrested pursuant to this section.

(4) Without unnecessary delay, the offender must be brought before the judge, and the offender must be advised of:

(a) the allegations of the petition;

(b) the opportunity to appear and to present evidence in the offender's own behalf;

(c) the opportunity to question adverse witnesses; and

(d) the right to be represented by counsel at the revocation hearing pursuant to Title 46, chapter 8, part 1.

(5) A hearing is required before a suspended or deferred sentence can be revoked or the terms or conditions of the sentence can be modified, unless:

(a) the offender admits the allegations and waives the right to a hearing; or

(b) the relief to be granted is favorable to the offender and the prosecutor, after having been given notice of the proposed relief and a reasonable opportunity to object, has not objected. An extension of the term of probation is not favorable to the offender for the purposes of this subsection (5)(b).

(6) At the hearing, the prosecution shall prove, by a preponderance of the evidence, that there has been a violation of the terms and conditions of the suspended or deferred sentence. However, when a failure to pay restitution is the basis for the petition, the offender may excuse the violation by showing sufficient evidence that the failure to pay restitution was not attributable to a

failure on the offender's part to make a good faith effort to obtain sufficient means to make the restitution payments as ordered.

(7) (a) If the judge finds that the offender has violated the terms and conditions of the suspended or deferred sentence, the judge may:

(i) continue the suspended or deferred sentence without a change in conditions;

(ii) continue the suspended sentence with modified or additional terms and conditions;

(iii) revoke the suspension of sentence and require the offender to serve either the sentence imposed or any lesser sentence; or

(iv) if the sentence was deferred, impose any sentence that might have been originally imposed.

(b) If a suspended or deferred sentence is revoked, the judge shall consider any elapsed time and either expressly allow all or part of the time as a credit against the sentence or reject all or part of the time as a credit. The judge shall state the reasons for the judge's determination in the order. Credit, however, must be allowed for time served in a detention center or home arrest time already served.

(8) If the judge finds that the prosecution has not proved, by a preponderance of the evidence, that there has been a violation of the terms and conditions of the suspended or deferred sentence, the petition must be dismissed and the offender, if in custody, immediately released.

History: En. 95-2206 by Sec. 1, Ch. 196, L. 1967; rep. and re-en. by Sec. 31, Ch. 513, L. 1973; amd. Sec. 36, Ch. 184, L. 1977; amd. Sec. 1, Ch. 436, L. 1977; amd. Sec. 1, Ch. 580, L. 1977; amd. Sec. 12, Ch. 584, L. 1977; R.C.M. 1947, 95-2206(5); amd. Sec. 1, Ch. 328, L. 1981; amd. Sec. 1, Ch. 204, L. 1983; amd. Sec. 1, Ch. 262, L. 1991; amd. Sec. 224, Ch. 800, L. 1991; amd. Sec. 45, Ch. 262, L. 1993; amd. Sec. 5, Ch. 52, L. 1999.

Compiler's Comments

1999 Amendment — Code Commissioner Correction: Chapter 52 throughout section substituted references to sentencing judge for references to district court and substituted references to offender for references to defendant; inserted (7)(b) regarding consideration of elapsed time as credit against the sentence; and made minor changes in style. Amendment effective October 1, 1999.

In last sentence of (7)(b) the Code Commissioner substituted "time served in a detention center" for "jail" pursuant to the authority contained in sec. 14, Ch. 52, L. 1999.

46-18-204. Dismissal after deferred imposition. Whenever the court has deferred the imposition of sentence and after termination of the time period during which imposition of sentence has been deferred, upon motion of the court, the defendant, or the defendant's attorney, the court may allow the defendant to withdraw a plea of guilty or nolo contendere or may strike the verdict of guilty from the record and order that the charge or charges against the defendant be dismissed. A copy of the order of dismissal must be sent to the prosecutor and the department of justice, accompanied by a form prepared by the department of justice and containing identifying information about the defendant. After the charge is dismissed, all records and data relating to the charge are confidential criminal justice information, as defined in 44-5-103, and public access to the information may only be obtained by district court order upon good cause shown.

History: En. 95-2207 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-2207; amd. Sec. 1, Ch. 147, L. 1987; amd. Sec. 1, Ch. 463, L. 1989; amd. Sec. 20, Ch. 395, L. 1999.

Compiler's Comments

1999 Amendment: Chapter 395 in first sentence near middle after "plea of guilty" inserted "or nolo contendere"; and made minor changes in style. Amendment effective October 1, 1999.

46-18-205. Mandatory minimum sentences — restrictions on deferral or suspension. (1) If the victim was less than 16 years old, the imposition or execution of the first 30 days of a sentence of imprisonment imposed under the following sections may not be deferred or suspended and the provisions of 46-18-222 do not apply to the first 30 days of the imprisonment:

(a) 45-5-503, sexual intercourse without consent;
(b) 45-5-504, indecent exposure;
(c) 45-5-505, deviate sexual conduct; or
(d) 45-5-507, incest.

(2) Except as provided in 45-9-202 and 46-18-222, the imposition or execution of the first 2 years of a sentence of imprisonment imposed under the following sections may not be deferred or suspended:

(a) 45-5-103(4), mitigated deliberate homicide;
(b) 45-5-202, aggravated assault;
(c) 45-5-302(2), kidnapping;
(d) 45-5-303(2), aggravated kidnapping;
(e) 45-5-401(2), robbery;
(f) 45-5-502(3), sexual assault;
(g) 45-5-503(2) and (3), sexual intercourse without consent;
(h) 45-9-101(2), (3), and (5)(d), criminal distribution of dangerous drugs;
(i) 45-9-102(4), criminal possession of dangerous drugs; and
(j) 45-9-103(2), criminal possession with intent to distribute dangerous drugs.

(3) Except as provided in 46-18-222, the imposition or execution of the first 10 years of a sentence of imprisonment imposed under 45-5-102, deliberate homicide, may not be deferred or suspended.

History: En. Sec. 3, Ch. 52, L. 1999.

Compiler's Comments

Code Commissioner Correction: In (2)(b) after "45-5-202" the Code Commissioner deleted "(3)(a)" to reflect the change made by sec. 16, Ch. 432, L. 1999. The authority for the correction was contained in sec. 14, Ch. 52, L. 1999.

Effective Date: This section is effective October 1, 1999.

46-18-206 through 46-18-210 reserved.

46-18-211. When no place of imprisonment is specified. When a statute authorizes imprisonment for its violation but does not prescribe the place of imprisonment, a sentence not to exceed 1 year shall be to the county jail.

History: En. 95-2206.2 by Sec. 31, Ch. 513, L. 1973; R.C.M. 1947, 95-2206.2.

46-18-212. When no penalty is specified. The court, in imposing sentence upon an offender convicted of an offense for which no penalty is otherwise provided or if the offense is designated a misdemeanor and no penalty is otherwise provided, may sentence the offender to a term of imprisonment not to exceed 6 months in the county jail or a fine not to exceed $500, or both.

History: En. 95-2206.3 by Sec. 31, Ch. 513, L. 1973; R.C.M. 1947, 95-2206.3(part).

Cross-References

Classification of offenses, 45-1-201.

Definition of misdemeanor, 45-2-101.

Violation of Montana Elder and Persons With Developmental Disabilities Abuse Prevention Act — penalties, 52-3-825.

46-18-213. When no penalty is specified — felony. The court, in imposing sentence upon an offender convicted of an offense which is designated as a felony and no penalty is otherwise provided, may sentence the offender for any term not to exceed 10 years in the state prison or may fine the offender in an amount not to exceed $50,000 or may impose both such fine and imprisonment.

History: En. 95-2206.4 by Sec. 31, Ch. 513, L. 1973; R.C.M. 1947, 95-2206.4; amd. Sec. 7, Ch. 198, L. 1981.

Cross-References

Classification of offenses, 45-1-201.

Definition of felony, 45-2-101.

46-18-214 through 46-18-218 reserved.

46-18-219. Life sentence without possibility of release. (1) (a) Except as provided in subsection (3), if an offender convicted of one of the following offenses was previously convicted of one of the following offenses or of an offense under the laws of another state or of the United States that, if committed in this state, would be one of the following offenses, the offender must be sentenced to life in prison, unless the death penalty is applicable and imposed:

(i) 45-5-102, deliberate homicide;
(ii) 45-5-303, aggravated kidnapping;
(iii) 45-5-503, sexual intercourse without consent;
(iv) 45-5-625, sexual abuse of children; or
(v) 45-5-627, except subsection (1)(b), ritual abuse of a minor.

(b) Except as provided in subsection (3), if an offender convicted of one of the following offenses was previously convicted of two of the following offenses, two of any combination of the offenses listed in subsection (1)(a) or the following offenses, or two of any offenses under the laws of another state or of the United States that, if committed in this state, would be one of the offenses listed in subsection (1)(a) or this subsection, the offender must be sentenced to life in prison, unless the death penalty is applicable and imposed:

(i) 45-5-103, mitigated deliberate homicide;
(ii) 45-5-202, aggravated assault;
(iii) 45-5-302, kidnapping; or
(iv) 45-5-401, robbery.

(2) Except as provided in 46-23-210 and subsection (3) of this section, an offender sentenced under subsection (1):

(a) shall serve the entire sentence;
(b) shall serve the sentence in prison;
(c) may not for any reason, except a medical reason, be transferred for any length of time to another type of institution, facility, or program;
(d) may not be paroled; and
(e) may not be given time off for good behavior or otherwise be given an early release for any reason.

(3) If the offender was previously sentenced for either of two or three offenses listed in subsection (1), pursuant to any of the exceptions listed in 46-18-222, then the provisions of subsections (1) and (2) of this section do not apply to the offender's present sentence.

(4) The imposition or execution of the sentences prescribed by this section may not be deferred or suspended. In the event of a conflict between this section and any provision of 46-18-201 or 46-18-205, this section prevails.

(5) (a) For purposes of this section, "prison" means a secure detention facility in which inmates are locked up 24 hours a day and that is operated by this state, another state, the federal government, or a private contractor.

(b) Prison does not include a work release center, prerelease center, boot camp, or any other type of facility that does not provide secure detention.

History: En. Sec. 1, Ch. 482, L. 1995; amd. Sec. 20, Ch. 482, L. 1995; amd. Sec. 6, Ch. 52, L. 1999; amd. Sec. 17, Ch. 432, L. 1999.

Compiler's Comments

1999 Amendments — Composite Section: Chapter 52 throughout section substituted references to offender for references to person; inserted (4) prohibiting deferral or suspension of life sentence; and made minor changes in style. Amendment effective October 1, 1999.

Chapter 432 in (1)(b)(ii) after "45-5-202" deleted "(1)". Amendment effective October 1, 1999.

46-18-220. Sentences for certain offenses committed in official detention — death penalty. An offender convicted of having committed attempted deliberate homicide, aggravated assault, or aggravated kidnapping while in official detention, as defined in 45-2-101, shall be sentenced to death or life imprisonment as provided in 46-18-301 through 46-18-310.

History: En. Sec. 1, Ch. 696, L. 1985; amd. Sec. 7, Ch. 52, L. 1999; amd. Sec. 1, Ch. 126, L. 1999; amd. Sec. 4, Ch. 491, L. 1999.

Compiler's Comments

1999 Amendments — Composite Section: Chapter 52 at beginning substituted "An offender" for "A person serving a sentence of imprisonment in the state prison"; and made minor changes in style. Amendment effective October 1, 1999.

Chapter 126 at beginning after "A person" deleted "serving a sentence of imprisonment in the state prison", after "convicted of" inserted "having committed", and after "aggravated kidnapping" substituted "while in official detention, as defined in 45-2-101" for "committed while incarcerated at the state prison". Amendment effective October 1, 1999.

Chapter 491 in two places substituted "a state prison" for "the state prison". Amendment effective April 27, 1999.

A composite section was prepared by the code commissioner because the changes made by Ch. 491 were rendered void by the changes made by Ch. 52 and Ch. 126.

Cross-References

Aggravating circumstances, 46-18-303.

46-18-221. Additional sentence for offenses committed with a dangerous weapon. (1) A person who has been found guilty of any offense and who, while engaged in the commission of the offense, knowingly displayed, brandished, or otherwise used a firearm, destructive device, as defined in 45-8-332(1), or other dangerous weapon shall, in addition to the punishment provided for the commission of such offense, be sentenced to a term of imprisonment in the state prison of not less than 2 years or more than 10 years, except as provided in 46-18-222.

(2) A person convicted of a second or subsequent offense under this section shall, in addition to the punishment provided for the commission of the present offense, be sentenced to a term of imprisonment in the state prison of not less than 4 years or more than 20 years, except as provided in 46-18-222. For the

purposes of this subsection, the following persons shall be considered to have been convicted of a previous offense under this section:

(a) a person who has previously been convicted of an offense, committed on a different occasion than the present offense, under 18 U.S.C. 924(c); and

(b) a person who has previously been convicted of an offense in this or another state, committed on a different occasion than the present offense, during the commission of which he knowingly displayed, brandished, or otherwise used a firearm, destructive device, as defined in 45-8-332(1), or other dangerous weapon.

(3) The imposition or execution of the minimum sentences prescribed by this section may not be deferred or suspended, except as provided in 46-18-222.

(4) An additional sentence prescribed by this section shall run consecutively to the sentence provided for the offense.

History: En. 95-2206.17 by Sec. 13, Ch. 584, L. 1977; R.C.M. 1947, 95-2206.17; amd. Sec. 1, Ch. 108, L. 1981.

Cross-References

Sentencing of persistent felony offender, 46-18-502.

46-18-222. Exceptions to mandatory minimum sentences and restrictions on deferred imposition and suspended execution of sentence. Mandatory minimum sentences prescribed by the laws of this state, mandatory life sentences prescribed by 46-18-219, and the restrictions on deferred imposition and suspended execution of sentence prescribed by 46-18-201(1)(b), 46-18-205, 46-18-221(3), 46-18-224, and 46-18-502(3) do not apply if:

(1) the offender was less than 18 years of age at the time of the commission of the offense for which the offender is to be sentenced;

(2) the offender's mental capacity, at the time of the commission of the offense for which the offender is to be sentenced, was significantly impaired, although not so impaired as to constitute a defense to the prosecution. However, a voluntarily induced intoxicated or drugged condition may not be considered an impairment for the purposes of this subsection.

(3) the offender, at the time of the commission of the offense for which the offender is to be sentenced, was acting under unusual and substantial duress, although not such duress as would constitute a defense to the prosecution;

(4) the offender was an accomplice, the conduct constituting the offense was principally the conduct of another, and the offender's participation was relatively minor;

(5) in a case in which the threat of bodily injury or actual infliction of bodily injury is an actual element of the crime, no serious bodily injury was inflicted on the victim unless a weapon was used in the commission of the offense; or

(6) the offense was committed under 45-5-502(3) and the judge determines that treatment of the offender in a local community affords a better opportunity for rehabilitation of the offender and for the ultimate protection of the victim and society, in which case the judge shall include in its judgment a statement of the reasons for its determination.

History: En. 95-2206.18 by Sec. 14, Ch. 584, L. 1977; R.C.M. 1947, 95-2206.18; amd. Sec. 3, Ch. 322, L. 1979; amd. Sec. 1, Ch. 396, L. 1979; amd. Sec. 2, Ch. 207, L. 1981; amd. Sec. 2, Ch. 327, L. 1981; amd. Sec. 2, Ch. 392, L. 1983; amd. Sec. 1, Ch. 532, L. 1983; amd.

Sec. 105, Ch. 370, L. 1987; amd. Sec. 3, Ch. 564, L. 1991; amd. Sec. 46, Ch. 262, L. 1993; amd. Sec. 12, Ch. 125, L. 1995; amd. Sec. 14, Ch. 482, L. 1995; amd. Sec. 8, Ch. 52, L. 1999.

Compiler's Comments

1999 Amendment: Chapter 52 throughout section substituted references to judge for references to court and substituted references to offender for references to defendant; in introductory clause before "46-18-219" inserted "mandatory life sentences prescribed by", substituted "46-18-201(1)(b)" for "46-18-201(5) through (7)", and inserted reference to 46-18-205; and made minor changes in style. Amendment effective October 1, 1999.

Cross-References

Deliberate homicide, 45-5-102.

Mitigated deliberate homicide, 45-5-103.

Aggravated assault, 45-5-202.

Kidnapping, 45-5-302.

Aggravated kidnapping, 45-5-303.

Robbery, 45-5-401.

Sexual intercourse without consent, 45-5-503.

Criminal sale of dangerous drugs, 45-9-101.

Criminal possession of dangerous drugs, 45-9-102.

Criminal possession with intent to sell, 45-9-103.

Sentencing of persistent felony offender, 46-18-502.

46-18-223. Hearing to determine application of exceptions. (1) When the application of an exception provided for in 46-18-222 is an issue, the court shall grant the defendant a hearing prior to the imposition of sentence to determine the applicability of the exception.

(2) The hearing shall be held before the court sitting without a jury. The defendant and the prosecution are entitled to assistance of counsel, compulsory process, and cross-examination of witnesses who appear at the hearing.

(3) If it appears by a preponderance of the information, including information submitted during the trial, during the sentencing hearing, and in so much of the presentence report as the court relies on, that none of the exceptions at issue apply, the court shall impose the appropriate mandatory sentence. The court shall state the reasons for its decision in writing and shall include an identification of the facts relied upon in making its determination. The statement shall be included in the judgment.

History: En. 95-2206.19 by Sec. 15, Ch. 584, L. 1977; R.C.M. 1947, 95-2206.19.

Cross-References

Duty of court to advise at initial appearance, 46-7-102.

Right to counsel, 46-8-101.

Court to advise defendant of rights at arraignment, 46-12-210.

Court to advise defendant of rights — extradition proceedings, 46-30-217.

46-18-224. Additional sentence for offense committed while carrying a handgun loaded with armor-piercing ammunition. (1) A person who has been found guilty of an offense in which bodily injury occurred or was attempted or threatened and who knowingly used or carried a handgun loaded with armor-piercing ammunition during the commission of the offense must, in addition to the sentence for the offense, be sentenced to a term of imprisonment in the state prison of not less than 5 years or more than 25 years, except as provided in 46-18-222.

(2) An additional sentence prescribed by this section must run consecutively to the sentence provided for the offense, and except as provided in 46-18-222, the sentence may not be suspended and imposition of it may not be deferred.

(3) For purposes of this section:

(a) "armor-piercing ammunition" means ammunition which, if fired from a handgun under the test procedure of the national institute of law enforcement and criminal justice standard for the ballistics resistance of police body armor promulgated December 1978, is capable of penetrating bullet-resistant apparel or body armor meeting the requirements of Type IIA of Standard NILECJ-STD-0101.01 as formulated by the United States department of justice and published in December 1978; and

(b) "handgun" means any firearm, including a pistol or revolver, originally designed to be fired by the use of a single hand.

History: En. Sec. 1, Ch. 392, L. 1983.

46-18-225. Sentencing of nonviolent felony offenders — criteria — alternatives to be considered — court to state reasons for imprisonment. (1) In sentencing a nonviolent felony offender, the sentencing judge shall first consider alternatives to imprisonment of the offender in a state prison, including placement of the offender in a community corrections facility or program, a prerelease center, or a prerelease program. In considering alternatives to imprisonment, the sentencing judge shall examine the sentencing criteria contained in subsection (2).

(2) Prior to sentencing a nonviolent felony offender to whom 46-18-219 does not apply to a term of imprisonment in a state prison, the sentencing judge shall take into account whether:

(a) the interests of justice and the needs of public safety truly require the level of security provided by imprisonment of the offender in a state prison;

(b) the needs of the offender can be better served in the community or in a facility or program other than a state prison;

(c) there are substantial grounds tending to excuse or justify the offense, though failing to establish a defense;

(d) the offender acted under strong provocation;

(e) the offender has made restitution or will make restitution to the victim of the offender's criminal conduct;

(f) the offender has no prior history of conviction for a criminal act or, if the offender has a prior history of conviction for a criminal act, the offender has led a law-abiding life for a substantial period of time before the commission of the present crime;

(g) the offender's criminal conduct was the result of circumstances that are unlikely to recur;

(h) the character and attitude of the offender indicate that the offender is likely to commit another crime;

(i) the offender is likely to respond quickly to correctional or rehabilitative treatment; and

(j) imprisonment of the offender would create an excessive hardship on the offender or the offender's family.

(3) If the judge sentences the offender to a state prison, the judge shall state the reasons why the judge did not select an alternative to imprisonment, based on the criteria contained in subsection (2).

History: En. Sec. 4, Ch. 794, L. 1991; amd. Sec. 66, Ch. 10, L. 1993; amd. Sec. 15, Ch. 482, L. 1995; amd. Sec. 215, Ch. 546, L. 1995; amd. Sec. 7, Ch. 189, L. 1997; amd. Sec. 9, Ch. 52, L. 1999.

Compiler's Comments

1999 Amendment: Chapter 52 inserted (1) requiring consideration of alternatives to imprisonment for nonviolent felony offenders; in (2) in introductory clause substituted "sentencing judge" for "court"; in (2)(f) after "criminal act or" inserted "if the offender has a prior history of conviction for a criminal act, the offender"; inserted (3) requiring the sentencing judge to state reasons why alternatives to prison were not selected; and made minor changes in style. Amendment effective October 1, 1999.

Cross-References

Community corrections facility or program defined, 46-18-104, 53-30-303.

Nonviolent felony offenders defined, 46-18-104.

46-18-226 through 46-18-230 reserved.

46-18-231. Fines in felony and misdemeanor cases. (1) (a) Except as provided in subsection (1)(b), whenever, upon a verdict of guilty or a plea of guilty or nolo contendere, an offender has been found guilty of an offense for which a felony penalty of imprisonment could be imposed, the sentencing judge may, in lieu of or in addition to a sentence of imprisonment, impose a fine only in accordance with subsection (3).

(b) For those crimes for which penalties are provided in the following sections, a fine may be imposed in accordance with subsection (3) in addition to a sentence of imprisonment:

(i) 45-5-103(4), mitigated deliberate homicide;

(ii) 45-5-202, aggravated assault;

(iii) 45-5-213, assault with a weapon;

(iv) 45-5-302(2), kidnapping;

(v) 45-5-303(2), aggravated kidnapping;

(vi) 45-5-401(2), robbery;

(vii) 45-5-502(3), sexual assault when the victim is less than 16 years old and the offender is 3 or more years older than the victim or the offender inflicts bodily injury in the course of committing the sexual assault;

(viii) 45-5-503(2) and (3), sexual intercourse without consent;

(ix) 45-9-101(2), (3), and (5)(d), criminal possession with intent to distribute a narcotic drug, criminal possession with intent to distribute a dangerous drug included in Schedule I or Schedule II, or other criminal possession with intent to distribute a dangerous drug;

(x) 45-9-102(4), criminal possession of an opiate;

(xi) 45-9-103(2), criminal possession of an opiate with an intent to distribute; and

(xii) 45-9-109, criminal possession with intent to distribute dangerous drugs on or near school property.

(2) Whenever, upon a verdict of guilty or a plea of guilty or nolo contendere, an offender has been found guilty of an offense for which a misdemeanor penalty of a fine could be imposed, the sentencing judge may impose a fine only in accordance with subsection (3).

(3) The sentencing judge may not sentence an offender to pay a fine unless the offender is or will be able to pay the fine. In determining the amount and method of payment, the sentencing judge shall take into account the nature of the crime committed, the financial resources of the offender, and the nature of the burden that payment of the fine will impose.

(4) Any fine levied under this section in a felony case shall be in an amount fixed by the sentencing judge not to exceed $50,000.

History: En. Sec. 1, Ch. 198, L. 1981; amd. Sec. 106, Ch. 370, L. 1987; amd. Sec. 8, Ch. 610, L. 1987; amd. Sec. 3, Ch. 575, L. 1989; amd. Sec. 3, Ch. 42, L. 1991; amd. Sec. 2,

Ch. 519, L. 1991; amd. Sec. 10, Ch. 52, L. 1999; amd. Sec. 21, Ch. 395, L. 1999; amd. Sec. 18, Ch. 432, L. 1999.

Compiler's Comments

1999 Amendments — Composite Section: Chapter 52 throughout section substituted references to sentencing judge for references to court and substituted references to offender for references to defendant and person; in (1)(a) at beginning inserted exception clause; in (1)(b) after "provided in" substituted "the following sections" for "45-5-103, 45-5-202(3), 45-5-302(2), 45-5-303(2), 45-5-401(2), 45-5-502(3), 45-5-503(2) and (3), 45-9-101(2), (3), and (5)(d), 45-9-102(4), 45-9-103(2), and 45-9-109"; inserted (1)(b)(i) through (1)(b)(xi) listing various crimes; and made minor changes in style. Amendment effective October 1, 1999.

Chapter 395 in (1) near beginning of first sentence and in (2) inserted "or nolo contendere". Amendment effective October 1, 1999.

Chapter 432 inserted (1)(b)(iii) referring to 45-5-213. Amendment effective October 1, 1999.

A composite section was prepared by the code commissioner by adding "assault with a weapon" to the reference to 45-5-213 inserted by Ch. 432 to reflect the changes made by Ch. 52, pursuant to sec. 14, Ch. 52, L. 1999.

46-18-232. Payment of costs by defendant. (1) A court may require a convicted defendant in a felony or misdemeanor case to pay costs, as defined in 25-10-201, plus costs of jury service as a part of his sentence. Such costs shall be limited to expenses specifically incurred by the prosecution in connection with the proceedings against the defendant.

(2) The court may not sentence a defendant to pay costs unless the defendant is or will be able to pay them. In determining the amount and method of payment of costs, the court shall take into account the financial resources of the defendant and the nature of the burden that payment of costs will impose.

(3) A defendant who has been sentenced to pay costs and who is not in default in the payment thereof may at any time petition the court that sentenced him for remission of the payment of costs or of any unpaid portion thereof. If it appears to the satisfaction of the court that payment of the amount due will impose manifest hardship on the defendant or his immediate family, the court may remit all or part of the amount due in costs or modify the method of payment.

History: En. Sec. 2, Ch. 198, L. 1981.

Cross-References

Rates for residential community correctional program board, room, and services, 53-1-501.

Defendant to bear expense of alternative imprisonment — alcohol-related offenses, 61-8-734.

46-18-233. Fine or costs as a condition on suspended or deferred sentence. (1) Whenever a defendant is sentenced to pay a fine or costs under 46-18-231 or 46-18-232 and the imposition or execution of the rest of his sentence is deferred or suspended, the court may make payment of the fine or costs a condition for probation.

(2) A suspended or deferred sentence may not be revoked if the defendant defaults on the payment of the fine and the default is not attributable to an intentional refusal to obey the order of the court or a failure to make a good faith effort to make the payment.

History: En. Sec. 3, Ch. 198, L. 1981.

46-18-234. When payment of fine or costs due. Whenever a defendant is sentenced to pay a fine or costs under 46-18-231 or 46-18-232, the court may grant permission for payment to be made within a specified period of time or in specified installments. If no such permission is included in the sentence, the payment is due immediately.

History: En. Sec. 4, Ch. 198, L. 1981.

46-18-235. Disposition of money collected as fines and costs. The money collected by a court as a result of the imposition of fines or assessment of costs under the provisions of 46-18-231 and 46-18-232 must be paid:

(1) by a district court to the county general fund of the county in which the court is held, except that:

(a) if the costs assessed include any district court expense listed in 3-5-901, the money collected from assessment of these costs must be paid to the state for deposit into the state general fund to the extent that the expenses were paid by the state; and

(b) if the fine was imposed for a violation of Title 45, chapter 9 or 10, the court may order the money paid into the drug forfeiture account maintained under 44-12-206 for the law enforcement agency that made the arrest from which the conviction and fine arose; and

(2) by a justice's court pursuant to 3-10-601.

History: En. Sec. 5, Ch. 198, L. 1981; amd. Sec. 6, Ch. 180, L. 1983; amd. Sec. 16, Ch. 680, L. 1985; amd. Sec. 10, Ch. 1, Sp. L. 1985; amd. Sec. 1, Ch. 553, L. 1987; amd. Sec. 30, Ch. 557, L. 1987; amd. Sec. 59, Ch. 83, L. 1989; amd. Sec. 2, Ch. 296, L. 1991; amd. Sec. 9, Ch. 704, L. 1991; amd. Sec. 51, Ch. 509, L. 1995; amd. Sec. 216, Ch. 546, L. 1995.

Cross-References

Collection and disposition of fines, penalties, forfeitures, and fees, 3-10-601.

46-18-236. *(Temporary)* **Imposition of charge upon conviction or forfeiture — administration.** (1) Except as provided in subsection (2), there must be imposed by all courts of original jurisdiction on a person upon conviction for any conduct made criminal by state statute or upon forfeiture of bond or bail a charge that is in addition to other taxable court costs, fees, or fines, as follows:

(a) $15 for each misdemeanor charge;

(b) the greater of $20 or 10% of the fine levied for each felony charge; and

(c) an additional $10 for each misdemeanor and felony charge under Title 45, 61-8-401, or 61-8-406.

(2) If a convicting court determines under 46-18-231 and 46-18-232 that the person is not able to pay the fine and costs or that the person is unable to pay within a reasonable time, the court shall waive payment of the charge imposed by this section.

(3) The charges imposed by this section are not fines and must be imposed in addition to any fine and may not be used in determining the jurisdiction of any court.

(4) When the payment of a fine is to be made in installments over a period of time, the charges imposed by this section must be collected from the first payment made and each subsequent payment as necessary if the first payment is not sufficient to cover the charges.

(5) The charges collected under subsection (1), except those collected by a justice's court, must be deposited with the appropriate local government finance officer or treasurer. If a city municipal court or city or town court is the court of original jurisdiction, the charges collected under subsection (1) must

be deposited with the city or town finance officer or treasurer. If a district court is the court of original jurisdiction, the charges collected under subsection (1) must be deposited with the county finance officer or treasurer. If the court of original jurisdiction is a court within a consolidated city-county government within the meaning of Title 7, chapter 3, the charges collected under subsection (1) must be deposited with the finance officer or treasurer of the consolidated government.

(6) (a) A city or town finance officer or treasurer may retain the charges collected under subsections (1)(a) and (1)(b) by a city municipal court or a city or town court and may use that money for the payment of salaries of the city or town attorney and deputies.

(b) Each county finance officer or treasurer may retain the charges collected under subsections (1)(a) and (1)(b) by district courts for crimes committed or alleged to have been committed within that county. The county finance officer or treasurer shall use the money for the payment of salaries of its county attorney and deputy county attorneys and for the payment of other salaries in the office of the county attorney, and any funds not needed for those salaries may be used for the payment of any other county salaries.

(7) (a) Except as provided in subsection (7)(b), each county, city, or town finance officer or treasurer may retain the charges collected under subsection (1)(c) for payment of the expenses of a victim and witness advocate program that provides the services specified in Title 40, chapter 15, and Title 46, chapter 24, and that is operated or used by the county, city, or town.

(b) The appropriate county, city, or town finance officer or treasurer shall deposit $1 of each $10 charge collected under subsection (1)(c) in the collecting court's fund for mitigation of administrative costs incurred by the court in the collection of the charge. The funds deposited under this subsection (7)(b) are not subject to allocation under 46-18-251.

(c) If the county, city, or town does not operate or use a victim and witness advocate program, all charges collected under subsection (1)(c) must be paid to the crime victims compensation and assistance account established in 53-9-109, except as provided in subsection (7)(b). *(Terminates July 1, 2001—sec. 4, Ch. 411, L. 1999.)*

46-18-236. *(Effective July 1, 2001)* **Imposition of charge upon conviction or forfeiture — administration.** (1) Except as provided in subsection (2), there must be imposed by all courts of original jurisdiction on a defendant upon conviction for any conduct made criminal by state statute or upon forfeiture of bond or bail a charge that is in addition to other taxable court costs, fees, or fines, as follows:

(a) $15 for each misdemeanor charge;

(b) the greater of $20 or 10% of the fine levied for each felony charge; and

(c) an additional $10 for each misdemeanor and felony charge under Title 45, 61-8-401, or 61-8-406.

(2) If a convicting court determines under 46-18-231 and 46-18-232 that the defendant is not able to pay the fine and costs or that the defendant is unable to pay within a reasonable time, the court shall waive payment of the charge imposed by this section.

(3) The charges imposed by this section are not fines and must be imposed in addition to any fine and may not be used in determining the jurisdiction of any court.

(4) When the payment of a fine is to be made in installments over a period of time, the charges imposed by this section must be collected from the first payment made and each subsequent payment as necessary if the first payment is not sufficient to cover the charges.

(5) The charges collected under subsection (1), except those collected by a justice's court, must be deposited with the appropriate local government finance officer or treasurer. If a city municipal court or city or town court is the court of original jurisdiction, the charges collected under subsection (1) must be deposited with the city or town finance officer or treasurer. If a district court is the court of original jurisdiction, the charges collected under subsection (1) must be deposited with the county finance officer or treasurer. If the court of original jurisdiction is a court within a consolidated city-county government within the meaning of Title 7, chapter 3, the charges collected under subsection (1) must be deposited with the finance officer or treasurer of the consolidated government.

(6) (a) A city or town finance officer or treasurer may retain the charges collected under subsections (1)(a) and (1)(b) by a city municipal court or a city or town court and may use that money for the payment of salaries of the city or town attorney and deputies.

(b) Each county finance officer or treasurer may retain the charges collected under subsections (1)(a) and (1)(b) by district courts for crimes committed or alleged to have been committed within that county. The county finance officer or treasurer shall use the money for the payment of salaries of its deputy county attorneys and for the payment of other salaries in the office of the county attorney, and any funds not needed for those salaries may be used for the payment of any other county salaries.

(7) (a) Except as provided in subsection (7)(b), each county, city, or town finance officer or treasurer may retain the charges collected under subsection (1)(c) for payment of the expenses of a victim and witness advocate program that provides the services specified in Title 40, chapter 15, and Title 46, chapter 24, and that is operated or used by the county, city, or town.

(b) The appropriate county, city, or town finance officer or treasurer shall deposit $1 of each $10 charge collected under subsection (1)(c) in the collecting court's fund for mitigation of administrative costs incurred by the court in the collection of the charge. The funds deposited under this subsection (7)(b) are not subject to allocation under 46-18-251.

(c) If the county, city, or town does not operate or use a victim and witness advocate program, all charges collected under subsection (1)(c) must be paid to the crime victims compensation and assistance account established in 53-9-109, except as provided in subsection (7)(b).

History: En. Sec. 1, Ch. 719, L. 1985; amd. Sec. 3, Ch. 17, Sp. L. June 1986; amd. Sec. 31, Ch. 557, L. 1987; amd. Sec. 4, Ch. 667, L. 1991; amd. Sec. 1, Ch. 398, L. 1999; amd. Sec. 2, Ch. 411, L. 1999.

Compiler's Comments

1999 Amendments — Composite Section: (Both versions) Chapter 398 inserted (1)(c) adding collection of additional $10 for each misdemeanor or felony charge for certain offenses; inserted (7)(a) through (7)(c) regarding disposition of charge collected under subsection (1)(c); and made minor changes in style. Amendment effective July 1, 1999.

(Temporary version) Chapter 411 in second sentence in (6)(b) after "salaries of its" inserted "county attorney and"; and made minor changes in style. Amendment effective July 1, 1999, and terminates July 1, 2001.

Style changes were slightly different in the chapters. In each case, the codifier chose appropriate text.

Cross-References

Collection and disposition of fines, penalties, forfeitures, and fees, 3-10-601.

Payment of salaries of county officials and assistants, 7-4-2502.

Salary schedule for certain county officers, 7-4-2503.

Amount of compensation for deputies and assistants, 7-4-2505.

Office of city attorney, Title 7, ch. 4, part 46.

46-18-237. Garnishment — report by supervising authority. (1) If the department of corrections becomes aware that a prisoner while incarcerated under the legal custody of the department of corrections is entitled to receive money from any source, the prisoner's supervising authority may prepare a report identifying:

(a) the total costs incurred by the state or county during the prisoner's incarceration;

(b) the criminal sentences imposed upon the prisoner, including:

(i) the amount of restitution, if any, ordered in each sentence;

(ii) the name and current address of each victim or other person to whom restitution is owed;

(iii) the amount of restitution paid by the prisoner; and

(iv) the amount of restitution currently owed by the prisoner for each sentence;

(c) the amount of any child support owed by the prisoner.

(2) The supervising authority shall provide notice and a copy of the report to the board of crime control and the county attorney for the county in which the prisoner was sentenced, either of whom may submit the report along with a petition for garnishment to the court that sentenced the prisoner. The court may order garnishment of the prisoner's money for the payment of restitution, child support, and per diem costs of incarceration owed by the prisoner. Upon receipt of the petition, the court shall provide a copy of the report to the prisoner, who has 15 days following receipt to file an objection. The court may hold a hearing to consider objections raised by the prisoner.

(3) Upon compliance with the provisions of subsections (1) and (2), the court shall determine the amount of restitution, child support, and repayment for per diem costs owed by the prisoner. The court shall order, up to the amount of money available, payment of an amount equal to the restitution owed by the prisoner to the person designated under 46-18-245 to supervise the making of restitution payments, any outstanding child support payments to the department of public health and human services for disbursement to the obligee, and per diem costs owed by the prisoner. All restitution owed by the prisoner must be paid prior to payment of any child support payments. All child support owed by the prisoner must be paid prior to the payment of any per diem costs.

History: En. Sec. 2, Ch. 475, L. 1997.

46-18-238 through 46-18-240 reserved.

46-18-241. Condition of restitution. (1) As provided in 46-18-201, a sentencing court shall require an offender to make full restitution to any victim of the offense who has sustained pecuniary loss as a result of the offense, including a person suffering an economic loss as a result of the crime. The duty to pay full restitution under the sentence remains with the offender until full restitution is paid.

(2) The court shall require the offender to pay the cost of supervising the payment of restitution, as provided in 46-18-245, if the offender is able to pay, by paying an amount equal to 10% of the amount of restitution ordered, but not less than $5. Payment must be made to the court, which shall disburse the money to the entity employing the person ordered to supervise restitution under 46-18-245.

(3) If at any time the court finds that, because of circumstances beyond the offender's control, the offender is not able to pay any restitution, the court may order the offender to perform community service during the time that the offender is unable to pay. The offender must be given a credit against restitution due at the rate of the hours of community service times the state minimum wage in effect at the time that the community service is performed.

History: **En. Sec. 1, Ch. 426, L. 1983; amd. Sec. 1, Ch. 490, L. 1989; amd. Sec. 13, Ch. 125, L. 1995; amd. Sec. 2, Ch. 310, L. 1995; amd. Sec. 2, Ch. 181, L. 1997.**

Cross-References

Treatment of victims and witnesses, Title 46, ch. 24.

The Crime Victims Compensation Act of Montana, Title 53, ch. 9, part 1.

46-18-242. Investigation and report of victim's loss. (1) Whenever the court believes that a victim of the offense may have sustained a pecuniary loss as a result of the offense or whenever the prosecuting attorney requests, the court shall order the probation officer, restitution officer, or other designated person to include in the presentence investigation and report:

(a) documentation of the offender's financial resources and future ability to pay restitution; and

(b) documentation of the victim's pecuniary loss, submitted by the victim or by the board of crime control if compensation for the victim's loss has been reimbursed by the crime victims compensation and assistance account.

(2) When a presentence report is not authorized or requested, the court may receive evidence of the offender's ability to pay and the victim's loss at the time of sentencing.

History: **En. Sec. 2, Ch. 426, L. 1983; amd. Sec. 14, Ch. 125, L. 1995.**

46-18-243. Definitions. For purposes of 46-18-241 through 46-18-249, the following definitions apply:

(1) "Pecuniary loss" means:

(a) all special damages, but not general damages, substantiated by evidence in the record, that a person could recover against the offender in a civil action arising out of the facts or events constituting the offender's criminal activities, including without limitation the money equivalent of loss resulting from property taken, destroyed, broken, or otherwise harmed and out-of-pocket losses, such as medical expenses, loss of income, expenses reasonably incurred in obtaining ordinary and necessary services that the victim would have performed if not injured, expenses reasonably incurred in attending court proceedings related to the commission of the offense, and reasonable expenses related to funeral and burial or crematory services; and

(b) reasonable out-of-pocket expenses incurred by the victim in filing charges or in cooperating in the investigation and prosecution of the offense.

(2) (a) "Victim" means:

(i) a person who suffers loss of property, bodily injury, or death as a result of:

(A) the commission of an offense;

(B) the good faith effort to prevent the commission of an offense; or

(C) the good faith effort to apprehend a person reasonably suspected of committing an offense;

(ii) the estate of a deceased or incapacitated victim or a member of the immediate family of a homicide victim;

(iii) a governmental entity that suffers loss of property as a result of the commission of an offense in this state or that incurs costs or losses during the commission or investigation of an escape, as defined in 45-7-306, or during the apprehension or attempted apprehension of the escapee; or

(iv) an insurer or surety with a right of subrogation to the extent it has reimbursed the victim of the offense for pecuniary loss.

(b) Victim does not include a person who is accountable for the crime or accountable for a crime arising from the same transaction.

History: En. Sec. 3, Ch. 426, L. 1983; amd. Sec. 15, Ch. 125, L. 1995; amd. Sec. 2, Ch. 26, L. 1997.

Cross-References

Treatment of victims and witnesses, Title 46, ch. 24.

46-18-244. Type and time of payment — defenses. (1) The court shall specify the amount, method, and time of each payment to the victim and may permit payment in installments.

(2) In determining the amount, method, and time of each payment, the court shall consider the financial resources and future ability of the offender to pay. The court shall provide for payment to a victim of the full amount of the pecuniary loss caused by the offense. The offender may assert any defense that the offender could raise in a civil action for the loss sought to be compensated by the restitution order.

(3) In addition to other methods of payment, the court may order one or more of the following in order to satisfy the offender's restitution obligation:

(a) forfeiture and sale of the offender's assets under the provisions of Title 25, chapter 13, part 7, unless the court finds, after notice and an opportunity for the offender to be heard, that the assets are reasonably necessary for the offender to sustain a living or support the offender's dependents or unless the state determines that the cost of forfeiture and sale would outweigh the amount available to the victim after sale. If the proceeds of sale exceed the amount of restitution ordered and the costs of forfeiture and sale, any remaining amount must be returned to the offender.

(b) return of any property to the victim;

(c) payment of up to one-third of the offender's prison earnings.

(4) With the consent of the victim and in the discretion of the court, an offender may be ordered to make restitution in services to the victim in lieu of money or to make restitution to a person designated by the victim, if that person provided services to the victim as a result of the offense.

(5) After a prosecution is commenced and upon petition of the prosecutor, the court may grant a restraining order or injunction, require a satisfactory bond, or take other action if the court finds that the restraining order or injunction, bond, or other action is necessary to preserve property or assets that could be used to satisfy an anticipated restitution order. A hearing must be held on the petition, and any person with an interest in the property is entitled to be heard.

History: En. Sec. 4, Ch. 426, L. 1983; amd. Sec. 16, Ch. 125, L. 1995; amd. Sec. 3, Ch. 181, L. 1997.

46-18-245. Supervision of payment. The court may order a probation officer, restitution officer, or other designated person to supervise the making of restitution and to report to the court any default in payment. If the victim has received compensation under Title 53, chapter 9, the court may also order an employee of the board of crime control to supervise the making of restitution and to report to the court any default in payment.

History: En. Sec. 5, Ch. 426, L. 1983; amd. Sec. 17, Ch. 125, L. 1995.

46-18-246. Waiver or modification of payment. An offender may at any time petition the sentencing court to adjust or otherwise waive payment of any part of any ordered restitution. The court shall schedule a hearing and give a victim to whom restitution was ordered notice of the hearing date, place, and time and inform the victim that the victim will have an opportunity to be heard. If the court finds that the circumstances upon which it based the imposition of restitution, amount of the victim's pecuniary loss, or method or time of payment no longer exist or that it otherwise would be unjust to require payment as imposed, the court may adjust or waive unpaid restitution or modify the time or method of making restitution. The court may extend the restitution schedule.

History: En. Sec. 6, Ch. 426, L. 1983; amd. Sec. 18, Ch. 125, L. 1995; amd. Sec. 4, Ch. 181, L. 1997.

46-18-247. Default. (1) If an offender sentenced to make restitution is in default, the sentencing court, upon the motion of the prosecuting attorney or upon its own motion, may issue an order under 46-18-203 requiring the offender to show cause why the offender should not be confined for failure to obey the sentence of the court. The court may order the offender to appear at a time, date, and place for a hearing or, if the offender fails to appear as ordered, issue a warrant for the offender's arrest. The order or warrant must be accompanied by written notice of the offender's right to a hearing as provided in 46-18-203.

(2) If the court finds that the offender's default was attributable to the offender's failure to make a good faith effort to obtain the necessary funds for payment of the ordered restitution, the court may take any action provided for in 46-18-203.

(3) An order to pay restitution constitutes a judgment rendered in favor of the state, and following a default in the payment of restitution or any installment of restitution, the sentencing court may order the restitution to be collected by any method authorized for the enforcement of other judgments.

History: En. Sec. 7, Ch. 426, L. 1983; amd. Sec. 19, Ch. 125, L. 1995; amd. Sec. 5, Ch. 181, L. 1997.

46-18-248. Rights of crime victims compensation and assistance account. (1) Whenever a victim is paid from the crime victims compensation and assistance account established in 53-9-109 for loss arising out of a criminal act, the account is subrogated, to the extent of the account's payment to the victim, to the rights of the victim to any restitution ordered by the court.

(2) The rights of the crime victims compensation and assistance account are subordinate to the claims of multiple victims who have suffered loss arising out of multiple offenses by the same offender or arising from any transaction that is part of the same continuous scheme of criminal activity of an offender.

History: En. Sec. 8, Ch. 426, L. 1983; amd. Sec. 53, Ch. 18, L. 1995.

46-18-249. Civil actions by victim. (1) Sections 46-18-241 through 46-18-249 do not limit or impair the right of a victim to sue and recover damages from the offender in a civil action.

(2) The findings in the sentencing hearing and the fact that restitution was required or paid are not admissible as evidence in a civil action and have no legal effect on the merits of a civil action.

(3) Any restitution paid by the offender to the victim must be set off against any pecuniary loss awarded to the victim in a civil action arising out of the facts or events which were the basis for the restitution. The court trying the civil action shall determine the amount of any setoff asserted by the defendant under this section.

History: En. Sec. 9, Ch. 426, L. 1983.

46-18-250. Victim's location unknown — payments to restitution fund — use of restitution fund. (1) If the location of a victim on whose behalf restitution is being paid is unknown, the court may order that restitution payments made on that victim's behalf be deposited in a fund known as the county restitution fund. Subject to the availability of money in the fund, if the whereabouts of a victim whose restitution payments were deposited in the county restitution fund become known, the county shall refund to the victim payments that were deposited in the fund.

(2) Money in the restitution fund may be used to provide payments on behalf of offenders who are ordered to pay restitution but, due to circumstances beyond their control, are unable to obtain employment or are unable to obtain employment sufficient to make restitution payments and sustain themselves and their dependents. The offender may perform community service, and for each hour of community service performed, the victim shall receive an amount equal to the minimum hourly wage from the county restitution fund. A judge may order an offender to perform community service work for restitution payments upon a finding that the offender would not otherwise be able to make restitution payments and that there are funds available in the county restitution fund for payments to the victim.

(3) Money in the county restitution fund that is due to a victim under this part must be paid to the crime victims compensation and assistance account, established in 53-9-109, if payments have been made to or on behalf of the victim from the account. Payment from the county restitution fund to the crime victims compensation and assistance account may be made only from money paid by the offender who caused the injury or death that resulted in the payment from the account.

History: En. Sec. 1, Ch. 545, L. 1989; amd. Sec. 54, Ch. 18, L. 1995.

46-18-251. Allocation of fines, costs, restitution, and other charges. (1) Except as provided in 46-18-236(7)(b), if an offender is subjected to any combination of fines, costs, restitution, charges, or other payments arising out of the same criminal proceeding, money collected from the offender must be allocated as provided in this section.

(2) Except as otherwise provided in 46-18-236(7)(b) and this section, if a defendant is subject to payment of restitution and any combination of fines, costs, charges under the provisions of 46-18-236, or other payments, 50% of all money collected from the defendant must be applied to payment of restitution and the balance must be applied to other payments in the following order:

(a) payment of charges imposed pursuant to 46-18-236;
(b) payment of supervisory fees imposed pursuant to 46-23-1031;
(c) payment of costs imposed pursuant to 46-18-232 or 46-18-233;
(d) payment of fines imposed pursuant to 46-18-231 or 46-18-233; and
(e) any other payments ordered by the court.

(3) The money applied under subsection (2) to the payment of restitution must be paid in the following order:

(a) to the victim until the victim's unreimbursed pecuniary loss is satisfied;

(b) to the crime victims compensation and assistance account provided for in 53-9-109 until the account is fully reimbursed for compensation to the victim;

(c) to any other government agency that has compensated the victim for the victim's pecuniary loss;

(d) to any insurance company that has compensated the victim for the victim's pecuniary loss.

(4) If any fines, costs, charges, or other payments remain unpaid after all of the restitution has been paid, any additional money collected must be applied to payment of those fines, costs, charges, or other payments. If any restitution remains unpaid after all of the fines, costs, charges, or other payments have been paid, any additional money collected must be applied toward payment of the restitution.

History: En. Sec. 20, Ch. 125, L. 1995; amd. Sec. 6, Ch. 181, L. 1997; amd. Sec. 5, Ch. 186, L. 1997; amd. Sec. 2, Ch. 398, L. 1999.

Compiler's Comments

1999 Amendment: Chapter 398 in (1) at beginning inserted exception clause; and in (2) near beginning inserted reference to 46-18-236(7)(b). Amendment effective July 1, 1999.

46-18-252 and 46-18-253 reserved.

46-18-254. Repealed. Sec. 15, Ch. 375, L. 1997.

History: En. Sec. 3, Ch. 293, L. 1989; amd. Sec. 67, Ch. 10, L. 1993; amd. Sec. 2, Ch. 407, L. 1995; amd. Sec. 217, Ch. 546, L. 1995.

46-18-255. Sentence upon conviction — restriction on employment. A judge sentencing a person upon conviction of a sexual or violent offense shall, as a condition to probation, parole, or deferment or suspension of sentence, impose upon the defendant reasonable employment or occupational prohibitions and restrictions designed to protect the class or classes of persons containing the likely victims of further offenses by the defendant.

History: En. Sec. 9, Ch. 293, L. 1989; amd. Sec. 3, Ch. 407, L. 1995.

Cross-References

Registration of sexual and violent offenders, Title 46, ch. 23, part 5.

46-18-256. Sexually transmitted disease testing — test procedure. (1) Following entry of judgment, a person convicted of a sexual offense, as defined in 46-23-502, must, at the request of the victim of the sexual offense or the parent or guardian of the victim, if the victim is a minor, be administered standard testing according to currently accepted protocol, using guidelines established by the centers for disease control, U.S. department of health and human services, to detect in the person the presence of antibodies indicative of the presence of human immunodeficiency virus (HIV) or other sexually transmitted diseases, as defined in 50-18-101.

(2) Arrangements for the test required by subsection (1) must be made by the county attorney of the county in which the person was convicted. The test must be conducted by a health care provider, as defined in 50-16-504.

(3) The county attorney of the county in which the person was convicted shall release the information concerning the test results to:

(a) the convicted person; and

(b) the victim of the offense committed by the convicted person or to the parent or guardian of the victim if the victim is a minor.

(4) At the request of the victim of a sexual offense or the parent or guardian of the victim if the victim is a minor, the victim must be provided counseling regarding HIV disease, HIV testing (in accordance with applicable law), and referral for appropriate health care and support services.

(5) For purposes of this section, "convicted" includes an adjudication, under the provisions of 41-5-1502, finding a youth to be a delinquent youth or a youth in need of intervention.

(6) The provisions of the AIDS Prevention Act, Title 50, chapter 16, part 10, do not apply to this section.

History: En. Sec. 1, Ch. 504, L. 1991; amd. Sec. 1, Ch. 71, L. 1993; amd. Sec. 56, Ch. 550, L. 1997.

46-18-257 through 46-18-260 reserved.

46-18-261. Recovery of suppression and investigation expenses for fires caused by arson. (1) A person convicted of arson, negligent arson, or solicitation of or conspiracy to commit arson or negligent arson may be ordered, as part of the sentence, to reimburse law enforcement and firefighting agencies for the cost of suppressing and investigating a fire that occurred during the commission of the crime.

(2) The court may order a person doing a presentence investigation and report to include documentation of the costs of suppressing and investigating the fire and of the defendant's ability to pay and may receive evidence concerning the matters at the time of sentencing.

(3) The court shall specify the amount, method, and time of payment, which may include but is not limited to installment payments. The court may order a probation officer or other appropriate officer attached to or working closely with the court in the administration of justice to supervise payment and report any default to the court.

(4) Upon petition by the offender and after a hearing, the payment may be modified. Agencies receiving payment at that time must be notified of and allowed to participate in the hearing.

(5) This section does not limit the right of a law enforcement or firefighting agency to recover from the offender in a civil action, but the findings in the sentencing hearing and the fact that payment of costs was part of the sentence are inadmissible in and have no legal effect on the merits of a civil action. Costs paid by the offender must be deducted from a recovery awarded in a civil action.

History: En. Sec. 1, Ch. 447, L. 1989.

Cross-References

Negligent arson, 45-6-102.

Arson, 45-6-103.

Part 3
Death Penalty

46-18-301. Hearing on imposition of death penalty. (1) When a defendant is found guilty of or pleads guilty to an offense for which the sentence of death may be imposed, the judge who presided at the trial or before whom the guilty plea was entered shall conduct a separate sentencing hearing to determine the existence or nonexistence of the circumstances set forth in 46-18-303 and 46-18-304 for the purpose of determining the sentence to be imposed. The hearing must be conducted before the court alone.

(2) (a) Subject to subsection (2)(b), the sentence must be pronounced and judgment rendered within 120 days after the defendant is found guilty or pleads guilty or within 120 days after the Montana supreme court enters a final decision on appeal.

(b) The district court may allow not more than one extension of up to 60 days after entering findings of fact that the extension is necessary to prevent undue hardship to a party.

History: En. 95-2206.6 by Sec. 1, Ch. 338, L. 1977; R.C.M. 1947, 95-2206.6; amd. Sec. 2, Ch. 378, L. 1997.

Cross-References

Deliberate homicide, 45-5-102.

Aggravated kidnapping, 45-5-303.

46-18-302. Evidence that may be received. In the sentencing hearing, evidence may be presented as to any matter the court considers relevant to the sentence, including but not limited to the nature and circumstances of the crime; the defendant's character, background, history, and mental and physical condition; the harm caused to the victim and the victim's family as a result of the offense; and any other facts in aggravation or mitigation of the penalty. Any evidence that the court considers to have probative force may be received regardless of its admissibility under the rules governing admission of evidence at criminal trials. Evidence admitted at the trial relating to aggravating or mitigating circumstances must be considered without reintroducing it at the sentencing proceeding. The state and the defendant or the defendant's counsel must be permitted to present argument for or against sentence of death.

History: En. 95-2206.7 by Sec. 2, Ch. 338, L. 1977; R.C.M. 1947, 95-2206.7; amd. Sec. 21, Ch. 125, L. 1995.

46-18-303. Aggravating circumstances. Aggravating circumstances are any of the following:

(1) (a) The offense was deliberate homicide and was committed:

(i) by an offender while in official detention, as defined in 45-2-101;

(ii) by an offender who had been previously convicted of another deliberate homicide;

(iii) by means of torture;

(iv) by an offender lying in wait or ambush;

(v) as a part of a scheme or operation that, if completed, would result in the death of more than one person; or

(vi) by an offender during the course of committing sexual assault, sexual intercourse without consent, deviate sexual conduct, or incest, and the victim was less than 18 years of age.

(b) The offense was deliberate homicide, as defined in 45-5-102(1)(a), and the victim was a peace officer killed while performing the officer's duty.

(2) The offense was aggravated kidnapping that resulted in the death of the victim or the death by direct action of the offender of a person who rescued or attempted to rescue the victim.

(3) The offense was attempted deliberate homicide, aggravated assault, or aggravated kidnapping committed while in official detention, as defined in 45-2-101, by an offender who has been previously:

(a) convicted of the offense of deliberate homicide; or

(b) found to be a persistent felony offender pursuant to part 5 of this chapter, and one of the convictions was for an offense against the person in violation of Title 45, chapter 5, for which the minimum prison term is not less than 2 years.

(4) The offense was sexual intercourse without consent, the offender has a previous conviction of sexual intercourse without consent in this state or of an offense under the laws of another state or of the United States that if committed in this state would be the offense of sexual intercourse without consent, and the offender inflicted serious bodily injury upon a person in the course of committing each offense.

History: En. 95-2206.8 by Sec. 3, Ch. 338, L. 1977; R.C.M. 1947, 95-2206.8; amd. Sec. 2, Ch. 696, L. 1985; amd. Sec. 1, Ch. 387, L. 1987; amd. Sec. 1, Ch. 81, L. 1989; amd. Sec. 2, Ch. 312, L. 1997; amd. Sec. 11, Ch. 52, L. 1999; amd. Sec. 2, Ch. 126, L. 1999; amd. Sec. 5, Ch. 491, L. 1999.

Compiler's Comments

1999 Amendments — Composite Section: Chapter 52 throughout section substituted references to offender for references to defendant and person; inserted (1)(a)(vi) regarding certain sexual crimes when the victim is less than 18 years old; deleted former (9) that read: "(9) The offense was deliberate homicide and was committed by a person during the course of committing sexual assault, sexual intercourse without consent, deviate sexual conduct, or incest, and the victim was less than 18 years of age"; and made minor changes in style. Amendment effective October 1, 1999.

Chapter 126 in (1)(a)(i) substituted "while in official detention, as defined in 45-2-101" for "serving a sentence of imprisonment in the state prison"; in (1)(a)(ii) after "by a" substituted "person" for "defendant"; inserted (1)(a)(vi) regarding a deliberate homicide committed by a person during the course of committing sexual assault, sexual intercourse without consent, deviate sexual conduct, or incest if the victim was under 18 years of age; in (3) after "committed while" substituted "in official detention, as defined in 45-2-101" for "incarcerated at the state prison"; deleted former (9) that read: "(9) The offense was deliberate homicide and was committed by a person during the course of committing sexual assault, sexual intercourse without consent, deviate sexual conduct, or incest, and the victim was less than 18 years of age"; and made minor changes in style. Amendment effective October 1, 1999.

Chapter 491 in (1)(a)(i) and (3) substituted "a state prison" for "the state prison". Amendment effective April 27, 1999.

Style changes were slightly different in the chapters. In each case, the codifier chose appropriate text.

The amendments to (1)(a)(i) and (3) by Ch. 491 were rendered void by the amendments made by Ch. 126 and were not codified.

Cross-References

Sentences for certain offenses committed in state prison — death penalty, 46-18-220.

46-18-304. Mitigating circumstances. (1) Mitigating circumstances are any of the following:

(a) The defendant has no significant history of prior criminal activity.

(b) The offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(c) The defendant acted under extreme duress or under the substantial domination of another person.

(d) The capacity of the defendant to appreciate the criminality of the defendant's conduct or to conform the defendant's conduct to the requirements of law was substantially impaired.

(e) The victim was a participant in the defendant's conduct or consented to the act.

(f) The defendant was an accomplice in an offense committed by another person, and the defendant's participation was relatively minor.

(g) The defendant, at the time of the commission of the crime, was less than 18 years of age.

(2) The court may consider any other fact that exists in mitigation of the penalty.

History: En. 95-2206.9 by Sec. 4, Ch. 338, L. 1977; R.C.M. 1947, 95-2206.9; amd. Sec. 55, Ch. 18, L. 1995.

46-18-305. Effect of aggravating and mitigating circumstances. In determining whether to impose a sentence of death or imprisonment, the court shall take into account the aggravating and mitigating circumstances enumerated in 46-18-303 and 46-18-304 and shall impose a sentence of death if it finds one or more of the aggravating circumstances and finds that there are no mitigating circumstances sufficiently substantial to call for leniency. If the court does not impose a sentence of death and one of the aggravating circumstances listed in 46-18-303 exists, the court may impose a sentence of imprisonment for life or for any term authorized by the statute defining the offense.

History: En. 95-2206.10 by Sec. 5, Ch. 338, L. 1977; R.C.M. 1947, 95-2206.10.

46-18-306. Specific written findings of fact. In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact as to the existence or nonexistence of each of the circumstances set forth in 46-18-303 and 46-18-304. The written findings of fact shall be substantiated by the records of the trial and the sentencing proceeding.

History: En. 95-2206.11 by Sec. 6, Ch. 338, L. 1977; R.C.M. 1947, 95-2206.11.

46-18-307. Automatic review of sentence. The judgment of conviction and sentence of death are subject to automatic review by the supreme court of Montana as provided for in 46-18-308 through 46-18-310.

History: En. 95-2206.12 by Sec. 7, Ch. 338, L. 1977; R.C.M. 1947, 95-2206.12.

46-18-308. Time for review — consolidation with appeal. The judgment of conviction and sentence of death are subject to automatic review by the supreme court of Montana within 60 days after certification by the sentencing court of the entire record unless the time is extended by the supreme court for good cause shown. The review by the supreme court has priority over all other cases and shall be heard in accordance with rules promulgated by the supreme court. The sentence review shall be in addition to direct appeal, if taken, and the review and appeal shall be consolidated for consideration.

History: En. 95-2206.13 by Sec. 8, Ch. 338, L. 1977; R.C.M. 1947, 95-2206.13.

46-18-309. Transmission of transcript and record of trial. The clerk of the trial court, within 10 days after receiving the transcript, shall transmit the entire record and transcript to the supreme court.

History: En. 95-2206.14 by Sec. 9, Ch. 338, L. 1977; R.C.M. 1947, 95-2206.14.

46-18-310. Supreme court's determination as to the sentence. (1) The supreme court shall consider the punishment as well as any errors enumerated by way of appeal. With regard to the sentence, the court shall determine:

(a) whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor;

(b) whether the evidence supports the judge's finding of the existence or nonexistence of the aggravating or mitigating circumstances enumerated in 46-18-303 and 46-18-304; and

(c) whether the sentence of death is excessive or disproportionate to the penalty imposed in other cases in which a sentencing hearing was held pursuant to 46-18-301, whether the sentence imposed was death or a sentence other than death, considering both the crime and the defendant. The court shall include in its decision a reference to those other cases it took into consideration.

(2) The supreme court shall uphold the sentencing court's findings of fact issued pursuant to 46-18-306 unless those findings are clearly erroneous. The supreme court may not substitute its judgment for that of the sentencing court in assessing the credibility of witnesses; drawing inferences from testimonial, physical, documentary, or other evidence; or resolving conflicts in the evidence presented at the sentencing hearing or considered by the sentencing court.

History: En. 95-2206.15 by Sec. 10, Ch. 338, L. 1977; R.C.M. 1947, 95-2206.15; amd. Sec. 1, Ch. 302, L. 1997.

Cross-References

Deliberate homicide, 45-5-102.

Aggravated kidnapping, 45-5-303.

Part 4

Factors That Reduce Sentence

46-18-401. Consecutive sentences. (1) Unless the judge otherwise orders:

(a) whenever a person serving a term of commitment imposed by a court in this state is committed for another offense, the shorter term or shorter remaining term may not be merged in the other term; and

(b) whenever a person under suspended sentence or on probation for an offense committed in this state is sentenced for another offense, the period still to be served on suspended sentence or probation may not be merged in any new sentence of commitment or probation.

(2) The court, whether or not it merges the sentences, shall immediately furnish each of the other courts and the penal institutions in which the defendant is confined under sentence with authenticated copies of its sentence, which must cite any sentence that is merged.

(3) If an unexpired sentence is merged pursuant to subsection (1), the court that imposed the sentence shall modify it in accordance with the effect of the merger.

(4) Separate sentences for two or more offenses must run consecutively unless the court otherwise orders.

History: En. 95-2213 by Sec. 1, Ch. 196, L. 1967; amd. Sec. 2, Ch. 340, L. 1977; R.C.M. 1947, 95-2213; amd. Sec. 23, Ch. 116, L. 1979; amd. Sec. 11, Ch. 583, L. 1981; amd. Sec. 1, Ch. 76, L. 1989; amd. Sec. 2, Ch. 372, L. 1995.

Cross-References

Service of term for additional crime, 46-23-217.

46-18-402. Credit for time served. If a defendant has served any portion of the defendant's sentence under a commitment based upon a judgment that is subsequently declared invalid or that is modified during the term of imprisonment, the time served must be credited against any subsequent sentence received upon a new commitment for the same criminal act or acts.

History: En. 95-2214 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-2214; amd. Sec. 3, Ch. 372, L. 1995.

46-18-403. Credit for incarceration prior to conviction. (1) Any person incarcerated on a bailable offense and against whom a judgment of imprisonment is rendered must be allowed credit for each day of incarceration prior to or after conviction, except that the time allowed as a credit may not exceed the term of the prison sentence rendered.

(2) Any person incarcerated on a bailable offense who does not supply bail and against whom a fine is levied on conviction of the offense must be allowed a credit for each day of incarceration prior to conviction, except that the amount allowed or credited may not exceed the amount of the fine. The daily rate of credit for incarceration must be established annually by the board of county commissioners by resolution. The daily rate must be equal to the actual cost incurred by the detention facility for which the rate is established.

History: En. 95-2215 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-2215; amd. Sec. 2, Ch. 270, L. 1989; amd. Sec. 4, Ch. 388, L. 1995.

46-18-404. Repealed. Sec. 12, Ch. 372, L. 1995.

History: En. 95-2206.16 by Sec. 1, Ch. 340, L. 1977; R.C.M. 1947, 95-2206.16; amd. Sec. 1, Ch. 426, L. 1979; amd. Sec. 1, Ch. 106, L. 1989.

Part 5

Persistent Felony Offenders

46-18-501. Definition of persistent felony offender. A "persistent felony offender" is an offender who has previously been convicted of a felony and who is presently being sentenced for a second felony committed on a different occasion than the first. An offender is considered to have been previously convicted of a felony if:

(1) the previous felony conviction was for an offense committed in this state or any other jurisdiction for which a sentence to a term of imprisonment in excess of 1 year could have been imposed;

(2) less than 5 years have elapsed between the commission of the present offense and either:

(a) the previous felony conviction; or

(b) the offender's release on parole or otherwise from prison or other commitment imposed as a result of the previous felony conviction; and

(3) the offender has not been pardoned on the ground of innocence and the conviction has not been set aside in a postconviction hearing.

History: En. 95-1507 by Sec. 5, Ch. 513, L. 1973; amd. Sec. 21, Ch. 184, L. 1977; amd. Sec. 11, Ch. 584, L. 1977; R.C.M. 1947, 95-1507(1).

46-18-502. Sentencing of persistent felony offender. (1) Except as provided in 46-18-219 and subsection (2) of this section, a persistent felony offender shall be imprisoned in the state prison for a term of not less than 5 years or more than 100 years or shall be fined an amount not to exceed $50,000, or both, if the offender was 21 years of age or older at the time of the commission of the present offense.

(2) Except as provided in 46-18-219, an offender shall be imprisoned in a state prison for a term of not less than 10 years or more than 100 years or shall be fined an amount not to exceed $50,000, or both, if:

(a) the offender was a persistent felony offender, as defined in 46-18-501, at the time of the offender's previous felony conviction;

(b) less than 5 years have elapsed between the commission of the present offense and:

(i) the previous felony conviction; or

(ii) the offender's release on parole, from prison, or from other commitment imposed as a result of the previous felony conviction; and

(c) the offender was 21 years of age or older at the time of the commission of the present offense.

(3) Except as provided in 46-18-222, the imposition or execution of the first 5 years of a sentence imposed under subsection (1) of this section or the first 10 years of a sentence imposed under subsection (2) of this section may not be deferred or suspended.

(4) Any sentence imposed under subsection (2) must run consecutively to any other sentence imposed.

History: En. 95-1507 by Sec. 5, Ch. 513, L. 1973; amd. Sec. 21, Ch. 184, L. 1977; amd. Sec. 11, Ch. 584, L. 1977; R.C.M. 1947, 95-1507(2), (3); amd. Sec. 7, Ch. 198, L. 1981; amd. Sec. 1, Ch. 327, L. 1981; amd. Sec. 16, Ch. 482, L. 1995; amd. Sec. 12, Ch. 52, L. 1999.

Compiler's Comments

1999 Amendment: Chapter 52 at beginning of (2) inserted exception clause; in (2)(b)(ii) after "parole" deleted "or otherwise"; in (2)(c) at end deleted "the offender shall, except as provided in 46-18-219, be imprisoned in the state prison for a term of not less than 10 years or more than 100 years or shall be fined an amount not to exceed $50,000, or both"; and made minor changes in style. Amendment effective October 1, 1999.

Cross-References

Prohibition on deferral of imposition of sentence, 46-18-201(5).

Additional sentence for offenses committed with dangerous weapon, 46-18-221.

46-18-503. Renumbered 46-13-108 by Code Commissioner, 1991.

Part 6
Procedure After Sentencing

Part Cross-References

Disposition of fine or forfeited bond — nonsupport, 45-5-621.

Disposition of fine or forfeited bond — endangering welfare of children, 45-5-622.

46-18-601. Judgment in writing — lien. (1) The judgment shall be reduced to writing and signed by the judge.

(2) A judgment that the defendant pay a fine or costs constitutes a lien upon the real estate of the defendant, which lien dates from the date of the defendant's arrest.

History: En. 95-2208 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-2208.

46-18-602. Repealed. Sec. 6, Ch. 104, L. 1981.

History: En. 95-2209 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-2209.

46-18-603. Disposition of fines and forfeitures. All fines and forfeitures collected in any court except city courts must be applied to the payment of the costs of the case in which the fine is imposed or the forfeiture incurred. After such costs are paid, the residue, if not paid to a justice's court or otherwise provided by law, must be paid to the county treasurer of the county in which the court is held and by him credited as provided by law. If the fine or forfeiture is paid to the county treasurer, at the time of such payment there shall be filed with the county treasurer a complete statement showing the total of the fine or forfeiture received or incurred with an itemized statement of the costs incurred by the county in such action. The statement shall give the title of the cause and be subscribed by the person or officer making such payment.

History: En. 95-2228 by Sec. 10, Ch. 513, L. 1973; R.C.M. 1947, 95-2228; amd. Sec. 32, Ch. 557, L. 1987.

Cross-References

Collection and disposition of fines, penalties, forfeitures, and fees, 3-10-601.

Disposition of fine or forfeited bond — nonsupport, 45-5-621.

Disposition of fine or forfeited bond — endangering welfare of children, 45-5-622.

46-18-604. Transmittal of sentencing data to supreme court — compilation. (1) Except as provided in subsection (2), the clerk of district court shall record on forms provided by the clerk of the supreme court the following sentencing data for each defendant sentenced:

(a) the name of the case;

(b) whether the conviction was by verdict or plea;

(c) the fine or imprisonment, or both, allowed by law;

(d) the actual fine or imprisonment, or both, imposed;

(e) the percentage of fine or imprisonment, or both, allowed by law that is actually imposed;

(f) the amount of fine or number of years of imprisonment, or both, that are suspended; and

(g) the percentage of fine or imprisonment, or both, imposed that is suspended.

(2) Whenever a sentence of death or of life imprisonment is allowed by law, this fact must be shown in the report, together with the case name and the actual sentence imposed.

(3) The clerk of district court shall report the names of the cases in which sentencing was deferred.

(4) The clerk of district court shall report the reasons given by the judge for the disposition of every case by attaching an extract of that portion of the judgment setting forth the basis for the sentence.

(5) The sentencing judge shall sign the form containing the information recorded by the clerk of district court pursuant to this section.

(6) The clerk of district court shall on a quarterly basis total for each judge the data recorded pursuant to subsections (1) and (2), sign the report, and forward all such data to the clerk of the supreme court.

(7) The clerk of the supreme court shall compile the reports submitted by the district court clerks and distribute the data to all district court clerks and any interested party on April 1 of each year.

(8) The clerk of the supreme court shall provide a form for the recording of data required by this section.

History: En. Sec. 1, Ch. 459, L. 1981.

Part 7

Jail Work Release Program

Part Cross-References

County jail work programs, 7-32-2225 through 7-32-2227.

46-18-701. Limited release during employment hours. (1) A court, after having sentenced a person to confinement in a county jail, may, in its discretion, upon request of the county attorney and sheriff of the county and with the consent of the convicted person, order that any part of the imprisonment imposed be served in confinement with limited release during the hours or periods the convicted person is actually employed.

(2) Upon the issuance of an order for limited release under this part, the sheriff shall arrange for the convicted person to continue the person's regular employment without interruption insofar as is reasonably possible. However, the prisoner must be confined in the county jail during the hours when the prisoner is not employed.

History: En. 95-2216 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-2216(a), (b); amd. Sec. 8, Ch. 189, L. 1997.

46-18-702. Disposition of prisoner's earnings. The earnings of the prisoner shall be collected by the sheriff. From such earnings the sheriff shall pay the prisoner's board and personal expenses both inside and outside the jail and, to the extent directed by the court, pay the support of his dependents, if any. Any balance shall be retained until his discharge.

History: En. 95-2216 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-2216(c).

46-18-703. Transfer to another county. The court may by order authorize the sheriff of the sentencing county to arrange with a sheriff of any other county within the state of Montana to have the convicted person transferred to the other county where it appears the convicted person can continue his regular employment in the latter county. When such transfer has been made to another county, the sheriff of the sentencing county shall still collect all moneys earned by the convicted person and shall dispose of said moneys as provided by 46-18-702.

History: **En. 95-2216 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-2216(f).**

46-18-704. Reduction of sentence. The committing court may, in its discretion, upon request of the county attorney and sheriff of such county, reduce the sentence of the prisoner up to one-fourth of the full term if, in the opinion of the court, the prisoner's conduct, diligence, and general attitude merit such diminution.

History: **En. 95-2216 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-2216(d).**

46-18-705. Effect of violation of conditions. In cases where the convicted person violates the conditions of said sentence, he shall be returned to the court. The court may then require that the balance of his sentence be spent in full confinement, and further, the court may cancel any diminution of sentence granted under this part.

History: **En. 95-2216 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-2216(e).**

Part 8
Effect of Conviction

Part Cross-References

Criminal justice policy — rights of convicted, Art. II, sec. 28, Mont. Const.

Treason — no forfeiture of property, Art. II, sec. 30, Mont. Const.

Sections affecting right to vote, Art. IV, sec. 2, Mont. Const.; 13-1-111; 13-2-402; 20-20-301.

Sections creating loss of or ineligibility for office, Art. IV, sec. 4, Mont. Const.; 2-16-501; 3-1-1109; 3-1-1110; 3-15-303; 5-5-403; 7-4-2520; 13-36-209; 13-36-210.

Sections creating loss of or ineligibility for employment, 7-32-2104, 7-32-2107, 32-1-322, 32-1-462, 44-1-612.

Sections relating to denial, revocation, or suspension of professional or occupational licenses, 16-10-403, 20-4-110, 23-4-201, 30-10-201, 32-2-409, 33-17-507, 33-17-1001, 33-21-113, 37-3-323, 37-6-311, 37-7-321, 37-11-321, 37-16-411, 37-47-307, 37-47-341, 37-51-321, 37-61-301, 37-67-331, 80-7-107.

Sections creating civil liability, 20-3-332, 23-5-131, 37-51-323, 61-4-406, 75-2-413.

Still competent to be witness, Rules 601 and 609, M.R.Ev. (see Title 26, ch. 10).

Sections creating forfeiture of money or property, 30-14-132, 33-21-113, 81-5-104, 81-5-111, 87-1-513.

Policy to minimize restrictions on or loss of licenses — encourage rehabilitation, Title 37, ch. 1, part 2.

Employment restrictions — sexual or violent offenders, 46-18-255.

Registration of sexual or violent offenders, Title 46, ch. 23, part 5.

Loss of driver's license, 61-5-205, 61-5-401.

Sections providing for loss of benefits, 72-2-813.

46-18-801. Effect of conviction — civil disabilities. (1) Conviction of an offense does not deprive the offender of a civil or constitutional right, except as provided in the Montana constitution or as specifically enumerated by the sentencing judge as a necessary condition of the sentence directed toward the objectives of rehabilitation and the protection of society. If the sentencing judge incorporates by reference in the sentencing order rules of the department of corrections or the board of pardons and parole setting conditions of probation, parole, or supervised release with which the offender is required to comply, the incorporation by reference constitutes a specific enumeration of the conditions for purposes of this section.

(2) Except as provided in the Montana constitution, if a person has been deprived of a civil or constitutional right by reason of conviction for an offense and the person's sentence has expired or the person has been pardoned, the

person is restored to all civil rights and full citizenship, the same as if the conviction had not occurred.

History: **En. 95-2227 by Sec. 9, Ch. 513, L. 1973; R.C.M. 1947, 95-2227; amd. Sec. 1, Ch. 555, L. 1995; amd. Sec. 201, Ch. 42, L. 1997.**

Cross-References

Criminal justice policy — rights of convicted, Art. II, sec. 28, Mont. Const.

Unlawful possession of firearm by convicted person, 45-8-313.

Lifetime firearms supervision of certain convicted persons, 45-8-314.

Additional restrictions on sentence, 46-18-202.

Part 9

Appellate Review of Legal Sentences

46-18-901. Review division of the supreme court for review of sentences. (1) The chief justice of the supreme court of Montana shall appoint three district court judges to act as a review division of the supreme court and shall designate one of such judges to act as chairman thereof. The clerk of the Montana supreme court shall record such appointment and shall give notice thereof to the clerk of every district court.

(2) This review division shall meet at least four times a year or more as its business requires, as determined by the chairman. The review division shall hold its meetings at Deer Lodge.

(3) The decision of any two of such judges shall be sufficient to determine any matter before the review division.

(4) The review division may adopt any rules which will expedite its review of sentences. The division is also authorized to appoint a secretary and such clerical help as it deems adequate and fix their compensation.

History: **En. 95-2501 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-2501(part).**

46-18-902. Interested judge not to act. No judge shall sit or act on a review of sentence imposed by him. In any case in which review of a sentence imposed by any of the judges serving on the review division is to be acted on by said division, the chief justice of the supreme court of Montana may designate another judge to act in place of such judge.

History: **En. 95-2501 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-2501(part).**

46-18-903. Application for review. (1) Any person sentenced to a term of 1 year or more in the state prison by any court of competent jurisdiction may within 60 days from the date such sentence was imposed, except in any case in which a different sentence could not have been imposed, file with the clerk of the district court in the county in which judgment was rendered an application for review of the sentence by the review division. Upon imposition of the sentence, the clerk shall give written notice to the person sentenced of his right to make such a request. Such notice shall include a statement that review of the sentence may result in decrease or increase of the sentence within limits fixed by law.

(2) The clerk shall transmit such application to the review division and shall notify the judge who imposed the sentence and the county attorney of the county in which the sentence was imposed. Such judge may transmit to the review division a statement of his reasons for imposing the sentence and shall

transmit such a statement within 7 days if requested to do so by the review division.

(3) The review division may for cause shown consider any late request for review of sentence and may grant such request.

(4) The filing of an application for review shall not stay the execution of the sentence.

History: En. 95-2502 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-2502.

46-18-904. Procedure upon review. (1) In each case in which an application for review is filed in accordance with 46-18-903, the review division shall review the judgment so far as it relates to the sentence imposed, either increasing or decreasing the penalty, and any other sentence imposed on the person at the same time and may order such different sentence or sentences to be imposed as could have been imposed at the time of the imposition of the sentence under review or may decide that the sentence under review should stand.

(2) In reviewing any judgment, said division may require the production of presentence reports and any other records, documents, or exhibits relevant to such review proceedings. The appellant may appear and be represented by counsel, and the state may be represented by the county attorney of the county in which the sentence was imposed. Any other interested person, including the sentencing judge, may attend and participate in the review proceedings.

(3) The sentence imposed by the district court is presumed correct. If the review division orders a different sentence, the court sitting in any convenient county shall resentence the defendant as ordered by the review division. Time served on the sentence reviewed shall be deemed to have been served on the sentence substituted.

History: En. 95-2503 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-2503(part); amd. Sec. 1, Ch. 654, L. 1985.

46-18-905. Decision — finality, report of. (1) The decision of the review division in each case shall be final, and the reasons for such decision shall be stated therein. The original of each decision shall be sent to the clerk of the court for the county in which the judgment was rendered, and a copy shall be sent to the judge who imposed the sentence reviewed, the person sentenced, and the principal officer of the institution in which he is confined.

(2) The decision shall be reported in the Montana Reports.

History: En. 95-2503 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-2503(part).

Part 10

Home Arrest

46-18-1001. Definitions. As used in this part, the following definitions apply:

(1) (a) "Home" means the temporary or permanent residence of an offender consisting of the actual living area approved by the supervising authority.

(b) When more than one residence or family are located on a single piece of property, the term does not include the residence of any other person who is not part of the social unit formed by the offender's immediate family.

(2) "Home arrest" means the use of a person's home for purposes of confinement and home arrest procedures and conditions imposed under this part. It does not include intensive supervision by the department of corrections.

(3) "Monitoring device" means an electronic device or apparatus capable of recording or transmitting information concerning the offender's presence in or absence from the home. The device may include an apparatus for testing the offender's breath for the presence of alcohol. A telephone alone is not a monitoring device.

(4) "Supervising authority" means:

(a) in the case of an adult felon, the department of corrections;

(b) in the case of an adult misdemeanant, a court-approved entity other than the department of corrections; or

(c) in the case of a juvenile, the juvenile probation division of the youth court or any other person or entity appointed by the court.

(5) "Violent felony offense" means deliberate homicide, mitigated deliberate homicide, negligent homicide, aggravated assault, negligent vehicular assault, kidnapping, aggravated kidnapping, robbery, sexual intercourse without consent, sexual abuse of children, arson, aggravated burglary, escape, any criminal attempt to commit an enumerated offense, or conviction as a persistent felony offender when the offender has a felony conviction for any of the listed offenses within the 5-year period preceding the date of the present conviction.

History: En. Sec. 1, Ch. 105, L. 1991; amd. Sec. 1, Ch. 262, L. 1991; amd. Sec. 218, Ch. 546, L. 1995; amd. Sec. 2, Ch. 322, L. 1997.

46-18-1002. Home arrest — petition — agreement. (1) An offender may petition a sentencing court for an order directing that all or a portion of a sentence of imprisonment be served under conditions of home arrest. The term of home arrest may not exceed 6 months. Petitions may be considered and ruled upon by the sentencing court prior to and throughout the term of the offender's sentence.

(2) The petition must include:

(a) either a statement by the department of corrections that it has a monitoring device available for its use on the offender or information from the offender as to a private company that can and will implement the home arrest, along with the name and credentials of the company and the type of monitoring device to be used;

(b) the place of any employment of the offender and the name of the offender's supervisor;

(c) if the offender has been accepted into one, a plan for participation in an educational, treatment, or training program;

(d) the source and amount of any income of the offender; and

(e) the address at which the home arrest will occur and a list of any other persons who will reside at that address during all or part of the home arrest, their ages, and their relationship to the offender.

(3) The sentencing judge shall

refer the petition to the supervising authority. The supervising authority shall review the petition and accept or reject the offender for home arrest. If the offender is rejected, the sentencing judge shall dismiss the petition. If the offender is accepted, the sentencing judge may conduct a hearing on the petition and grant or deny the petition. An order for home arrest must incorporate the home arrest plan, with any modifications by the court, and require compliance with the plan. The clerk of court shall give the county attorney a copy of the order.

(4) A home arrestee is subject to the decisions and applicable rules of the supervising authority during the period of supervision.

(5) The offender shall file with the court the written and notarized consent to the home arrest signed by each adult who will reside with the offender during all or part of the home arrest.

History: En. Sec. 2, Ch. 105, L. 1991; amd. Sec. 3, Ch. 322, L. 1997.

46-18-1003. Home arrest — conditions — fees — consent of cohabitors. (1) A home arrestee must be confined to the arrestee's home under conditions imposed by the sentencing court, which may include but are not limited to the following:

(a) The home arrestee must be confined to the arrestee's home at all times except when:

(i) working at approved employment or traveling directly to and from employment;

(ii) seeking employment;

(iii) undergoing medical, psychiatric, or mental health treatment or participating in an approved counseling or aftercare program;

(iv) attending an educational institution or program approved by the supervising authority;

(v) attending a regularly scheduled religious service at a place of worship;

(vi) participating in an approved community service program; or

(vii) conforming to a schedule prepared by the supervising authority, specifically setting forth the times when the arrestee may be absent from the home and the locations where the arrestee may be during those times.

(b) The home arrestee may not change the place of home arrest or the schedule without prior approval of the supervising authority.

(c) The home arrestee shall maintain a telephone in the home and the ordered monitoring device on the arrestee's person at all times.

(d) Conditions set by the court or the supervising authority may include:

(i) restitution;

(ii) supervision fees under 7-32-2245, 46-18-702, 46-18-703, or 46-23-1031;

(iii) any of the conditions imposed on persons on probation or conditional discharge under 46-23-1011 or 46-23-1021.

(2) An arrest warrant may be issued if the supervising authority has reason to believe that the home arrestee has violated a condition of the home arrest. Upon arrest, the supervising authority shall notify the sentencing court and give the court a written report on the violation. The court shall conduct a hearing and, if the violation is established, may revoke the home arrest and require the home arrestee to serve all or a part of the sentence. If imposition of sentence was suspended, the court may impose any sentence that could have been originally imposed. Time spent under home arrest must be credited against any sentence to be served.

History: En. Sec. 3, Ch. 105, L. 1991; amd. Sec. 4, Ch. 322, L. 1997.

46-18-1004. Home arrest — ineligibility. A person being held under a detainer, warrant, or process issued by some other jurisdiction is not eligible for home arrest. A person convicted of a violent felony offense is not eligible for home arrest. However, this section does not prevent the use of a monitoring device as a part of an intensive supervision program or other program of the department of corrections.

History: En. Sec. 4, Ch. 105, L. 1991; amd. Sec. 1, Ch. 262, L. 1991; amd. Sec. 219, Ch. 546, L. 1995.

46-18-1005. Home arrest — responsibility for own living expenses — government benefits. A person serving a sentence under conditions of home arrest is responsible for food, housing, clothing, and medical care expenses and is eligible for government benefits to the same extent as a person on probation, parole, or conditional discharge.

History: En. Sec. 5, Ch. 105, L. 1991.

46-18-1006. Home arrest — list of offenders. At least once every 30 days, the supervising authority shall provide all local and county law enforcement agencies with a list of the offenders under home arrest in their jurisdictions. This list must include the following information:

(1) the offender's place of home arrest;

(2) the offense for which the offender was charged, convicted, or otherwise placed under home arrest;

(3) the date that the sentence of home arrest will be completed; and

(4) the name, address, and phone number of the officer of the supervising authority for the offender.

History: En. Sec. 6, Ch. 105, L. 1991.

CHAPTER 19

EXECUTION OF JUDGMENT

Part 1 — Method of Execution

46-19-101. Commitment of defendant.
46-19-102. Execution of fine.
46-19-103. Execution of death sentence.

Part 2 — Suspension of Execution of Death

46-19-201. When and how mental fitness of defendant determined.
46-19-202. Proceedings following determination regarding fitness.
46-19-203. Procedure for determining if woman is pregnant.
46-19-204. Proceedings following determination regarding pregnancy.

Part 3 — Commitment to Prison in Another State

46-19-301. Western Interstate Corrections Compact — contents.
46-19-302. Effectuation of purposes of compact.
46-19-303. Power of governor to enter into contracts.
46-19-304. Commitment or transfer of inmate to institution outside of state.
46-19-305. Hearings requested by other states.

Part 4 — Interstate Corrections Compact

46-19-401. Compact adopted — text.
46-19-402. Effectuation of purposes of compact.

Part 1
Method of Execution

Part Cross-References

County detention centers, Title 7, ch. 32, part 22.

Escape from custody — use of force to prevent, 45-3-106.

Escape from custody — definition, 45-7-306.

Possession of weapon by prisoner, 45-8-318.

State prison, Title 53, ch. 30, part 1.

46-19-101. Commitment of defendant. Upon rendition of judgment after pronouncement of a sentence imposing punishment of imprisonment or death, the court shall commit the defendant to the custody of the sheriff, who shall deliver the defendant to the place of his confinement or execution.

History: En. 95-2301 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-2301.

46-19-102. Execution of fine. (1) If the judgment is for a fine alone, execution may issue on the judgment as on a judgment in a civil case.

(2) If the judgment is for a fine and imprisonment until the fine is paid, the defendant must be committed to the custody of the proper officer and detained and allowed a credit for each day of incarceration as provided in 46-18-403.

History: En. 95-2302 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-2302; amd. Sec. 3, Ch. 270, L. 1989; amd. Sec. 5, Ch. 388, L. 1995.

Cross-References

Execution of judgment, Title 25, ch. 13, 14.

46-19-103. Execution of death sentence. (1) In pronouncing the sentence of death, the court shall set the date of execution, which may not be less than 30 days or more than 60 days from the date the sentence is pronounced. If execution has been stayed by any court and the date set for execution has passed prior to dissolution of the stay, the court in which the defendant was previously sentenced shall, upon dissolution of the stay, set a new date of execution for not less than 20 or more than 90 days from the day the date is set. The defendant is entitled to be present in court on the day the new date of execution is set.

(2) Pending execution of a sentence of death, the sheriff may deliver the defendant to the Montana state prison or the Montana women's prison for confinement, and the state shall bear the costs of imprisoning the defendant from the date of delivery.

(3) The punishment of death must be inflicted by administration of a continuous, intravenous injection of a lethal quantity of an ultra-fast-acting barbiturate in combination with a chemical paralytic agent until a coroner or deputy coroner pronounces that the defendant is dead.

(4) When an execution date is set, a death warrant signed by the judge and attested by the clerk of court under the seal of the court must, within 5 days, be prepared. The warrant and a certified copy of the judgment must be delivered to the director of the department of corrections. The warrant must be directed to the director and recite the conviction, judgment, appointed date of execution, and duration of the warrant.

(5) The warden of the Montana state prison shall provide a suitable and efficient room or place in which executions will be carried out, enclosed from public view, within the walls of the state prison, and shall provide all implements necessary to the execution. The warden shall, subject to subsection (6), select the person to perform the execution, and the warden or the warden's designee shall supervise the execution. The identity of the executioner must remain anonymous. Facts pertaining to the selection and training of the executioner must remain confidential.

(6) (a) An execution must be performed by a person selected by the warden and trained to administer a lethal injection. The person administering the injection need not be a physician, registered nurse, or licensed practical nurse licensed or registered under the laws of this or any other state.

(b) The warden shall allow the execution to be observed by no more than 12 witnesses, excluding department of corrections staff necessary to carry out the execution. The witnesses must, to the extent possible, include three persons from the news media, three persons designated by the family of the victim of the crime, three persons designated by the person to be executed, and three persons chosen by the department of corrections.

(c) A proposed witness is subject to rejection by the department of corrections if the department has reason to believe that the witness:

(i) poses a risk to the safety or security of department of corrections personnel, the other witnesses, or other persons; or

(ii) is likely to disrupt proceedings due to the witness's emotional or mental state.

(7) Within 20 days after the execution, the warden shall return the death warrant to the clerk of the court from which it was issued, noting on the warrant the time it was executed.

(8) The rejection of a witness under subsection (6)(c) is not grounds for stay of the execution.

History: En. 95-2303 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-2303; amd. Sec. 1, Ch. 191, L. 1981; amd. Sec. 1, Ch. 292, L. 1983; amd. Sec. 4, Ch. 411, L. 1983; amd. Sec. 107, Ch. 370, L. 1987; amd. Sec. 1, Ch. 552, L. 1989; amd. Sec. 1, Ch. 92, L. 1997; amd. Sec. 1, Ch. 387, L. 1999; amd. Sec. 6, Ch. 491, L. 1999.

Compiler's Comments

1999 Amendments — Composite Section: Chapter 387 in (3) near end before "pronounces" substituted "coroner or deputy coroner" for "licensed physician" and at end after "dead" deleted "according to accepted standards of medical practice"; in (6)(b) substituted present language designating the makeup of witnesses for an execution for former language that read: "The warden shall allow the execution to be observed by 12 witnesses, 3 of whom may be designated by the person to be executed"; inserted (6)(c) providing grounds for rejection of a witness by the department of corrections; inserted (8) providing that rejection of a witness is not grounds for staying an execution; and made minor changes in style. Amendment effective October 1, 1999.

Chapter 491 in (2) substituted "the Montana state prison or the Montana women's prison" for "a state prison". Amendment effective April 27, 1999.

Cross-References

Execution of death sentence justified, 45-3-109.

Definition of dead, 50-22-101.

Part 2
Suspension of Execution of Death

46-19-201. When and how mental fitness of defendant determined. If after judgment of death there is good reason to suppose that the defendant lacks mental fitness, the mental fitness of the defendant will be determined in accordance with the provisions of chapter 14 of this title.

History: En. 95-2304 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-2304.

46-19-202. Proceedings following determination regarding fitness. (1) If it is found that defendant is mentally fit as provided in 46-19-201, the warden of the Montana state prison shall execute the judgment.

(2) If it is found that the defendant lacks fitness, the execution of judgment must be suspended and the court shall commit the defendant to the custody of the superintendent of the Montana state hospital to be placed in an appropriate institution of the department of public health and human services for as long as the lack of fitness endures.

(3) When the court, on its own motion or upon application of the superintendent of the Montana state hospital, the county prosecuting officer, or the defendant or the defendant's legal representative, determines after a hearing, if a hearing is requested, that the defendant has regained fitness to proceed, the warden must be directed by the court to carry out the execution. If, however, the court is of the view that so much time has elapsed since the commitment of the defendant that it would be unjust to proceed with execution of the sentence, the court may suspend the execution of the sentence and may order the defendant to be discharged.

History: En. 95-2305 by Sec. 1, Ch. 196, L. 1967; amd. Sec. 94, Ch. 120, L. 1974; R.C.M. 1947, 95-2305; amd. Sec. 8, Ch. 361, L. 1983; amd. Sec. 5, Ch. 411, L. 1983; amd. Sec. 1, Ch. 262, L. 1991; amd. Sec. 220, Ch. 546, L. 1995.

46-19-203. Procedure for determining if woman is pregnant. If there is good reason to suppose a woman against whom a judgment of death is rendered is pregnant, the sheriff of the county, with the concurrence of the judge of the court by which the judgment was rendered, must summon a jury of three physicians to inquire into the supposed pregnancy. Immediate notice of this inquiry must be given to the county attorney of the county who must attend the inquiry and may produce his own witnesses.

History: En. 95-2306 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-2306.

46-19-204. Proceedings following determination regarding pregnancy. If it is found by the inquiry that the woman is not pregnant, the warden of the Montana state prison shall execute the judgment. If it is found that the woman is pregnant, the warden shall suspend the execution of judgment and transmit the inquisition to the governor. When the governor is satisfied that the woman is no longer pregnant, he may issue a death warrant appointing a day for the execution of the judgment. The warrant must recite the conviction, the judgment, the method of execution, that execution of judgment was suspended due to pregnancy, that the governor is satisfied that the woman is no longer pregnant, the appointed date for the execution, and the duration of the warrant.

History: En. 95-2307 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-2307; amd. Sec. 6, Ch. 411, L. 1983; amd. Sec. 1, Ch. 551, L. 1989.

Part 3

Commitment to Prison in Another State

46-19-301. Western Interstate Corrections Compact — contents. The Western Interstate Corrections Compact as contained herein is hereby enacted into law and entered into on behalf of this state with any and all other states legally joining therein in a form substantially as follows:

WESTERN INTERSTATE CORRECTIONS COMPACT

Article I. Purpose and Policy

The party states, desiring by common action to improve their institutional facilities and provide programs of sufficiently high quality for the confinement, treatment, and rehabilitation of various types of offenders, declare that it is the policy of each of the party states to provide such facilities and programs on the basis of cooperation with one another, thereby serving the best interests of such offenders and of society. The purpose of this compact is to provide for the development and execution of such programs of cooperation for the confinement, treatment, and rehabilitation of offenders.

Article II. Definitions

As used in this compact, unless the context clearly requires otherwise:

(1) "state" means a state of the United States or, subject to the limitation contained in Article VII, Guam;

(2) "sending state" means a state party to this compact in which conviction was had;

(3) "receiving state" means a state party to this compact to which an inmate is sent for confinement other than a state in which conviction was had;

(4) "inmate" means a male or female offender who is under sentence to or confined in a prison or other correctional institution;

(5) "institution" means any prison, reformatory, or other correctional facility (including but not limited to a facility for the mentally ill or mentally defective) in which inmates may lawfully be confined.

Article III. Contracts

(1) Each party state may make one or more contracts with any one or more of the other party states for the confinement of inmates on behalf of a sending state in institutions situated within receiving states. Any such contract shall provide for:

(a) its duration;

(b) payments to be made to the receiving state by the sending state for inmate maintenance, extraordinary medical and dental expenses, and any participation in or receipt by inmates of rehabilitative or correctional services, facilities, programs, or treatment not reasonably included as part of normal maintenance;

(c) participation in programs of inmate employment, if any; the disposition or crediting of any payments received by inmates on account thereof; and the crediting of proceeds from or disposal of any products resulting therefrom;

(d) delivery and retaking of inmates;

(e) such other matters as may be necessary and appropriate to fix the obligations, responsibilities, and rights of the sending and receiving states.

(2) Prior to the construction or completion of construction of any institution or addition thereto by a party state, any other party state or states may contract therewith for the enlargement of the planned capacity of the

institution or addition thereto, or for the inclusion therein of particular equipment or structures, and for the reservation of a specific per centum of the capacity of the institution to be kept available for use by inmates of the sending state or states so contracting. Any sending state so contracting may, to the extent that moneys are legally available therefor, pay to the receiving state a reasonable sum as consideration for such enlargement of capacity or provision of equipment or structures and reservation of capacity. Such payment may be in a lump sum or in installments as provided in the contract.

(3) The terms and provisions of this compact shall be a part of any contract entered into by the authority of or pursuant thereto, and nothing in any such contract shall be inconsistent therewith.

Article IV. Procedures and Rights

(1) Whenever the duly constituted judicial or administrative authorities in a state party to this compact, and which has entered into a contract pursuant to Article III, shall decide that confinement in or transfer of an inmate to an institution within the territory of another party state is necessary in order to provide adequate quarters and care or desirable in order to provide an appropriate program of rehabilitation or treatment, said officials may direct that the confinement be within an institution within the territory of said other party state, the receiving state to act in that regard solely as agent for the sending state.

(2) The appropriate officials of any state party to this compact shall have access at all reasonable times to any institution in which it has a contractual right to confine inmates for the purpose of inspecting the facilities thereof and visiting such of its inmates as may be confined in the institution.

(3) Inmates confined in an institution pursuant to the terms of this compact shall at all times be subject to the jurisdiction of the sending state and may at any time be removed therefrom for transfer to a prison or other institution within the sending state, for transfer to another institution in which the sending state may have a contractual or other right to confine inmates, for release on probation or parole, for discharge, or for any other purpose permitted by the laws of the sending state; provided that the sending state shall continue to be obligated to such payments as may be required pursuant to the terms of any contract entered into under the terms of Article III.

(4) Each receiving state shall provide regular reports to each sending state on the inmates of that sending state in institutions pursuant to this compact including a conduct record of each inmate and certify said record to the official designated by the sending state in order that each inmate may have the benefit of his or her record in determining and altering the disposition of said inmate in accordance with the law which may obtain in the sending state and in order that the same may be a source of information for the sending state.

(5) All inmates who may be confined in an institution pursuant to the provisions of this compact shall be treated in a reasonable and humane manner and shall be cared for and treated equally with such similar inmates of the receiving state as may be confined in the same institution. The fact of confinement in a receiving state shall not deprive any inmate so confined of any legal rights which said inmate would have had if confined in an appropriate institution of the sending state.

(6) Any hearing or hearings to which an inmate confined pursuant to this compact may be entitled by the laws of the sending state may be had before the appropriate authorities of the sending state or of the receiving state if authorized by the sending state. The receiving state shall provide adequate facilities for such hearings as may be conducted by the appropriate officials of a sending state. In the event such hearing or hearings are had before officials of the receiving state, the governing law shall be that of the sending state and a record of the hearing or hearings as prescribed by the sending state shall be made. Said record together with any recommendations of the hearing officials shall be transmitted forthwith to the official or officials before whom the hearing would have been had if it had taken place in the sending state. In any and all proceedings had pursuant to the provisions of this subdivision, the officials of the receiving state shall act solely as agents of the sending state and no final determination shall be made in any matter except by the appropriate officials of the sending state. Costs of records made pursuant to this subsection shall be borne by the sending state.

(7) Any inmate confined pursuant to this compact shall be released within the territory of the sending state unless the inmate and the sending and receiving states shall agree upon release in some other place. The sending state shall bear the cost of such return to its territory.

(8) Any inmate confined pursuant to the terms of this compact shall have any and all rights to participate in and derive any benefits, incur or be relieved of any obligations, or have such obligations modified or his status changed on account of any action or proceeding in which he could have participated if confined in any appropriate institution of the sending state located within such state.

(9) The parent, guardian, trustee, or other person or persons entitled under the laws of the sending state to act for, advise, or otherwise function with respect to any inmate shall not be deprived of or restricted in his exercise of any power in respect of any inmate confined pursuant to the terms of this compact.

Article V. Acts Not Reviewable in Receiving State — Extradition

(1) Any decision of the sending state in respect of any matter over which it retains jurisdiction pursuant to this compact shall be conclusive upon and not reviewable within the receiving state, but if at the time the sending state seeks to remove an inmate from an institution in the receiving state there is pending against the inmate within such state any criminal charge or if the inmate is suspected of having committed within such state a criminal offense, the inmate shall not be returned without the consent of the receiving state until discharged from prosecution or other form of proceeding, imprisonment, or detention for such offense. The duly accredited officers of the sending state shall be permitted to transport inmates pursuant to this compact through any and all states party to this compact without interference.

(2) An inmate who escapes from an institution in which he is confined pursuant to this compact shall be deemed a fugitive from the sending state and from the state in which the institution is situated. In the case of an escape to a jurisdiction other than the sending or receiving state, the responsibility for

institution of extradition proceedings shall be that of the sending state, but nothing contained herein shall be construed to prevent or affect the activities of officers and agencies of any jurisdiction directed toward the apprehension and return of an escapee.

Article VI. Federal Aid

Any state party to this compact may accept federal aid for use in connection with any institution or program, the use of which is or may be affected by this compact or any contract pursuant hereto, and any inmate in a receiving state pursuant to this compact may participate in any such federally aided program or activity for which the sending and receiving states have made contractual provision, provided that, if such program or activity is not part of the customary correctional regimen, the express consent of the appropriate official of the sending state shall be required therefor.

Article VII. Entry into Force

This compact shall enter into force and become effective and binding upon the states so acting when it has been enacted into law by any two contiguous states from among the states of Alaska, Arizona, California, Colorado, Hawaii, Idaho, Montana, Nebraska, Nevada, New Mexico, Oregon, Utah, Washington, and Wyoming. For the purposes of this article, Alaska and Hawaii shall be deemed contiguous to each other; to any and all of the states of California, Oregon, and Washington; and to Guam. Thereafter, this compact shall enter into force and become effective and binding as to any other of said states or any other state contiguous to at least one party state upon similar action by such state. Guam may become party to this compact by taking action similar to that provided for joinder by any other eligible party state and upon the consent of congress to such joinder. For the purposes of this article, Guam shall be deemed contiguous to Alaska, Hawaii, California, Oregon, and Washington.

Article VIII. Withdrawal and Termination

This compact shall continue in force and remain binding upon a party state until it shall have enacted a statute repealing the same and providing for the sending of formal written notice of withdrawal from the compact to the appropriate officials of all other party states. An actual withdrawal shall not take effect until 2 years after the notices provided in said statute have been sent. Such withdrawal shall not relieve the withdrawing state from its obligations assumed hereunder prior to the effective date of withdrawal. Before the effective date of withdrawal, a withdrawing state shall remove to its territory, at its own expense, such inmates as it may have confined pursuant to the provisions of this compact.

Article IX. Other Arrangements Unaffected

Nothing contained in this compact shall be construed to abrogate or impair any agreement or other arrangement which a party state may have with a nonparty state for the confinement, rehabilitation, or treatment of inmates or to repeal any other laws of a party state authorizing the making of cooperative institutional arrangements.

Article X. Construction and Severability

The provisions of this compact shall be liberally construed and shall be severable. If any phrase, clause, sentence, or provision of this compact is declared to be contrary to the constitution of any participating state or of the United States or the applicability thereof to any government, agency, person, or circumstance is held invalid, the validity of the remainder of this compact and the applicability thereof to any government, agency, person, or circumstance shall not be affected thereby. If this compact shall be held contrary to the constitution of any state participating therein, the compact shall remain in full force and effect as to the remaining states and in full force and effect as to the state affected as to all severable matters.

History: En. 95-2308 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-2308.

46-19-302. Effectuation of purposes of compact. The courts, departments, agencies, and officers of this state and its subdivisions shall enforce this compact and shall do all things appropriate to the effectuation of its purposes and intent which may be within their respective jurisdictions, including but not limited to the making and submission of such reports as are required by the compact.

History: En. 95-2310 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-2310.

46-19-303. Power of governor to enter into contracts. The governor may designate the department of corrections to enter into contracts recommended by the department on behalf of this state as may be appropriate to implement the participation of this state in the Western Interstate Corrections Compact pursuant to 46-19-301.

History: En. 95-2312 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-2312; amd. Sec. 1, Ch. 59, L. 1979; amd. Sec. 1, Ch. 262, L. 1991; amd. Sec. 221, Ch. 546, L. 1995.

46-19-304. Commitment or transfer of inmate to institution outside of state. Any court or state agency having power to commit or transfer an inmate (as defined in Article II(4) of the Western Interstate Corrections Compact) to any institution for confinement may commit or transfer such inmate to any institution outside this state if this state has entered into a contract or contracts for the confinement of inmates in said institution pursuant to Article III of the Western Interstate Corrections Compact.

History: En. 95-2309 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-2309.

46-19-305. Hearings requested by other states. The board of pardons and parole and the department of corrections shall hold hearings as may be requested by any other party state pursuant to Article IV(6) of the Western Interstate Corrections Compact.

History: En. 95-2311 by Sec. 1, Ch. 196, L. 1967; amd. Sec. 95, Ch. 120, L. 1974; R.C.M. 1947, 95-2311; amd. Sec. 1, Ch. 262, L. 1991; amd. Sec. 222, Ch. 546, L. 1995.

Part 4
Interstate Corrections Compact

46-19-401. Compact adopted — text. The Interstate Corrections Compact is entered into by this state with any and all other states legally joining therein in the form substantially as follows:

INTERSTATE CORRECTIONS COMPACT

Article I. Purpose and Policy

The party states, desiring by common action to fully utilize and improve their institutional facilities and provide adequate programs for the confinement, treatment and rehabilitation of various types of offenders, declare that it is the policy of each of the party states to provide such facilities and programs on a basis of cooperation with one another, thereby serving the best interests of such offenders and of society and effecting economies in capital expenditures and operational costs. The purpose of this compact is to provide for the mutual development and execution of such programs of cooperation for the confinement, treatment and rehabilitation of offenders with the most economical use of human and material resources.

Article II. Definitions

As used in this compact, unless the context requires otherwise:

(a) "State" means a state of the United States; the United States of America; a territory or possession of the United States; the District of Columbia; the Commonwealth of Puerto Rico.

(b) "Sending state" means a state party to this compact in which conviction or court commitment was had.

(c) "Receiving state" means a state party to this compact to which an inmate is sent for confinement other than a state in which conviction or court commitment was had.

(d) "Inmate" means a male or female offender who is committed under sentence to or confined in a penal or correctional institution.

(e) "Institution" means any penal or correctional facility, including but not limited to a facility for the mentally ill or mentally defective, in which inmates may lawfully be confined.

Article III. Contracts

(a) Each party state may make one or more contracts with any one or more of the other party states for the confinement of inmates on behalf of a sending state in institutions situated within receiving states. Any such contract shall provide for:

1. Its duration.
2. Payments to be made to the receiving state by the sending state for inmate maintenance, extraordinary medical and dental expenses, and any participation in or receipt by inmates of rehabilitative or correctional services, facilities, programs or treatment not reasonably included as part of normal maintenance.
3. Participation in programs of inmate employment, if any; the disposition or crediting of any payments received by inmates on account thereof; and the crediting of proceeds from or disposal of any products resulting therefrom.
4. Delivery and retaking of inmates.
5. Such other matters as may be necessary and appropriate to fix the obligations, responsibilities and rights of the sending and receiving states.

(b) The terms and provisions of this compact shall be a part of any contract entered into by the authority of or pursuant thereto, and nothing in any such contract shall be inconsistent therewith.

Article IV. Procedures and Rights

(a) Whenever the duly constituted authorities in a state party to this compact, and which has entered into a contract pursuant to Article III, shall decide that confinement in, or transfer of an inmate to, an institution within the territory of another party state is necessary or desirable in order to provide adequate quarters and care or an appropriate program of rehabilitation or treatment, said officials may direct that the confinement be within an institution within the territory of said other party state, the receiving state to act in that regard solely as agent for the sending state.

(b) The appropriate officials of any state party to this compact shall have access, at all reasonable times, to any institution in which it has a contractual right to confine inmates for the purpose of inspecting the facilities thereof and visiting such of its inmates as may be confined in the institution.

(c) Inmates confined in an institution pursuant to the terms of this compact shall at all times be subject to the jurisdiction of the sending state and may at any time be removed therefrom for transfer to a prison or other institution within the sending state. For transfer to another institution in which the sending state may have a contractual or other right to confine inmates, for release on probation or parole, for discharge, or for any other purpose permitted by the laws of the sending state; provided that the sending state shall continue to be obligated to such payments as may be required pursuant to the terms of any contract entered into under the terms of Article III.

(d) Each receiving state shall provide regular reports to each sending state on the inmates of that sending state in institutions pursuant to this compact including a conduct record of each inmate and certify said record to the official designated by the sending state, in order that each inmate may have official review of his or her record in determining and altering the disposition of said inmate in accordance with the law which may obtain in the sending state and in order that the same may be a source of information for the sending state.

(e) All inmates who may be confined in an institution pursuant to the provisions of this compact shall be treated in a reasonable and humane manner and shall be treated equally with such similar inmates of the receiving state as may be confined in the same institution. The fact of confinement in a receiving state shall not deprive any inmate so confined of any legal rights which said inmate would have had if confined in an appropriate institution of the sending state.

(f) Any hearing or hearings to which an inmate confined pursuant to this compact may be entitled by the laws of the sending state may be had before the appropriate authorities of the sending state, or of the receiving state if authorized by the sending state. The receiving state shall provide adequate facilities for such hearings as may be conducted by the appropriate officials of a sending state. In the event such hearing or hearings are had before officials of the receiving state, the governing law shall be that of the sending state and a record of the hearing or hearings as prescribed by the sending state shall be made. Said record together with any recommendations of the hearing officials shall be transmitted forthwith to the official or officials before whom the hearing would have been had if it had taken place in the sending state. In any and all proceedings had pursuant to the provisions of this subsection, the officials of the receiving state shall act solely as agents of the sending state and no final determination shall be made in any matter except by the appropriate officials of the sending state.

(g) Any inmate confined pursuant to this compact shall be released within the territory of the sending state unless the inmate, and the sending and receiving states, shall agree upon release in some other place. The sending state shall bear the cost of such return to its territory.

(h) Any inmate confined pursuant to the terms of this compact shall have any and all rights to participate in and derive any benefits or incur or be relieved of any obligations or have such obligations modified or his status changed on account of any action or proceeding in which he could have participated if confined in any appropriate institution of the sending state located within such state.

(i) The parent, guardian, trustee, or other person or persons entitled under the laws of the sending state to act for, advise, or otherwise function with respect to any inmate shall not be deprived of or restricted in his exercise of any power in respect of any inmate confined pursuant to the terms of this compact.

Article V. Acts Not Reviewable in Receiving State — Extradition

(a) Any decision of the sending state in respect of any matter over which it retains jurisdiction pursuant to this compact shall be conclusive upon and not reviewable within the receiving state, but if at the time the sending state seeks to remove an inmate from an institution in the receiving state there is pending against the inmate within such state any criminal charge or if the inmate is formally accused of having committed within such state a criminal offense, the inmate shall not be returned without the consent of the receiving state until discharged from prosecution or other form of proceeding, imprisonment or detention for such offense. The duly accredited officers of the sending state shall be permitted to transport inmates pursuant to this compact through any and all states party to this compact without interference.

(b) An inmate who escapes from an institution in which he is confined pursuant to this compact shall be deemed a fugitive from the sending state and from the state in which the institution is situated. In the case of an escape to a jurisdiction other than the sending or receiving state, the responsibility for institution of extradition or rendition proceedings shall be that of the sending state, but nothing contained herein shall be construed to prevent or affect the activities of officers and agencies of any jurisdiction directed toward the apprehension and return of an escapee.

Article VI. Federal Aid

Any state party to this compact may accept federal aid for use in connection with any institution or program, the use of which is or may be affected by this compact or any contract pursuant hereto and any inmate in a receiving state pursuant to this compact may participate in any such federally aided program or activity for which the sending and receiving states have made contractual provision, provided that if such program or activity is not part of the customary correctional regimen, the express consent of the appropriate official of the sending state shall be required therefor.

Article VII. Entry Into Force

This compact shall enter into force and become effective and binding upon the states so acting when it has been enacted into law by any two states. Thereafter, this compact shall enter into force and become effective and binding as to any other of said states upon similar action by such state.

Article VIII. Withdrawal and Termination

This compact shall continue in force and remain binding upon a party state until it shall have enacted a statute repealing the same and providing for the sending of formal written notice of withdrawal from the compact to the appropriate officials of all other party states. An actual withdrawal shall not take effect until one year after the notices provided in said statute have been sent. Such withdrawal shall not relieve the withdrawing state from its obligations assumed hereunder prior to the effective date of withdrawal. Before the effective date of withdrawal, a withdrawing state shall remove to its territory, at its own expense, such inmates as it may have confined pursuant to the provisions of this compact.

Article IX. Other Arrangements Unaffected

Nothing contained in this compact shall be construed to abrogate or impair any agreement or other arrangement which a party state may have with a nonparty state for the confinement, rehabilitation or treatment of inmates nor to repeal any other laws of a party state authorizing the making of cooperative institutional arrangements.

Article X. Construction and Severability

The provisions of this compact shall be liberally construed and shall be severable. If any phrase, clause, sentence or provision of this compact is declared to be contrary to the constitution of any participating state or of the United States or the applicability thereof to any government, agency, person or circumstance is held invalid, the validity of the remainder of this compact and the applicability thereof to any government, agency, person or circumstance shall not be affected thereby. If this compact shall be held contrary to the constitution of any state participating therein, the compact shall remain in full force and effect as to the remaining states and in full force and effect as to the state affected as to all severable matters.

History: En. Sec. 1, Ch. 112, L. 1987.

46-19-402. Effectuation of purposes of compact. The department of corrections shall enforce this compact and shall do all things appropriate to the effectuation of its purposes and intent which may be within its jurisdiction, including but not limited to the making and submission of the reports that are required by the compact.

History: En. Sec. 2, Ch. 112, L. 1987; amd. Sec. 1, Ch. 262, L. 1991; amd. Sec. 223, Ch. 546, L. 1995.

CHAPTER 20

APPEALS

Part 1 — General Provisions

46-20-101. Single method of review in criminal cases.
46-20-102. Superseded.
46-20-103. Scope of appeal by state.
46-20-104. Scope of appeal by defendant.
46-20-105. Appeal by one codefendant.

Part 2 — Initiation of Appeal

46-20-201. Superseded.
46-20-202. Superseded.
46-20-203. Superseded.
46-20-204. Stay of execution and relief pending appeal.
46-20-205. Effect of an appeal by the state.

Part 3 — The Record on Appeal (Superseded. Sup. Ct. Ord. June 16, 1986, eff. Jan. 19, 1987)

Part 4 — Briefs (Superseded. Sup. Ct. Ord. June 16, 1986, eff. Jan. 19, 1987)

Part 5 — Motions and Papers in General (Superseded. Sup. Ct. Ord. June 16, 1986, eff. Jan. 19, 1987)

Part 6 — Oral Argument (Superseded. Sup. Ct. Ord. June 16, 1986, eff. Jan. 19, 1987)

Part 7 — Action by Court

46-20-701. Elements of record court considers on review — errors noticed.
46-20-702. Renumbered 46-20-701(2) by Code Commissioner, 1987.
46-20-703. Action reviewing court may take.
46-20-704. Superseded.
46-20-705. Superseded.
46-20-706. Termination of appeal — remand.
46-20-707. Discharge of defendant on reversal of judgment.

Chapter Cross-References

Procedure on appeal — Montana Alcoholic Beverage Code, 16-6-202.

Part 1

General Provisions

46-20-101. Single method of review in criminal cases. (1) This chapter shall govern review in all criminal cases.

(2) All existing methods of review in criminal cases in the state are abolished. After January 1, 1968, the only method of review in criminal cases shall be by notice of appeal.

History: **En. 95-2401 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-2401.**

46-20-102. Superseded. Sup. Ct. Ord. June 16, 1986, eff. Jan. 19, 1987.
History: **En. 95-2402 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-2402.**

46-20-103. Scope of appeal by state. (1) Except as otherwise specifically authorized, the state may not appeal in a criminal case.

(2) The state may appeal from any court order or judgment the substantive effect of which results in:

(a) dismissing a case;
(b) modifying or changing the verdict as provided in 46-16-702(3)(c);
(c) granting a new trial;
(d) quashing an arrest or search warrant;
(e) suppressing evidence;
(f) suppressing a confession or admission;
(g) granting or denying change of venue; or
(h) imposing a sentence that is contrary to law.

History: **En. 95-2403 by Sec. 1, Ch. 196, L. 1967; amd. Sec. 41, Ch. 184, L. 1977; R.C.M. 1947, 95-2403; amd. Sec. 1, Ch. 478, L. 1989.**

Cross-References

Appeal by party other than state to District Court from Justices' or City Courts, 46-17-311.

46-20-104. Scope of appeal by defendant. (1) An appeal may be taken by the defendant only from a final judgment of conviction and orders after judgment which affect the substantial rights of the defendant.

(2) Upon appeal from a judgment, the court may review the verdict or decision and any alleged error objected to which involves the merits or necessarily affects the judgment. Failure to make a timely objection during trial constitutes a waiver of the objection except as provided in 46-20-701(2).

History: **En. 95-2404 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-2404; amd. Sec. 1, Ch. 319, L. 1983.**

46-20-105. Appeal by one codefendant. When several defendants are tried jointly, any one or more of them may take an appeal but those who do not join in the appeal shall not be affected thereby.

History: **En. 95-2429 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-2429.**

Part 2
Initiation of Appeal

Part Cross-References

Notice to Attorney General when department or board appeals, 46-1-302.

46-20-201. Superseded. Sup. Ct. Ord. June 16, 1986, eff. Jan. 19, 1987.
History: **En. 95-2405 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-2405(a) thru (c).**

46-20-202. Superseded. Sup. Ct. Ord. June 16, 1986, eff. Jan. 19, 1987.
History: **En. 95-2405 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-2405(d).**

46-20-203. Superseded. Sup. Ct. Ord. June 16, 1986, eff. Jan. 19, 1987.
History: **En. 95-2405 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-2405(e).**

46-20-204. Stay of execution and relief pending appeal. (1) If an appeal is taken, a sentence of death shall be stayed by order of the trial court until final order by the supreme court.

(2) If an appeal is taken and the defendant is admitted to bail, a sentence of imprisonment shall be stayed by the trial court.

(3) If an appeal is taken, a sentence to pay a fine or a fine and costs shall be stayed by the trial court or by the reviewing court.

(4) If an appeal is taken and the accused was admitted to probation, he shall remain on probation or post bail.

History: En. 95-2406 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-2406.

46-20-205. Effect of an appeal by the state. An appeal taken by the state in no case stays or affects the operation of the judgment or order in favor of the defendant until judgment or order is reversed.

History: En. 95-2407 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-2407.

Part 3

The Record on Appeal (Superseded. Sup. Ct. Ord. June 16, 1986, eff. Jan. 19, 1987)

Part Compiler's Comments

Histories of Superseded Sections:

46-20-301. En. 95-2408 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-2408(a).

46-20-302. En. 95-2408 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-2408(b); amd. Sec. 1, Ch. 148, L. 1983.

46-20-303. En. 95-2428 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-2428.

46-20-304. En. 95-2408 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-2408(c).

46-20-305. En. 95-2408 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-2408(d).

46-20-306. En. 95-2408 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-2408(e).

46-20-307 through 46-20-310 reserved.

46-20-311. En. 95-2409 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-2409(a), (b).

46-20-312. En. 95-2409 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-2409(part).

46-20-313. En. 95-2409 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-2409(part).

46-20-314. En. 95-2409 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-2409(d).

46-20-315. En. 95-2409 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-2409(e).

46-20-316. En. 95-2410 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-2410(a).

46-20-317. En. 95-2410 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-2410(b).

46-20-318. En. 95-2410 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-2410(c); amd. Sec. 24, Ch. 116, L. 1979.

46-20-319. En. 95-2411 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-2411.

Part 4

Briefs (Superseded. Sup. Ct. Ord. June 16, 1986, eff. Jan. 19, 1987)

Part Compiler's Comments

Histories of Superseded Sections:

46-20-401. En. 95-2416 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-2416(a).

46-20-402. En. 95-2416 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-2416(b).

46-20-403. En. 95-2416 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-2416(c).

46-20-404. En. 95-2417 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-2417.

46-20-405. En. 95-2419 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-2419.

46-20-406. En. 95-2416 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-2416(d).

46-20-407. En. 95-2416 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-2416(e).

46-20-408. En. 95-2416 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-2416(f).

46-20-409. En. 95-2416 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-2416(g).

46-20-410. En. 95-2418 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-2418.

Part 5

Motions and Papers in General (Superseded. Sup. Ct. Ord. June 16, 1986, eff. Jan. 19, 1987)

Part Compiler's Comments

Histories of Superseded Sections:

46-20-501. En. 95-2415 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-2415.

46-20-502. En. 95-2413 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-2413.

46-20-503. En. 95-2414 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-2414.

46-20-504. En. 95-2424 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-2424(c).

46-20-505 through 46-20-510 reserved.

46-20-511. En. 95-2420 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-2420(a).

46-20-512. En. 95-2420 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-2420(b).

46-20-513. En. 95-2420 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-2420(c).

Part 6

Oral Argument (Superseded. Sup. Ct. Ord. June 16, 1986, eff. Jan. 19, 1987)

Part Compiler's Comments

Histories of Superseded Sections:

46-20-601. En. 95-2424 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-2424(a), (b).

46-20-602. En. 95-2421 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-2421(a).

46-20-603. En. 95-2421 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-2421(b), (c), (f).

46-20-604. En. 95-2421 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-2421(d), (e).

Part 7

Action by Court

46-20-701. Elements of record court considers on review — errors noticed. (1) Whenever the record on appeal contains any order, ruling, or proceeding of the trial court against the convicted person affecting the convicted person's substantial rights on the appeal of the cause, together with any required objection of the convicted person, the supreme court on that appeal shall consider the orders, rulings, or proceedings and the objections thereto and shall reverse or affirm the cause on the appeal according to the substantial rights of the respective parties, as shown upon the record. A cause may not be reversed by reason of any error committed by the trial court against the convicted person unless the record shows that the error was prejudicial.

(2) Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded. A claim alleging an error affecting jurisdictional or constitutional rights may not be noticed on appeal if the alleged error was not objected to as provided in 46-20-104, unless the convicted person establishes that the error was prejudicial as to the convicted person's guilt or punishment and that:

(a) the right asserted in the claim did not exist at the time of the trial and has been determined to be retroactive in its application;

(b) the prosecutor, the judge, or a law enforcement agency suppressed evidence from the convicted person or the convicted person's attorney that prevented the claim from being raised and disposed of; or

(c) material and controlling facts upon which the claim is predicated were not known to the convicted person or the convicted person's attorney and could not have been ascertained by the exercise of reasonable diligence.

History: (1)En. 95-2412 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-2412; (2)En. 95-2425 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-2425; amd. Sec. 2, Ch. 319, L. 1983; Sec. 46-20-702, MCA 1985; redes. 46-20-701(2) by Code Commissioner, 1987; amd. Sec. 202, Ch. 42, L. 1997.

46-20-702. Renumbered 46-20-701(2) by Code Commissioner, 1987.

46-20-703. Action reviewing court may take. On appeal the reviewing court may:

(1) reverse, affirm, or modify the judgment or order from which the appeal is taken;

(2) set aside, affirm, or modify any or all of the proceedings subsequent to or dependent upon the judgment or order from which the appeal is taken;

(3) reduce the offense of which the appellant was convicted to a lesser included offense;

(4) reduce the punishment imposed by the trial court; or

(5) order a new trial if justice so requires.

History: En. 95-2426 by Sec. 1, Ch. 196, L. 1967; amd. Sec. 42, Ch. 184, L. 1977; R.C.M. 1947, 95-2426.

46-20-704. Superseded. Sup. Ct. Ord. June 16, 1986, eff. Jan. 19, 1987.

History: En. 95-2422 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-2422.

46-20-705. Superseded. Sup. Ct. Ord. June 16, 1986, eff. Jan. 19, 1987.

History: En. 95-2423 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-2423; amd. Sec. 1, Ch. 294, L. 1981.

46-20-706. Termination of appeal — remand. (1) Upon termination of the appeal, the supreme court shall remand the cause with proper instruction together with the opinion of the court. The clerk shall return all original documents to the trial court.

(2) After the cause has been remanded to the trial court, the appellate court has no further jurisdiction of the appeal or the proceedings thereon and all orders necessary to carry the judgment into effect must be made by the court to which the cause is remanded.

History: En. 95-2427 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-2427.

46-20-707. Discharge of defendant on reversal of judgment. If a judgment against the defendant is reversed without ordering a new trial, the appellate court must:

(1) if he is in custody, direct him to be discharged therefrom;

(2) if he is on bail, direct that his bail be exonerated; or

(3) if money was deposited instead of bail, direct that it be refunded to the defendant.

History: En. 95-2430 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-2430.

CHAPTER 21

POSTCONVICTION HEARING

Part 1 — Initiating Proceedings

46-21-101. When validity of sentence may be challenged.
46-21-102. When petition may be filed.
46-21-103. Commencement of proceedings.
46-21-104. Contents of petition.
46-21-105. Amendment of petition — waiver of grounds for relief.

Part 2 — Action of Court

46-21-201. Proceedings on petition.
46-21-202. Record of proceedings.
46-21-203. Review.

Part 1

Initiating Proceedings

46-21-101. When validity of sentence may be challenged. (1) A person adjudged guilty of an offense in a court of record who has no adequate remedy of appeal and who claims that a sentence was imposed in violation of the constitution or the laws of this state or the constitution of the United States, that the court was without jurisdiction to impose the sentence, that a suspended or deferred sentence was improperly revoked, or that the sentence was in excess of the maximum authorized by law or is otherwise subject to collateral attack upon any ground of alleged error available under a writ of habeas corpus, writ of coram nobis, or other common law or statutory remedy may petition the court that imposed the sentence to vacate, set aside, or correct the sentence or revocation order.

(2) If the sentence was imposed by a justice's, municipal, or city court, the petition may not be filed unless the petitioner has exhausted all appeal remedies provided by law. The petition must be filed with the district court in the county where the lower court is located.

History: En. 95-2601 by Sec. 1, Ch. 196, L. 1967; amd. Sec. 43, Ch. 184, L. 1977; R.C.M. 1947, 95-2601; amd. Sec. 1, Ch. 195, L. 1981; amd. Sec. 1, Ch. 211, L. 1985; amd. Sec. 225, Ch. 800, L. 1991; amd. Sec. 3, Ch. 378, L. 1997.

46-21-102. When petition may be filed. (1) Except as provided in subsection (2), a petition for the relief referred to in 46-21-101 may be filed at any time within 1 year of the date that the conviction becomes final. A conviction becomes final for purposes of this chapter when:

(a) the time for appeal to the Montana supreme court expires;

(b) if an appeal is taken to the Montana supreme court, the time for petitioning the United States supreme court for review expires; or

(c) if review is sought in the United States supreme court, on the date that that court issues its final order in the case.

(2) A claim that alleges the existence of newly discovered evidence that, if proved and viewed in light of the evidence as a whole would establish that the petitioner did not engage in the criminal conduct for which the petitioner was

convicted, may be raised in a petition filed within 1 year of the date on which the conviction becomes final or the date on which the petitioner discovers, or reasonably should have discovered, the existence of the evidence, whichever is later.

History: **En. 95-2604 by Sec. 1, Ch. 196, L. 1967; amd. Sec. 44, Ch. 184, L. 1977; R.C.M. 1947, 95-2604; amd. Sec. 2, Ch. 195, L. 1981; amd. Sec. 226, Ch. 800, L. 1991; amd. Sec. 4, Ch. 378, L. 1997.**

46-21-103. Commencement of proceedings. The proceeding for relief under 46-21-101 must be commenced by filing a verified petition with the clerk of the appropriate court. The clerk shall docket the petition upon its receipt and bring the petition promptly to the attention of the court.

History: **En. 95-2602 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-2602; amd. Sec. 227, Ch. 800, L. 1991.**

46-21-104. Contents of petition. (1) The petition for postconviction relief must:

(a) identify the proceeding in which the petitioner was convicted, give the date of the rendition of the final judgment complained of, and clearly set forth the alleged violation or violations;

(b) identify any previous proceedings that the petitioner may have taken to secure relief from the conviction; and

(c) identify all facts supporting the grounds for relief set forth in the petition and have attached affidavits, records, or other evidence establishing the existence of those facts.

(2) The petition must be accompanied by a supporting memorandum, including appropriate arguments and citations and discussion of authorities.

History: **En. 95-2603 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-2603; amd. Sec. 3, Ch. 195, L. 1981; amd. Sec. 228, Ch. 800, L. 1991; amd. Sec. 2, Ch. 302, L. 1997.**

46-21-105. Amendment of petition — waiver of grounds for relief. (1) (a) All grounds for relief claimed by a petitioner under 46-21-101 must be raised in the original or amended original petition. The original petition may be amended only once. At the request of the state or on its own motion, the court shall set a deadline for the filing of an amended original petition. If a hearing will be held, the deadline must be reasonably in advance of the hearing but may not be less than 30 days prior to the date of the hearing.

(b) The court shall dismiss a second or subsequent petition by a person who has filed an original petition unless the second or subsequent petition raises grounds for relief that could not reasonably have been raised in the original or an amended original petition.

(2) When a petitioner has been afforded the opportunity for a direct appeal of the petitioner's conviction, grounds for relief that were or could reasonably have been raised on direct appeal may not be raised, considered, or decided in a proceeding brought under this chapter. Ineffectiveness or incompetence of counsel in proceedings on an original or an amended original petition under this part may not be raised in a second or subsequent petition under this part.

(3) For purposes of this section, "grounds for relief" includes all legal and factual issues that were or could have been raised in support of the petitioner's claim for relief.

History: **En. 95-2607 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-2607; amd. Sec. 4, Ch. 195, L. 1981; amd. Sec. 229, Ch. 800, L. 1991; amd. Sec. 1, Ch. 96, L. 1995; amd. Secs. 3, 4, Ch. 302, L. 1997; amd. Sec. 5, Ch. 378, L. 1997.**

Part 2
Action of Court

46-21-201. Proceedings on petition. (1) (a) Unless the petition and the files and records of the case conclusively show that the petitioner is not entitled to relief, the court shall cause notice of the petition to be served upon the county attorney in the county in which the conviction took place and upon the attorney general and order them to file a responsive pleading to the petition. Following its review of the responsive pleading, the court may dismiss the petition as a matter of law for failure to state a claim for relief or it may proceed to determine the issue.

(b) If the death sentence has been imposed, upon receipt of the response or responses to the petition, the court shall promptly hold a conference to determine a schedule for the expeditious resolution of the proceeding. The court shall issue a decision within 90 days after the hearing on the petition or, if there is no hearing, within 90 days after the filing of briefs as allowed by rule or by court order. If the decision is not issued during that period, a party may petition the supreme court for a writ of mandate or other appropriate writ or relief to compel the issuance of a decision.

(c) To the extent that they are applicable and are not inconsistent with this chapter, the rules of procedure governing civil proceedings apply to the proceeding.

(2) If the death sentence has not been imposed and a hearing is required or if the interests of justice require, the court shall appoint counsel for a petitioner who qualifies for the appointment of counsel under Title 46, chapter 8, part 1.

(3) (a) Within 30 days after a conviction for which a death sentence was imposed becomes final, the sentencing court shall notify the sentenced person that if the person is indigent and wishes to file a petition under this chapter, the court will appoint counsel who meets the Montana supreme court's standards for competency of appointed counsel in proceedings under this chapter for an indigent person sentenced to death.

(b) Within 75 days after a conviction for which a death sentence was imposed upon a person who wishes to file a petition under this chapter becomes final, the sentencing court shall:

(i) appoint counsel to represent the person if the court finds that the person is indigent and either has accepted the offer of appointment or is unable to competently decide whether to accept the offer of appointed counsel;

(ii) if the offer is rejected by a person who understands the legal consequences of the rejection, enter findings of fact after a hearing, if the court determines that a hearing is necessary, stating that the person rejected the offer with an understanding of the legal consequences of the rejection; or

(iii) if the court finds that the petitioner is not indigent, deny appointment of counsel.

(c) The court may not appoint counsel who has previously represented the person at any stage in the case unless the person and the counsel expressly agree to the appointment.

(d) If a petitioner entitled to counsel under this subsection (3) is not indigent at the time that the court's determination is made under subsection

(3)(b) but thereafter becomes indigent at any stage of the proceedings, the court shall appoint counsel as provided in subsection (3)(b)(i).

(e) The expenses of counsel appointed pursuant to this subsection (3) must be paid as provided in 46-8-201.

(f) Violation of this subsection (3) is not a basis for a claim or relief under this chapter.

(4) The court, for good cause, may grant leave to either party to use the discovery procedures available in criminal or civil proceedings. Discovery procedures may be used only to the extent and in the manner that the court has ordered or to which the parties have agreed.

(5) The court may receive proof of affidavits, depositions, oral testimony, or other evidence. In its discretion, the court may order the petitioner brought before the court for the hearing.

(6) If the court finds in favor of the petitioner, it shall enter an appropriate order with respect to the judgment or sentence in the former proceedings and any supplementary orders as to reassignment, retrial, custody, bail, or discharge that may be necessary and proper. If the court finds for the prosecution, the petition must be dismissed.

History: En. 95-2605 by Sec. 1, Ch. 196, L. 1967; amd. Sec. 45, Ch. 184, L. 1977; R.C.M. 1947, 95-2605; amd. Sec. 5, Ch. 195, L. 1981; amd. Sec. 230, Ch. 800, L. 1991; amd. Sec. 6, Ch. 378, L. 1997.

Compiler's Comments

Contingent Effective Date — Standards Effective January 1, 2000: Section 10(2), Ch. 378, L. 1997, provided: "The provision in [section 6] [enacting 46-21-201(3)(a)] that the notification must state that counsel to be appointed will meet supreme court standards for counsel is effective on [the effective date of standards adopted under section 7]." On June 29, 1999, the Montana supreme court issued an order adopting standards of competency for counsel in capital cases. The standards are effective January 1, 2000.

46-21-202. Record of proceedings. A court that hears a petition pursuant to this chapter shall keep a record of the proceedings and enter its findings and conclusions.

History: En. 95-2606 by Sec. 1, Ch. 196, L. 1967; amd. Sec. 46, Ch. 184, L. 1977; R.C.M. 1947, 95-2606; amd. Sec. 231, Ch. 800, L. 1991.

46-21-203. Review. Either the petitioner or the prosecution may appeal to the supreme court from an order entered on a petition. The appeal must be taken within 60 days of the entry of the order.

History: En. 95-2608 by Sec. 1, Ch. 196, L. 1967; amd. Sec. 47, Ch. 184, L. 1977; R.C.M. 1947, 95-2608; amd. Sec. 6, Ch. 195, L. 1981; amd. Sec. 232, Ch. 800, L. 1991.

CHAPTER 22

HABEAS CORPUS

Part 1 — Availability of Writ

46-22-101. Applicability of writ of habeas corpus.
46-22-102. No release for technical defects.
46-22-103. Writ for purpose of bail.

Part 2 — Issuance of Writ

46-22-201. Application for writ of habeas corpus.
46-22-202. Granting writ of habeas corpus.

46-22-203. Writ granted without delay.
46-22-204. Writ and process may issue at any time.
46-22-205. Form of writ.
46-22-206. Service of writ.

Part 3 — Return of Writ, Hearing, Appeal

46-22-301. Return of service.
46-22-302. Appearance of petitioner.
46-22-303. Refusal to obey writ — contempt.
46-22-304. Hearing on return.
46-22-305. Production of evidence.
46-22-306. Disposition of petitioner.
46-22-307. Appeal by prosecution.

Chapter Cross-References

Right of habeas corpus, Art. II, sec. 19, Mont. Const.

Part 1
Availability of Writ

46-22-101. Applicability of writ of habeas corpus. (1) Except as provided in subsection (2), every person imprisoned or otherwise restrained of liberty within this state may prosecute a writ of habeas corpus to inquire into the cause of imprisonment or restraint and, if illegal, to be delivered from the imprisonment or restraint.

(2) The writ of habeas corpus is not available to attack the validity of the conviction or sentence of a person who has been adjudged guilty of an offense in a court of record and has exhausted the remedy of appeal. The relief under this chapter is not available to attack the legality of an order revoking a suspended or deferred sentence.

History: En. 95-2701 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-2701; amd. Sec. 7, Ch. 195, L. 1981; amd. Sec. 2, Ch. 211, L. 1985; amd. Sec. 233, Ch. 800, L. 1991.

46-22-102. No release for technical defects. A person may not be released on a writ of habeas corpus due to any technical defect in commitment not affecting the person's substantial rights.

History: En. 95-2716 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-2716; amd. Sec. 234, Ch. 800, L. 1991.

46-22-103. Writ for purpose of bail. When a person is imprisoned or detained in custody on any criminal charge for want of bail, such person is entitled to a writ of habeas corpus for the purpose of giving bail upon averring that fact in his petition, without alleging that he is illegally confined.

History: En. 95-2702 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-2702.

Part 2
Issuance of Writ

46-22-201. Application for writ of habeas corpus. (1) Application for a writ of habeas corpus is made by petition signed either by the party for whose relief it is intended or by some person on the petitioner's behalf. It must specify:

(a) that the petitioner is unlawfully imprisoned or restrained of liberty;

(b) why the imprisonment or restraint is unlawful; and

(c) where and by whom the petitioner is confined or restrained.

(2) All parties must be named if they are known or otherwise described so that they may be identified.

(3) The petition must be verified by the oath or affirmation of the party making the application.

History: En. 95-2703 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-2703; amd. Sec. 25, Ch. 116, L. 1979; amd. Sec. 235, Ch. 800, L. 1991.

46-22-202. Granting writ of habeas corpus. (1) A writ of habeas corpus may be granted by any justice of the supreme court or by any district court judge upon petition by or on behalf of any person restrained of liberty within the justice's or judge's jurisdiction.

(2) When a writ of habeas corpus is issued, it may be made returnable before the issuing court.

History: En. 95-2704 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-2704; amd. Sec. 26, Ch. 116, L. 1979; amd. Sec. 236, Ch. 800, L. 1991.

Cross-References

Individual power of Supreme Court Justices to issue writs of habeas corpus, 3-2-212.

District Court may issue and determine at chambers, 3-5-311, 3-5-312.

46-22-203. Writ granted without delay. Any justice or judge authorized to grant a writ of habeas corpus shall grant the writ without delay if it appears that a writ ought to issue.

History: En. 95-2705 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-2705; amd. Sec. 237, Ch. 800, L. 1991.

46-22-204. Writ and process may issue at any time. The writ of habeas corpus or any associated process may be issued and served on any day or at any time.

History: En. 95-2715 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-2715; amd. Sec. 238, Ch. 800, L. 1991.

Cross-References

Court actions permitted on nonjudicial days, 3-1-302.

46-22-205. Form of writ. (1) The writ of habeas corpus must be directed to the person having custody of or restraining the person on whose behalf the application is made and must command that person to have the petitioner before the judge before whom the writ is returnable at a time and place specified.

(2) The issue or issues to be determined upon return of the writ may be stated either in the writ or in an order attached to the writ. If the issues to be determined are not stated in the writ or in an attached order, then a copy of the petition must be attached to the writ.

History: En. 95-2707 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-2707; amd. Sec. 239, Ch. 800, L. 1991.

46-22-206. Service of writ. (1) The writ of habeas corpus must be served upon the person to whom it is directed. If the writ is directed to a state institution, a copy of the writ must be served upon the attorney general. If the writ is directed to a county facility, a copy of the writ must be served upon the county attorney.

(2) The writ must be served by the clerk of court, the sheriff, or any other person directed to do so by the court.

(3) The writ must be served in the same manner as a summons in civil actions, except when otherwise expressly directed by the judge.

History: **En. 95-2708 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-2708; amd. Sec. 240, Ch. 800, L. 1991.**

Cross-References

Procedure for service of summons and writ, Rule 4D, M.R.Civ.P. (see Title 25, ch. 20).

Part 3

Return of Writ, Hearing, Appeal

46-22-301. Return of service. (1) The person upon whom the writ is served shall make a return and state in that return:

(a) (i) whether the petitioner is in that person's custody or under that person's power or restraint; and

(ii) if the petitioner is in custody or otherwise restrained, the authority for and cause of the custody or restraint; or

(b) if the petitioner has been transferred to the custody of or otherwise restrained by another, to whom the party was transferred, the time and place of the transfer, the reason for the transfer, and the authority under which the transfer took place.

(2) The return must be signed and verified by oath unless the person making the return is a sworn public officer making a return in an official capacity.

History: **En. 95-2709 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-2709; amd. Sec. 241, Ch. 800, L. 1991.**

46-22-302. Appearance of petitioner. (1) The person commanded by the writ shall bring the petitioner before the court as required by the writ unless the petitioner cannot be brought before the court without danger to the petitioner's health. Sickness or infirmity must be confirmed in an affidavit by the person having custody of the petitioner.

(2) If the court is satisfied with the truth of the affidavit, the court may proceed and dispose of the case as if the petitioner were present or the hearing may be postponed until the petitioner is present.

History: **En. 95-2710 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-2710; amd. Sec. 242, Ch. 800, L. 1991.**

46-22-303. Refusal to obey writ — contempt. If the person commanded by the writ refuses to obey, that person must be adjudged in contempt of court.

History: **En. 95-2706 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-2706; amd. Sec. 243, Ch. 800, L. 1991.**

Cross-References

Contempts, Title 3, ch. 1, part 5.

46-22-304. Hearing on return. The court before whom the writ is returned shall immediately proceed to hear and examine the return. The hearing may be summary in nature.

History: **En. 95-2711 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-2711; amd. Sec. 244, Ch. 800, L. 1991.**

46-22-305. Production of evidence. Evidence may be produced and compelled in preparation of a hearing as provided in Title 46, chapter 22.

History: En. 95-2712 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-2712; amd. Sec. 245, Ch. 800, L. 1991.

Cross-References

Procedure for acquiring evidence, Rules 26 and 28 through 37, M.R.Civ.P. (see Title 25, ch. 20).

46-22-306. Disposition of petitioner. (1) If the court finds in favor of the petitioner, an appropriate order must be entered with respect to the judgment or sentence in the former proceeding and any supplementary orders as to reassignment, retrial, custody, bail, or discharge as may be necessary and proper.

(2) If the court finds for the prosecution, the petitioner must be returned to the custody of the person to whom the writ was directed.

History: En. 95-2713 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-2713; amd. Sec. 246, Ch. 800, L. 1991.

46-22-307. Appeal by prosecution. An appeal may be taken to the supreme court by the prosecution from an order of judgment discharging the petitioner. The court may admit the petitioner to bail pending appeal as provided in 46-9-107. The appeal must be taken in the same manner as in civil actions.

History: En. 95-2714 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-2714; amd. Sec. 247, Ch. 800, L. 1991.

Cross-References

Procedure for appeal to Supreme Court, Title 25, ch. 12; Rule 72, M.R.Civ.P. (see Title 25, ch. 20).

CHAPTER 23

PROBATION, PAROLE, AND CLEMENCY

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Chapter Cross-References

Jail work release program, Title 46, ch. 18, part 7.

Part 1

General Provisions — Board of Pardons and Parole

46-23-101. Short title. Parts 1, 2, 3, and 10 of this chapter shall be known and may be cited as the "Parole and Executive Clemency Act".

History: En. Sec. 1, Ch. 153, L. 1955; Sec. 94-9821, R.C.M. 1947; redes. 95-3203 by Sec. 29, Ch. 513, L. 1973; amd. Sec. 2, Ch. 333, L. 1975; R.C.M. 1947, 95-3203.

46-23-102. Cases of juveniles excluded. The provisions of parts 1, 2, 3, and 10 of this chapter shall not apply to probation in the juvenile courts or to parole from state institutions for juveniles.

History: En. Sec. 30, Ch. 153, L. 1955; Sec. 94-9850, R.C.M. 1947; redes. 95-3232 by Sec. 29, Ch. 513, L. 1973; R.C.M. 1947, 95-3232.

46-23-103. Definitions. Unless the context requires otherwise, in this chapter, the following definitions apply:

(1) "Board" means the board of pardons and parole provided for in 2-15-2302.

(2) "Department" means the department of corrections provided for in 2-15-2301.

(3) "Executive clemency" refers to the powers of the governor as provided by section 12 of Article VI of the constitution of Montana.

(4) "Initial appearance" means the prisoner's first appearance before the board during the prisoner's current term of incarceration.

(5) "Parole" means the release to the community of a prisoner by the decision of the board prior to the expiration of the prisoner's term, subject to conditions imposed by the board and subject to supervision of the department.

History: **En. Sec. 3, Ch. 153, L. 1955; Sec. 94-9823, R.C.M. 1947; amd. Sec. 1, Ch. 73, L. 1973; redes. 95-3205 by Sec. 29, Ch. 513, L. 1973; amd. Sec. 82, Ch. 120, L. 1974; amd. Sec. 5, Ch. 333, L. 1975; R.C.M. 1947, 95-3205; amd. Sec. 1, Ch. 262, L. 1991; amd. Sec. 224, Ch. 546, L. 1995; amd. Sec. 1, Ch. 450, L. 1999.**

Compiler's Comments

1999 Amendment: Chapter 450 inserted definition of initial appearance; and made minor changes in style. Amendment effective April 22, 1999.

46-23-104. Board of pardons and parole. (1) The board of pardons and parole is responsible for executive clemency and parole as provided in this chapter.

(2) The board shall meet monthly, and at other times that the board considers necessary, at the state prison.

(3) The principal office of the board is in Deer Lodge.

(4) The board may designate one of its members, one of its staff members, or any other adult correctional releasing authority to conduct interviews relative to:

(a) parole eligibility;

(b) plans for release on parole; or

(c) revocation hearings.

History: **En. Sec. 2, Ch. 153, L. 1955; Sec. 94-9822, R.C.M. 1947; redes. 95-3204 by Sec. 29, Ch. 513, L. 1973; amd. Sec. 81, Ch. 120, L. 1974; amd. Sec. 3, Ch. 333, L. 1975; R.C.M. 1947, 95-3204; amd. Sec. 1, Ch. 234, L. 1981; amd. Sec. 1, Ch. 300, L. 1987; amd. Sec. 225, Ch. 546, L. 1995.**

Cross-References

Board of Pardons and Parole established, 2-15-2302.

46-23-105. Legal adviser. The board may appoint any qualified attorney or the attorney general to act as its legal adviser and represent it in all proceedings whenever so requested by the board.

History: **En. Sec. 7, Ch. 153, L. 1955; Sec. 94-9827, R.C.M. 1947; redes. 95-3209 by Sec. 29, Ch. 513, L. 1973; R.C.M. 1947, 95-3209.**

46-23-106. Information from courts to board. It is the duty of the court disposing of any criminal case to cause to be transmitted to the board of pardons and parole statistical data in accordance with regulations issued by the board regarding all dispositions of defendants whether found guilty or discharged.

History: **En. 95-2210 by Sec. 1, Ch. 196, L. 1967; R.C.M. 1947, 95-2210; amd. Sec. 226, Ch. 546, L. 1995.**

46-23-107. Orders of board — reviewability. Decisions of the board must be by majority vote. The orders of the board are not reviewable.

History: **En. Sec. 4, Ch. 153, L. 1955; amd. Sec. 42, Ch. 93, L. 1969; Sec. 94-9824, R.C.M. 1947; redes. 95-3206 by Sec. 29, Ch. 513, L. 1973; amd. Sec. 83, Ch. 120, L. 1974; amd. Sec. 6, Ch. 333, L. 1975; amd. Sec. 59, Ch. 184, L. 1977; R.C.M. 1947, 95-3206(1); amd. Sec. 1, Ch. 188, L. 1989.**

46-23-108. Repealed. Sec. 6, Ch. 450, L. 1999.

History: En. Sec. 4, Ch. 153, L. 1955; amd. Sec. 42, Ch. 93, L. 1969; Sec. 94-9824, R.C.M. 1947; redes. 95-3206 by Sec. 29, Ch. 513, L. 1973; amd. Sec. 83, Ch. 120, L. 1974; amd. Sec. 6, Ch. 333, L. 1975; amd. Sec. 59, Ch. 184, L. 1977; R.C.M. 1947, 95-3206(2); amd. Sec. 27, Ch. 116, L. 1979.

46-23-109. Parole and revocation hearings and administrative reviews — telephone — videoconference. The board may, in its discretion, hold any parole hearing or revocation hearing via interactive videoconference and may hold an administrative review via telephone conference.

History: En. Sec. 4, Ch. 450, L. 1999.

Compiler's Comments

Effective Date: Section 8, Ch. 450, L. 1999, provided: "[This act] is effective on passage and approval." Approved April 22, 1999.

46-23-110. Records — dissemination. (1) The department and the board shall keep a record of the board's acts and decisions. Citizens may inspect and make copies of the public records of the board, as provided in 2-6-102 and this section.

(2) Records and materials that are constitutionally protected from disclosure are not subject to disclosure under the provisions of subsection (1). Information that is constitutionally protected from disclosure is information in which there is an individual privacy or safety interest that clearly exceeds the merits of public disclosure.

(3) Upon a request to inspect or copy records of the board's acts and decisions, the board or a board staff member shall review the file requested and determine whether any document in the file is subject to a personal privacy or safety interest that clearly exceeds the merits of public disclosure.

(4) The board may assert the privacy or safety interest and may withhold a document if the board determines that the demand for individual privacy clearly exceeds the merits of public disclosure or if the document's contents would compromise the safety, order, or security of a facility or the safety of facility personnel, a member of the public, or an inmate of the facility if disclosed.

(5) The board may not withhold from public scrutiny under subsections (2) through (4) any more information than is required to protect an individual privacy interest or a safety interest.

(6) The board may charge a reasonable fee for copying and inspecting records.

(7) The board may limit the time and place that the records may be inspected or copied.

History: En. Sec. 5, Ch. 450, L. 1999.

Compiler's Comments

Effective Date: Section 8, Ch. 450, L. 1999, provided: "[This act] is effective on passage and approval." Approved April 22, 1999.

Part 2
Granting of Parole

46-23-201. Prisoners eligible for nonmedical parole. (1) Subject to the restrictions contained in subsections (2) through (4), the board may release on nonmedical parole by appropriate order any person confined in a state prison, except persons under sentence of death and persons serving sentences imposed under 46-18-202(2) or 46-18-219, when in its opinion there is reasonable probability that the prisoner can be released without detriment to the prisoner or to the community.

(2) A prisoner serving a time sentence may not be paroled under this section until the prisoner has served at least one-fourth of the prisoner's full term.

(3) A prisoner serving a life sentence may not be paroled under this section until the prisoner has served 30 years.

(4) A parole may be ordered under this section only for the best interests of society and not as an award of clemency or a reduction of sentence or pardon. A prisoner may be placed on parole only when the board believes that the prisoner is able and willing to fulfill the obligations of a law-abiding citizen.

History: En. Sec. 12, Ch. 153, L. 1955; Sec. 94-9832, R.C.M. 1947; redes. 95-3214 by Sec. 29, Ch. 513, L. 1973; amd. Sec. 86, Ch. 120, L. 1974; amd. Sec. 3, Ch. 312, L. 1975; amd. Sec. 60, Ch. 184, L. 1977; amd. Sec. 3, Ch. 340, L. 1977; amd. Sec. 3, Ch. 580, L. 1977; R.C.M. 1947, 95-3214(1), (2); amd. Secs. 1, 2, Ch. 235, L. 1983; amd. Sec. 1, Ch. 451, L. 1985; amd. Sec. 2, Ch. 188, L. 1989; amd. Sec. 2, Ch. 248, L. 1991; amd. Sec. 1, Ch. 262, L. 1991; amd. Sec. 1, Ch. 315, L. 1991; amd. Sec. 3, Ch. 519, L. 1991; amd. Sec. 68, Ch. 10, L. 1993; amd. Sec. 4, Ch. 372, L. 1995; amd. Sec. 17, Ch. 482, L. 1995; amd. Sec. 227, Ch. 546, L. 1995; amd. Sec. 9, Ch. 189, L. 1997; amd. Sec. 7, Ch. 491, L. 1999.

Compiler's Comments

1999 Amendment: Chapter 491 in (1) near middle substituted "a state prison" for "the Montana state prison or the women's prison". Amendment effective April 27, 1999.

46-23-202. Investigation of prisoner by board. (1) Within the 2 months prior to a prisoner's official parole eligibility date or as soon thereafter as possible, the prisoner shall make an initial appearance before the board. The board shall consider all pertinent information regarding the prisoner, including:

(a) the circumstances of the offense;

(b) the prisoner's previous social history and criminal record;

(c) the prisoner's conduct, employment, and attitude in prison; and

(d) the reports of any physical and mental examinations that have been made.

(2) Before ordering the parole of a prisoner, the board shall:

(a) conduct a hearing and interview the prisoner. At the time of the hearing, the board must receive relevant statements from interested persons and any person may be represented by counsel, provided that the board has the power to regulate procedures at all hearings.

(b) permit a victim to present a statement concerning the effects of the crime on the victim, the circumstances surrounding the crime, the manner in which the crime was perpetrated, and the victim's opinion regarding whether the prisoner should be paroled. In the board's discretion, the victim's statement may be kept confidential. The board shall consider the victim's statement, along with the information provided under subsection (1), in determining whether to grant parole.

History: En. Sec. 12, Ch. 153, L. 1955; Sec. 94-9832, R.C.M. 1947; redes. 95-3214 by Sec. 29, Ch. 513, L. 1973; amd. Sec. 86, Ch. 120, L. 1974; amd. Sec. 3, Ch. 312, L. 1975; amd. Sec. 60, Ch. 184, L. 1977; amd. Sec. 3, Ch. 340, L. 1977; amd. Sec. 3, Ch. 580, L. 1977;

R.C.M. 1947, 95-3214(3); amd. Sec. 1, Ch. 45, L. 1983; amd. Sec. 4, Ch. 579, L. 1993; amd. Sec. 22, Ch. 125, L. 1995; amd. Sec. 5, Ch. 372, L. 1995; amd. Sec. 2, Ch. 450, L. 1999.

Compiler's Comments

1999 Amendment: Chapter 450 in (1) at end of first sentence inserted "or as soon thereafter as possible, the prisoner shall make an initial appearance before the board"; and made minor changes in style. Amendment effective April 22, 1999.

46-23-203. Information from prison officials. It shall be the duty of all prison officials to grant to the members of the board or its properly accredited representatives access at all reasonable times to any prisoner over whom the board has jurisdiction under parts 1, 2, 3, and 10 of this chapter, to provide for the board or such representatives facilities for communicating with and observing such prisoner, and to furnish to the board such reports as the board shall require concerning the conduct and character of any prisoner in their custody and any other facts deemed by the board pertinent in determining whether such prisoner shall be paroled.

History: En. Sec. 14, Ch. 153, L. 1955; Sec. 94-9834, R.C.M. 1947; redes. 95-3216 by Sec. 29, Ch. 513, L. 1973; R.C.M. 1947, 95-3216.

46-23-204. Repealed. Sec. 40, Ch. 125, L. 1995.

History: En. Sec. 15, Ch. 153, L. 1955; Sec. 94-9835, R.C.M. 1947; redes. 95-3217 by Sec. 29, Ch. 513, L. 1973; R.C.M. 1947, 95-3217.

46-23-205. Subpoenas — issuance, service. (1) The board shall have the power to issue subpoenas compelling the attendance of such witnesses and the production of such records, books, papers, and documents as it may deem necessary for investigation of the case of any person before it. Subpoenas may be signed and oaths administered by the board or any member thereof.

(2) Subpoenas so issued may be served by any sheriff, constable, police officer, parole and probation officer, or other law enforcement officer.

History: En. Sec. 16, Ch. 153, L. 1955; Sec. 94-9836, R.C.M. 1947; redes. 95-3218 by Sec. 29, Ch. 513, L. 1973; R.C.M. 1947, 95-3218(part).

Cross-References

Subpoenas and witnesses, Title 26, ch. 2.

46-23-206. Enforcement of subpoenas by court. In case of contumacy by or refusal of any person to obey a subpoena issued to such person, any member of the board or duly authorized representative of any of them may make application to any court of record of this state and such court shall have jurisdiction to issue to such person an order requiring such person to appear before the board and there to produce evidence if so ordered or there to give testimony touching the matter under investigation. Any failure to obey such order of the court may be punished by said court as a contempt thereof.

History: En. Sec. 16, Ch. 153, L. 1955; Sec. 94-9836, R.C.M. 1947; redes. 95-3218 by Sec. 29, Ch. 513, L. 1973; R.C.M. 1947, 95-3218(part).

46-23-207. Penalty for disobedience. Any person who shall without just cause fail or refuse to attend and testify, to answer any lawful inquiry, or to produce records, books, papers, and other documents if it is in his power to do so in obedience to a subpoena of the board or any member thereof shall be punished by a fine of not more than $200 or by imprisonment for not longer than 60 days or by both such fine and imprisonment. Each day such violation continues shall be deemed to be a separate offense.

History: En. Sec. 16, Ch. 153, L. 1955; Sec. 94-9836, R.C.M. 1947; redes. 95-3218 by Sec. 29, Ch. 513, L. 1973; R.C.M. 1947, 95-3218(part).

46-23-208 and 46-23-209 reserved.

46-23-210. Medical parole. (1) The board may release on medical parole by appropriate order a person placed in a correctional institution or program, except a person under sentence of death. To be eligible for a medical parole, a person must have an examination and written diagnosis by a physician licensed under Title 37 to practice medicine. The diagnosis must include:

(a) a determination that the person suffers from an incapacitating physical condition, disease, or syndrome;

(b) a description of the physical condition, disease, or syndrome and a detailed description of the person's physical incapacity; and

(c) a prognosis addressing the likelihood of the person's recovery from the physical condition, disease, or syndrome and the extent of any potential recovery.

(2) The diagnosis must be reviewed and accepted by the department before the board may consider granting a medical parole. The board may not grant a medical parole unless the incapacitating physical condition, disease, or syndrome renders the person highly unlikely to present a clear and present danger to public safety.

(3) The board shall require as a condition of medical parole that the person agree to placement in an environment chosen by the department during the parole period, including but not limited to a hospital, nursing home, or family home. The board may require as a condition of parole that the person agree to periodic examinations and diagnoses at the person's expense. Reports of each examination and diagnosis must be submitted to the board and department by the examining physician. If either the board or department determines that the person's physical capacity has improved to the extent that the person is likely to pose a possible detriment to society, the board may revoke the parole and return the person to the custody of the department.

(4) Medical parole may be requested by the board, the department, an incarcerated person, or an incarcerated person's parent, grandparent, child, or sibling by submitting the request in writing to the administrator of the correctional institution in which the person is incarcerated.

(5) A grant or denial of medical parole does not affect the person's eligibility for nonmedical parole.

(6) Sections 46-23-203, 46-23-205 through 46-23-207, and 46-23-215 through 46-23-218 apply to nonmedical parole.

History: En. Sec. 1, Ch. 248, L. 1991; amd. Sec. 1, Ch. 381, L. 1993; amd. Sec. 23, Ch. 125, L. 1995; amd. Sec. 3, Ch. 420, L. 1997.

46-23-211 through 46-23-214 reserved.

46-23-215. Conditions of parole. (1) A prisoner while on parole remains in the legal custody of the department but is subject to the orders of the board.

(2) When an order for parole is issued, it must recite the conditions of parole. If restitution was imposed as part of the sentence under 46-18-201, the order of parole must contain a condition to pay restitution to the victim. The prisoner may not be paroled until the prisoner provides a biological sample for purposes of Title 44, chapter 6, part 1, if the prisoner has not already done so under 44-6-103 and if the prisoner was convicted of, or was found under 41-5-1502 to have committed, a sexual offense or violent offense as defined in

46-23-502. An order for parole or any parole agreement signed by a prisoner may contain a clause waiving extradition.

(3) Whenever a prisoner in a state prison has been approved for parole on condition that the prisoner obtain employment or secure suitable living arrangements or on any other condition that is difficult to fulfill while incarcerated, the department may grant the prisoner a furlough, not to exceed 10 days, for purposes of fulfilling the condition. While on furlough, the prisoner remains in the legal custody of the department and is subject to all other conditions recited by the board.

History: En. Sec. 12, Ch. 153, L. 1955; Sec. 94-9832, R.C.M. 1947; redes. 95-3214 by Sec. 29, Ch. 513, L. 1973; amd. Sec. 86, Ch. 120, L. 1974; amd. Sec. 3, Ch. 312, L. 1975; amd. Sec. 60, Ch. 184, L. 1977; amd. Sec. 3, Ch. 340, L. 1977; amd. Sec. 3, Ch. 580, L. 1977; R.C.M. 1947, 95-3214(4); amd. Sec. 1, Ch. 1, Sp. L. 1982; amd. Sec. 3, Ch. 392, L. 1987; amd. Sec. 24, Ch. 125, L. 1995; amd. Sec. 10, Ch. 189, L. 1997; amd. Sec. 6, Ch. 147, L. 1999; amd. Sec. 8, Ch. 491, L. 1999.

Compiler's Comments

1999 Amendments — Composite Section: Chapter 147 in (2) inserted third sentence concerning providing biological sample as condition for parole. Amendment effective March 23, 1999.

Chapter 491 in (1) substituted "department" for "correctional facility from which the prisoner was released"; and in (3) in first sentence near beginning substituted "a state prison" for "the Montana state prison or the women's prison" and after "while incarcerated, the" substituted "department" for "warden" and in second sentence substituted "department" for "prison". Amendment effective April 27, 1999.

Retroactive Applicability: Section 7, Ch. 147, L. 1999, provided: "[Section 6] [46-23-215] applies retroactively, within the meaning of 1-2-109, to persons sentenced or in the custody or under the supervision of the department of corrections on or after March 27, 1995, the effective date of the original DNA testing and identification law."

46-23-216. Duration of parole. (1) A prisoner on parole is considered released on parole until the expiration of the maximum term or terms for which the prisoner was sentenced.

(2) The period served on parole or conditional release must be considered service of the term of imprisonment, and subject to the provisions contained in 46-23-1023 through 46-23-1026 relating to a prisoner who is a fugitive from or has fled from justice, the total time served may not exceed the maximum term or sentence. When a prisoner on parole or conditional release has performed the obligations of the release, the board shall make a final order or discharge and issue a certificate of discharge to the prisoner.

History: (1)En. Sec. 13, Ch. 153, L. 1955; Sec. 94-9833, R.C.M. 1947; redes. 95-3215 by Sec. 29, Ch. 513, L. 1973; amd. Sec. 87, Ch. 120, L. 1974; amd. Sec. 4, Ch. 312, L. 1975; amd. Sec. 61, Ch. 184, L. 1977; amd. Sec. 4, Ch. 340, L. 1977; Sec. 95-3215, R.C.M. 1947, 95-3215; (2)En. Sec. 20, Ch. 153, L. 1955; Sec. 94-9840, R.C.M. 1947; redes. 95-3222 by Sec. 29, Ch. 513, L. 1973; Sec. 95-3222, R.C.M. 1947; R.C.M. 1947, 95-3215, 95-3222; amd. Secs. 6, 7, Ch. 372, L. 1995.

46-23-217. Service of term for additional crime. A prisoner who commits a crime while imprisoned in a state prison or while released on parole or under the supervised release program and who is convicted and sentenced for the crime shall serve the sentence consecutively with the remainder of the original sentence. However, the prisoner remains eligible for parole consideration under 46-23-201 in regard to the original sentence. If paroled from the original sentence, the prisoner shall begin serving the subsequent sentence.

History: En. Sec. 19, Ch. 153, L. 1955; Sec. 94-9839, R.C.M. 1947; redes. 95-3221 by Sec. 29, Ch. 513, L. 1973; R.C.M. 1947, 95-3221; amd. Sec. 28, Ch. 116, L. 1979; amd. Sec. 3, Ch. 188, L. 1989; amd. Sec. 8, Ch. 372, L. 1995; amd. Sec. 9, Ch. 491, L. 1999.

Compiler's Comments

1999 Amendment: Chapter 491 in first sentence near beginning substituted "a state prison" for "the state prison". Amendment effective April 27, 1999.

46-23-218. Authority of board to adopt rules. The board may adopt any rules that it considers proper or necessary with respect to the eligibility of prisoners for parole, the conduct of parole hearings, video hearings, progress reviews, the conduct of revocation proceedings, clemency proceedings, and conditions to be imposed upon parolees.

History: En. Sec. 12, Ch. 153, L. 1955; Sec. 94-9832, R.C.M. 1947; redes. 95-3214 by Sec. 29, Ch. 513, L. 1973; amd. Sec. 86, Ch. 120, L. 1974; amd. Sec. 3, Ch. 312, L. 1975; amd. Sec. 60, Ch. 184, L. 1977; amd. Sec. 3, Ch. 340, L. 1977; amd. Sec. 3, Ch. 580, L. 1977; R.C.M. 1947, 95-3214(5); amd. Sec. 3, Ch. 450, L. 1999.

Compiler's Comments

1999 Amendment: Chapter 450 near middle after "parole hearings" inserted "video hearings, progress reviews, the conduct of revocation proceedings, clemency proceedings"; and made minor changes in style. Amendment effective April 22, 1999.

Cross-References

Adoption and publication of rules, Title 2, ch. 4, part 3.

Part 3
Executive Clemency

Part Cross-References

Pardons, Art. VI, sec. 12, Mont. Const.

46-23-301. Cases of executive clemency — application for clemency — definitions. (1) (a) "Clemency" means kindness, mercy, or leniency that may be exercised by the governor toward a convicted person. The governor may grant clemency in the form of:

(i) the remission of fines or forfeitures;

(ii) the commutation of a sentence to one that is less severe;

(iii) respite; or

(iv) pardon.

(b) "Pardon" means a declaration of record that an individual is to be relieved of all legal consequences of a prior conviction.

(2) A person convicted of a crime need not exhaust judicial or administrative remedies before filing an application for clemency, except that an application may not be filed with respect to a sentence of death while an automatic review proceeding is pending before the Montana supreme court under 46-18-307 through 46-18-310. The board shall consider cases of executive clemency only upon application. All applications for executive clemency must be made to the board. An application for executive clemency in capital cases may be filed with the board no later than 10 days after the district court sets a date of execution. Applications may be filed only by the person convicted of the crime, by the person's attorney acting on the person's behalf and with the person's consent, or by a court-appointed next friend, guardian, or conservator acting on the person's behalf. The board shall cause an investigation to be made of and base any recommendation it makes on:

(a) all the circumstances surrounding the crime for which the applicant was convicted; and

(b) the individual circumstances relating to social conditions of the applicant prior to commission of the crime, at the time the offense was committed, and at the time of the application for clemency.

(3) The board shall advise the governor and recommend action to be taken. The board may recommend that clemency be granted or denied. In noncapital cases, if the board recommends that clemency be denied, the application may not be forwarded to the governor and the governor may not take action on the case. In capital cases, the board shall transmit the application and either a recommendation that clemency be granted or a recommendation that clemency be denied to the governor. The governor is not bound by any recommendation of the board, but the governor shall review the record of the hearing and the board's recommendation before granting or denying clemency. The governor has the final authority to grant or deny clemency in those cases forwarded to the governor. An appeal may not be taken from the governor's decision to grant or deny clemency.

History: En. Sec. 21, Ch. 153, L. 1955; Sec. 94-9841, R.C.M. 1947; amd. Sec. 2, Ch. 73, L. 1973; redes. 95-3223 by Sec. 29, Ch. 513, L. 1973; R.C.M. 1947, 95-3223; amd. Sec. 1, Ch. 561, L. 1989; amd. Sec. 2, Ch. 92, L. 1997.

46-23-302. Order for hearing on application for executive clemency. After the board has considered an application for executive clemency and has by majority vote favored a hearing, it shall pass an order in substance as follows:

"Whereas, the Board of Pardons and Parole has officially received an application for executive clemency concerning ...., a convict confined in the state prison (or concerning ...., who has been found guilty of an offense committed against the laws of the state), who was convicted of the crime of.... committed at ...., in the county of ...., State of Montana, on the .... day of ...., 20..., and sentenced for a term of .... years.

Therefore, it is ordered that ...., the .... day of ...., 20..., is set for the consideration of the executive clemency matter and all persons having an interest in the matter who desire to be heard either for or against the granting of the pardon, commutation, restoration of citizenship, or remission or suspension of fine or forfeiture are notified to be present at .... o'clock of that day, at .....

Further, it is ordered that a copy of this order be printed and published in the.... (here insert name of some newspaper of general circulation in the county where the crime was committed), a daily (or weekly) newspaper printed and published at ...., in the county of ...., once each week for 2 weeks beginning ...., 20..., and ending ....."

History: En. Sec. 22, Ch. 153, L. 1955; Sec. 94-9842, R.C.M. 1947; amd. Sec. 3, Ch. 73, L. 1973; redes. 95-3224 by Sec. 29, Ch. 513, L. 1973; R.C.M. 1947, 95-3224; amd. Sec. 2, Ch. 561, L. 1989; amd. Sec. 228, Ch. 546, L. 1995; amd. Sec. 78, Ch. 51, L. 1999.

Compiler's Comments

1999 Amendment: Chapter 51 near end of second paragraph and near beginning of third paragraph after "day of ...." substituted "20..." for "19...", and near end of third paragraph after "beginning ...." substituted "20..." for "19..."; and made minor changes in style. Amendment effective January 1, 2000.

46-23-303. Publication of order. The board must cause a copy of such order to be published in the newspaper therein designated at least once a week for 2 weeks prior to the hearing and, at the same time, cause to be deposited in the post office at the seat of government, postpaid, a copy of said order and notice addressed to the district judge, county attorney, and sheriff, respectively, of the county where the crime was committed and in like manner mail a copy of the order to the applicant.

History: En. Sec. 23, Ch. 153, L. 1955; Sec. 94-9843, R.C.M. 1947; redes. 95-3225 by Sec. 29, Ch. 513, L. 1973; R.C.M. 1947, 95-3225; amd. Sec. 3, Ch. 561, L. 1989.

46-23-304. Proof of publication. Prior to the time set for hearing, proof of the publication of notice must be made by the publisher or managing agent.

History: En. Sec. 24, Ch. 153, L. 1955; Sec. 94-9844, R.C.M. 1947; redes. 95-3226 by Sec. 29, Ch. 513, L. 1973; R.C.M. 1947, 95-3226.

46-23-305. When publication not necessary. No publication need be made as provided in 46-23-302, 46-23-303, and 46-23-304 in the following cases:

(1) when there is imminent danger of the death of the person convicted or imprisoned;

(2) when the term of imprisonment of the applicant is within 10 days of its expiration.

History: En. Sec. 26, Ch. 153, L. 1955; Sec. 94-9846, R.C.M. 1947; amd. and redes. 95-3228 by Sec. 28, Ch. 513, L. 1973; R.C.M. 1947, 95-3228.

46-23-306. Record of hearing. At the hearing the board must cause to be kept a record showing:

(1) the names of all persons appearing before the board on behalf of the person seeking clemency from the governor;

(2) the names of all persons appearing before the board in opposition to the granting of the same;

(3) the testimony of all persons giving evidence before the board;

(4) that the affidavit and return from the printer of the publication of the notice and order of hearing was on file prior to the hearing.

History: En. Sec. 25, Ch. 153, L. 1955; Sec. 94-9845, R.C.M. 1947; redes. 95-3227 by Sec. 29, Ch. 513, L. 1973; R.C.M. 1947, 95-3227; amd. Sec. 29, Ch. 116, L. 1979.

46-23-307. Decision of board. Within 30 days after the hearing of any capital case or in noncapital cases where the decision is made to recommend clemency be granted, the board must make a decision in writing, and if such decision be made to recommend executive clemency, the copy of the decision together with all papers used in each case shall be immediately transmitted to the governor.

History: En. Sec. 27, Ch. 153, L. 1955; Sec. 94-9847, R.C.M. 1947; redes. 95-3229 by Sec. 29, Ch. 513, L. 1973; R.C.M. 1947, 95-3229; amd. Sec. 4, Ch. 561, L. 1989.

46-23-308 through 46-23-314 reserved.

46-23-315. Authority of governor to grant respite — application. The governor has the power to grant respites after conviction and judgment for any offenses committed against the criminal laws of the state for the time that the governor thinks proper. The governor may grant a respite upon application of a person authorized to apply for executive clemency and prior to any review or recommendation by the board of pardons and parole. A respite must be of temporary duration for a definite period of time. Any respite that is granted that stays the execution of a death warrant has the effect of postponing the execution of the warrant. In that case, if clemency is not granted, the death warrant is again in effect at the expiration of the period of respite and the execution must take place on the date of expiration of the respite.

History: **En. Sec. 28, Ch. 153, L. 1955; Sec. 94-9848, R.C.M. 1947; redes. 95-3230 by Sec. 29, Ch. 513, L. 1973; R.C.M. 1947, 95-3230; amd. Sec. 5, Ch. 561, L. 1989; amd. Sec. 229, Ch. 546, L. 1995.**

46-23-316. Governor's report to legislature. The governor shall, as provided in 5-11-210, report to the legislature each case of remission of fine or forfeiture, respite, commutation, or pardon granted since the last previous report, stating the name of the convict, the crime of which he was convicted, the sentence and its date, the date of remission, commutation, pardon, or respite, with the reason for granting the same, and the objection, if any, of any of the members of the board made thereto.

History: **En. Sec. 29, Ch. 153, L. 1955; Sec. 94-9849, R.C.M. 1947; redes. 95-3231 by Sec. 29, Ch. 513, L. 1973; R.C.M. 1947, 95-3231; amd. Sec. 6, Ch. 561, L. 1989; amd. Sec. 37, Ch. 112, L. 1991.**

Part 4

Supervised Release Program (Repealed)

46-23-401. Repealed. Sec. 15, Ch. 322, L. 1997.

History: **En. Sec. 2, Ch. 288, L. 1969; amd. Sec. 92, Ch. 120, L. 1974; amd. Sec. 2, Ch. 496, L. 1975; R.C.M. 1947, 95-2218; amd. Sec. 1, Ch. 583, L. 1981; amd. Sec. 1, Ch. 262, L. 1991; amd. Sec. 230, Ch. 546, L. 1995.**

46-23-402 through 46-23-404. Repealed. Sec. 13, Ch. 583, L. 1981.

Compiler's Comments

Histories of Repealed Sections:

46-23-402. En. Sec. 1, Ch. 288, L. 1969; amd. Sec. 1, Ch. 496, L. 1975; R.C.M. 1947, 95-2217; amd. Sec. 30, Ch. 116, L. 1979; amd. Sec. 1, Ch. 635, L. 1979.

46-23-403. En. Sec. 8, Ch. 288, L. 1969; amd. Sec. 8, Ch. 496, L. 1975; amd. Sec. 39, Ch. 184, L. 1977; R.C.M. 1947, 95-2224.

46-23-404. En. Sec. 9, Ch. 288, L. 1969; R.C.M. 1947, 95-2225.

46-23-405. Repealed. Sec. 15, Ch. 322, L. 1997.

History: **En. Secs. 3, 7, Ch. 288, L. 1969; amd. Secs. 3, 7, Ch. 496, L. 1975; R.C.M. 1947, 95-2219, 95-2223(1); amd. Sec. 2, Ch. 635, L. 1979; amd. Sec. 2, Ch. 583, L. 1981; amd. Sec. 25, Ch. 125, L. 1995.**

46-23-406. Repealed. Sec. 13, Ch. 583, L. 1981.

History: **En. Sec. 7, Ch. 288, L. 1969; amd. Sec. 7, Ch. 496, L. 1975; R.C.M. 1947, 95-2223(2).**

46-23-407 through 46-23-410 reserved.

46-23-411. Repealed. Sec. 15, Ch. 322, L. 1997.

History: **En. Sec. 4, Ch. 288, L. 1969; amd. Sec. 4, Ch. 496, L. 1975; amd. Sec. 2, Ch. 580, L. 1977; R.C.M. 1947, 95-2220; amd. Sec. 3, Ch. 635, L. 1979; amd. Sec. 3, Ch. 583, L. 1981; amd. Sec. 1, Ch. 445, L. 1989; amd. Sec. 18, Ch. 482, L. 1995.**

46-23-412. Repealed. Sec. 15, Ch. 322, L. 1997.

History: **En. Sec. 5, Ch. 288, L. 1969; amd. Sec. 5, Ch. 496, L. 1975; R.C.M. 1947, 95-2221(1), (5); amd. Sec. 4, Ch. 583, L. 1981.**

46-23-413 through 46-23-415. Repealed. Sec. 13, Ch. 583, L. 1981.

Compiler's Comments

Histories of Repealed Sections:

46-23-413. En. Sec. 5, Ch. 288, L. 1969; amd. Sec. 5, Ch. 496, L. 1975; R.C.M. 1947, 95-2221(7).

46-23-414. En. Sec. 5, Ch. 288, L. 1969; amd. Sec. 5, Ch. 496, L. 1975; R.C.M. 1947, 95-2221(2) thru (4), (6).

46-23-415. En. Sec. 6, Ch. 288, L. 1969; amd. Sec. 6, Ch. 496, L. 1975; R.C.M. 1947, 95-2222.

46-23-416 through 46-23-420 reserved.

46-23-421. Repealed. Sec. 15, Ch. 322, L. 1997.

History: En. 95-2226.1 by Sec. 9, Ch. 496, L. 1975; R.C.M. 1947, 95-2226.1(1); amd. Sec. 5, Ch. 583, L. 1981.

46-23-422. Repealed. Sec. 15, Ch. 322, L. 1997.

History: En. 95-2226.1 by Sec. 9, Ch. 496, L. 1975; R.C.M. 1947, 95-2226.1(2); amd. Sec. 4, Ch. 635, L. 1979; amd. Sec. 2, Ch. 328, L. 1981; amd. Sec. 6, Ch. 583, L. 1981.

46-23-423 through 46-23-425. Repealed. Sec. 13, Ch. 583, L. 1981.

Compiler's Comments

Histories of Repealed Sections:

46-23-423. En. 95-2226.1 by Sec. 9, Ch. 496, L. 1975; R.C.M. 1947, 95-2226.1(3).

46-23-424. En. 95-2226.1 by Sec. 9, Ch. 496, L. 1975; R.C.M. 1947, 95-2226.1(4).

46-23-425. En. 95-2226.1 by Sec. 9, Ch. 496, L. 1975; R.C.M. 1947, 95-2226.1(5); amd. Sec. 5, Ch. 635, L. 1979.

46-23-426. Repealed. Sec. 15, Ch. 322, L. 1997.

History: En. 95-2226.1 by Sec. 9, Ch. 496, L. 1975; R.C.M. 1947, 95-2226.1(6); amd. Sec. 7, Ch. 583, L. 1981; amd. Sec. 9, Ch. 372, L. 1995.

Part 5

Registration of Sexual and Violent Offenders

Part Cross-References

Confidential criminal justice information and public criminal justice information — definitions, 44-5-103.

Dissemination of public criminal justice information, 44-5-301.

Additional restrictions on sentence, 46-18-202.

Employment restrictions — sexual or violent offenders, 46-18-255.

46-23-501. Short title. Section 46-18-255 and this part may be cited as the "Sexual or Violent Offender Registration Act".

History: En. Sec. 1, Ch. 293, L. 1989; amd. Sec. 4, Ch. 407, L. 1995; amd. Sec. 4, Ch. 375, L. 1997.

46-23-502. Definitions. As used in 46-18-255 and this part, the following definitions apply:

(1) "Department" means the department of corrections provided for in 2-15-2301.

(2) "Mental abnormality" means a congenital or acquired condition that affects the mental, emotional, or volitional capacity of a person in a manner that predisposes the person to the commission of one or more sexual offenses to a degree that makes the person a menace to the health and safety of other persons.

(3) "Personality disorder" means a personality disorder as defined in the fourth edition of the Diagnostic and Statistical Manual of Mental Disorders adopted by the American psychiatric association.

(4) "Predatory sexual offense" means a sexual offense committed against a stranger or against a person with whom a relationship has been established or furthered for the primary purpose of victimization.

(5) "Sexual offender evaluator" means a person qualified under rules established by the department to conduct sexual offender and sexually violent predator evaluations.

(6) "Sexual offense" means:

(a) any violation of or attempt, solicitation, or conspiracy to commit a violation of 45-5-502(3), 45-5-503, 45-5-504(1) (if the victim is under 18 years of age and the offender is 18 years of age or older), 45-5-504(2)(c), 45-5-507 (if the victim is under 18 years of age and the offender is 3 or more years older than the victim), or 45-5-625; or

(b) any violation of a law of another state or the federal government reasonably equivalent to a violation listed in subsection (6)(a).

(7) "Sexual or violent offender" means a person who has been convicted of a sexual or violent offense.

(8) "Sexually violent predator" means a person who has been convicted of a sexual offense and who suffers from a mental abnormality or a personality disorder that makes the person likely to engage in predatory sexual offenses.

(9) "Violent offense" means:

(a) any violation of or attempt, solicitation, or conspiracy to commit a violation of 45-5-102, 45-5-103, 45-5-202, 45-5-206 (third or subsequent offense), 45-5-210(1)(b), (1)(c), or (1)(d), 45-5-212, 45-5-213, 45-5-301 (if the victim is less than 18 years of age and the offender is not a parent of the victim), 45-5-302, 45-5-303, 45-5-401, 45-5-603(1)(b), or 45-6-103; or

(b) any violation of a law of another state or the federal government reasonably equivalent to a violation listed in subsection (9)(a).

History: En. Sec. 2, Ch. 293, L. 1989; amd. Sec. 1, Ch. 262, L. 1991; amd. Sec. 5, Ch. 407, L. 1995; amd. Sec. 231, Ch. 546, L. 1995; amd. Secs. 7, 12, Ch. 550, L. 1995; amd. Sec. 5, Ch. 375, L. 1997; amd. Sec. 1, Ch. 227, L. 1999; amd. Sec. 19, Ch. 432, L. 1999.

Compiler's Comments

1999 Amendments — Composite Section: Chapter 227 in definition of sexual offense in (a) after "45-5-503" inserted "45-5-504(1) (if the victim is under 18 years of age and the offender is 18 years of age or older)" and after "45-5-507" substituted "(if the victim is under 18 years of age and the offender is 3 or more years older than the victim)" for "(unless the act occurred between two consenting persons 16 years of age or older)"; in definition of violent offense in (a) inserted reference to 45-5-210(1)(b), (1)(c), or (1)(d); and made minor changes in style. Amendment effective October 1, 1999.

Chapter 432 in definition of violent offense inserted "45-5-212, 45-5-213". Amendment effective October 1, 1999.

46-23-503. Release of sexual or violent offender from place of confinement — duties of official in charge. (1) A sexual or violent offender who is released from the custody of the department of corrections must be informed in writing not less than 10 days prior to release of the duty to register under this part by the official in charge of the place of confinement.

(2) Prior to the offender's release from custody, the official shall obtain and give to the department of justice and to the sheriff of the county in which the offender intends to reside or, if the offender intends to reside in a municipality, to the chief of police of the municipality:

(a) the address at which the offender intends to reside upon release from the department's custody;

(b) the offender's fingerprints and photo, unless they are already in the possession of the department of justice, sheriff, or chief of police; and

(c) a form signed by and read to or by the offender stating that the offender's duty to register under this part has been explained to the offender.

History: En. Sec. 4, Ch. 293, L. 1989; amd. Sec. 1, Ch. 262, L. 1991; amd. Sec. 6, Ch. 407, L. 1995; amd. Sec. 232, Ch. 546, L. 1995; amd. Sec. 6, Ch. 375, L. 1997.

46-23-504. Persons required to register — procedure. (1) A sexual or violent offender:

(a) shall register immediately upon conclusion of the sentencing hearing if the offender is not sentenced to confinement or is not sentenced to the department and placed in confinement by the department;

(b) must be registered as provided in 46-23-503 at least 10 days prior to release from confinement if sentenced to confinement or sentenced to the department and placed in confinement by the department;

(c) shall register within 10 days of entering a county of this state for the purpose of residing or setting up a temporary domicile for 10 days or more if the offender was sentenced in another state.

(2) Registration under subsection (1)(a) must be with the probation office having supervision over the offender. Registration under subsection (1)(c) must be with the chief of police of the municipality or the sheriff of the county if the offender resides in an area other than a municipality. Whichever person an offender registers with under subsection (1)(c) shall notify the other person of the registration.

(3) At the time of registering, the offender shall sign a statement in writing giving the information required by the department of justice. The chief of police or sheriff shall fingerprint the offender, unless the offender's fingerprints are on file with the department of justice, and shall photograph the offender. Within 3 days, the chief of police or sheriff shall send copies of the statement, fingerprints, and photographs to the department of justice.

(4) The department of justice shall mail a registration verification form each 90 days to an offender designated as a level 3 offender under 46-23-509 and each year to a violent offender or an offender designated as a level 1 or level 2 offender under 46-23-509. The form must require the offender's current address and notarized signature. Within 10 days after receipt of the form, the offender shall complete the form and return it to the department.

(5) The offender is responsible, if able to pay, for costs associated with registration. The fees charged for registration may not exceed the actual costs of registration. The department of justice may adopt a rule establishing fees to cover registration costs incurred by the department of justice in maintaining registration and address verification records. The fees must be deposited in the general fund.

(6) The clerk of the district court in the county in which a person is convicted of a sexual or violent offense shall notify the sheriff in that county of the conviction within 10 days after entry of the judgment.

History: En. Sec. 5, Ch. 293, L. 1989; amd. Sec. 7, Ch. 407, L. 1995; amd. Sec. 7, Ch. 375, L. 1997.

46-23-505. Notice of change of address — duty to inform — forwarding of information. If an offender required to register under this part changes residence, the offender shall within 10 days of the change give written notification of the new address to the agency with whom the offender last registered. The agency shall, within 3 days after receipt of the new address, forward it to the department of justice, which shall forward a copy of the new address and photograph to the sheriff having jurisdiction over the new place of residence and to the chief of police of the municipality of the new place of residence if the new place of residence is in a municipality.

History: En. Sec. 6, Ch. 293, L. 1989; amd. Sec. 8, Ch. 407, L. 1995; amd. Sec. 8, Ch. 375, L. 1997.

46-23-506. Duration of registration. (1) A sexual offender required to register under this part shall register for the remainder of the offender's life, except as provided in subsection (3) or during a period of time during which the offender is in prison.

(2) A violent offender required to register under this part shall register:

(a) for the 10 years following release from confinement or, if not confined following sentencing, for the 10 years following the conclusion of the sentencing hearing; or

(b) if convicted during the 10-year period provided in subsection (2)(a) of failing to register or keep registration current or of a felony, for the remainder of the offender's life unless relieved of the duty to register as provided in subsection (3).

(3) Except as provided in subsection (5), at any time after 10 years of registration, the offender may petition the sentencing court or the district court for the judicial district in which the offender resides for an order relieving the offender of the duty to register. The petition must be served on the county attorney in the county where the petition is filed. Prior to a hearing on the petition, the county attorney shall mail a copy of the petition to the victim of the last offense for which the offender was convicted if the victim's address is reasonably available. The court shall consider any written or oral statements of the victim. The court may grant the petition upon finding that:

(a) the offender has remained a law-abiding citizen; and

(b) continued registration is not necessary for public protection and that relief from registration is in the best interests of society.

(4) The offender may move that all or part of the proceedings in a hearing under subsection (3) be closed to the public, or the judge may close them on the judge's own motion. If a proceeding is closed to the public, the judge shall permit a victim of the offense to be present unless the judge determines that exclusion of the victim is necessary to protect the offender's right of privacy or the safety of the victim. If the victim is present, the judge, at the victim's request, shall permit the presence of an individual to provide support to the victim unless the judge determines that exclusion of the individual is necessary to protect the offender's right to privacy.

(5) Subsection (3) does not apply to an offender who was convicted of:

(a) 45-5-503 if the victim was compelled to submit by force, as defined in 45-5-501, against the victim or another;

(b) 45-5-507 if at the time the offense occurred the victim was under 12 years of age and the offender was 3 or more years older than the victim;

(c) a second or subsequent sexual offense that requires registration; or

(d) a sexual offense and was designated as a sexually violent predator under 46-23-509.

History: En. Sec. 7, Ch. 293, L. 1989; amd. Sec. 9, Ch. 407, L. 1995; amd. Sec. 8, Ch. 550, L. 1995; amd. Sec. 9, Ch. 375, L. 1997; amd. Sec. 2, Ch. 227, L. 1999.

Compiler's Comments

1999 Amendment: Chapter 227 at beginning of (3) inserted exception clause; in (3)(b) deleted former second sentence that read: "If the offender was designated as a sexually violent predator under 46-23-509, the court is also required to find that the offender no longer suffers from a mental abnormality or personality disorder that makes the offender likely to engage in a predatory sexual offense";

inserted (5) outlining certain convicted sexual offenders who may not petition, after 10 years of registration, for an order relieving offender from duty to register; and made minor changes in style. Amendment effective October 1, 1999.

46-23-507. Penalty. A sexual or violent offender who knowingly fails to register, verify registration, or keep registration current under this part may be sentenced to a term of imprisonment of not more than 5 years or may be fined not more than $10,000, or both.

History: En. Sec. 8, Ch. 293, L. 1989; amd. Sec. 10, Ch. 407, L. 1995; amd. Sec. 9, Ch. 550, L. 1995; amd. Sec. 10, Ch. 375, L. 1997.

46-23-508. Dissemination of information. (1) Information maintained under this part is confidential criminal justice information, as defined in 44-5-103, except that:

(a) the name and address of a registered sexual or violent offender are public criminal justice information, as defined in 44-5-103; and

(b) a law enforcement agency shall release any offender registration information relevant to the public if the agency determines that a registered offender is a risk to the safety of the community and that disclosure of the registration information may protect the public and, at a minimum:

(i) if an offender was given a level 1 designation under 46-23-509, the agency with which the offender is registered shall notify the agency in whose jurisdiction the offense occurred of the registration;

(ii) if an offender was given a level 2 designation under 46-23-509, the agency with which the offender is registered may disseminate the offender's name to the public with the notation that the offender is a sexual or violent offender and may notify a victim of the offense and any agency, organization, or group serving persons who have characteristics similar to those of a previous victim of the offender of:

(A) the offender's address;

(B) the type of victim targeted by the offense;

(C) the name, photograph, and physical description of the offender;

(D) the offenses for which the offender is required to register under this part; and

(E) any conditions imposed by the court upon the offender for the safety of the public; and

(iii) if an offender was given a level 3 designation under 46-23-509, the agency shall give the victim and the public notification that includes the information contained in subsection (1)(b)(ii). The agency shall also include the date of the offender's release from confinement or if not confined, the date the offender was sentenced, with a notation that the offender was not confined, and shall include the community in which the offense occurred.

(c) Prior to release of information under subsection (1)(b), a law enforcement agency may, in its sole discretion, request an in camera review by a district court of the determination by the law enforcement agency under subsection (1)(b). The court shall review a request under this subsection (1)(c) and shall, as soon as possible, render its opinion so that release of the information is not delayed beyond release of the offender from confinement.

(2) The identity of a victim of an offense for which registration is required under this part may not be released by a law enforcement agency without the permission of the victim.

History: **En. Sec. 11, Ch. 407, L. 1995; En. Sec. 10, Ch. 550, L. 1995; amd. Sec. 11, Ch. 375, L. 1997; amd. Sec. 1, Ch. 219, L. 1999.**

Compiler's Comments

1999 Amendment: Chapter 219 in (1)(a) after "name" inserted "and address"; in (1)(b)(ii)(A) substituted "the offender's address" for "the offender's approximate, but not exact, address, such as by stating the neighborhood, town, or part of a county"; in (1)(b)(iii) at end of first sentence deleted "except that the offender's exact address must be included"; and made minor changes in style. Amendment effective October 1, 1999.

46-23-509. Sexual offender evaluations and designations — rulemaking authority. (1) The department shall adopt rules for the qualification of sexual offender evaluators who conduct sexual offender and sexually violent predator evaluations and for determinations by sexual offender evaluators of the risk of a repeat offense and the threat that an offender poses to the public safety.

(2) Prior to sentencing of a person convicted of a sexual offense, the department or a sexual offender evaluator shall provide the court with a sexual offender evaluation report recommending one of the following levels of designation for the offender:

(a) level 1, the risk of a repeat sexual offense is low;

(b) level 2, the risk of a repeat sexual offense is moderate;

(c) level 3, the risk of a repeat sexual offense is high, there is a threat to public safety, and the sexual offender evaluator believes that the offender is a sexually violent predator.

(3) Upon sentencing the offender, the court shall:

(a) review the sexual offender evaluation report, any statement by a victim, and any statement by the offender;

(b) designate the offender as level 1, 2, or 3; and

(c) designate a level 3 offender as a sexually violent predator.

(4) An offender designated as a level 2 or level 3 offender may petition the sentencing court to change the offender's designation if the offender has enrolled in and successfully completed the treatment phase of either the prison's sexual offender program or of an equivalent program approved by the department. After considering the petition, the court may change the offender's risk level designation if the court finds by clear and convincing evidence that the offender's risk of committing a repeat sexual offense has changed since the time sentence was imposed. The court shall impose one of the three risk levels specified in this section.

(5) If, at the time of sentencing, the sentencing judge did not apply a level designation to a sexual offender who is required to register under this part, the department shall designate the offender as level 1, 2, or 3 when the offender is released from confinement.

History: **En. Sec. 12, Ch. 375, L. 1997; amd. Sec. 2, Ch. 358, L. 1999.**

Compiler's Comments

1999 Amendment: Chapter 358 inserted (5) requiring the department to apply a level designation when the offender is released if the sentencing court did not apply a level designation at the time of sentencing; and made minor changes in style. Amendment effective October 1, 1999.

46-23-510. Expungement of records on reversal of conviction. Upon final reversal of a conviction of a sexual or violent offense, the sentencing court shall order the expungement of any records kept by a court, law enforcement agency, or other state or local government agency under this part.

History: **En. Sec. 13, Ch. 375, L. 1997.**

46-23-511. Immunity from suit. A state or local governmental entity, a private entity, or an officer or employee of an entity is not liable in negligence, except gross negligence or willful or wanton misconduct, for damages arising from a good faith discretionary release or dissemination of or good faith failure to release or disseminate information under this part.

History: **En. Sec. 14, Ch. 375, L. 1997.**

46-23-512. Plea agreement agreeing to compliance with this part. A defendant convicted of an offense that would otherwise not be subject to registration under this part may agree to comply with the registration requirements of this part as part of a plea agreement, and a court accepting the plea agreement may order the defendant to comply with this part.

History: **En. Sec. 1, Ch. 358, L. 1999.**

Compiler's Comments

Effective Date: This section is effective October 1, 1999.

Parts 6 through 9 reserved

Part 10

Supervision of Probationers and Parolees

46-23-1001. Definitions. As used in this part, unless the context requires otherwise, the following definitions apply:

(1) "Board" means the board of pardons and parole provided for in 2-15-2302.

(2) "Department" means the department of corrections provided for in 2-15-2301.

(3) "Parole" means the release to the community of a prisoner by the decision of the board prior to the expiration of the prisoner's term, subject to conditions imposed by the board and subject to supervision of the department.

(4) "Probation" means the release by the court without imprisonment, except as otherwise provided by law, of a defendant found guilty of a crime upon verdict or plea, subject to conditions imposed by the court and subject to the supervision of the department upon direction of the court.

History: **En. 95-3301 by Sec. 7, Ch. 333, L. 1975; R.C.M. 1947, 95-3301; amd. Sec. 1, Ch. 262, L. 1991; amd. Sec. 233, Ch. 546, L. 1995.**

46-23-1002. Powers of the department. The department may:

(1) appoint probation and parole officers and other employees necessary to administer this part;

(2) authorize probation and parole officers to carry firearms, including concealed firearms, when necessary. The department shall adopt rules establishing firearms training requirements and procedures for authorizing the carrying of firearms.

(3) adopt rules for the conduct of persons placed on parole or probation, except that the department may not make any rule conflicting with conditions of parole imposed by the board or conditions of probation imposed by a court.

History: En. 95-3302 by Sec. 8, Ch. 333, L. 1975; R.C.M. 1947, 95-3302; amd. Sec. 1, Ch. 639, L. 1989.

46-23-1003. Qualifications of probation and parole officers. (1) Probation and parole officers shall have at least a college degree and some formal training in behavioral sciences. Exceptions to this rule must be approved by the department. Related work experience in the areas listed in 2-15-2302(2) may be substituted for educational requirements at the rate of 1 year of experience for 9 months formal education if approved by the department. All present employees will be exempt from this requirement but are encouraged to further their education at the earliest opportunity.

(2) Each probation and parole officer must, through a source approved by his employer, obtain 16 hours a year of training in subjects relating to the powers and duties of probation officers. In addition, each probation and parole officer must receive training in accordance with standards adopted by the board of crime control, as provided in 44-4-301. The training must be at the Montana law enforcement academy unless the board finds that training at some other place is more appropriate.

History: En. 95-3302.1 by Sec. 4, Ch. 333, L. 1975; R.C.M. 1947, 95-3302.1; amd. Sec. 2, Ch. 544, L. 1987; amd. Sec. 2, Ch. 809, L. 1991.

46-23-1004. Duties of department. The department is responsible for any investigation and supervision requested by the board or the courts. The department shall:

(1) divide the state into districts and assign probation and parole officers to serve in these districts and courts;

(2) obtain any necessary office quarters for the staff in each district;

(3) assign the secretarial, bookkeeping, and accounting work to the clerical employees, including receipt and disbursement of money;

(4) direct the work of the probation and parole officers and other employees;

(5) formulate methods of investigation, supervision, recordkeeping, and reports;

(6) conduct training courses for the staff;

(7) cooperate with all agencies, public and private, that are concerned with the treatment or welfare of persons on probation or parole;

(8) administer the interstate compact for the supervision of parolees and probationers; and

(9) notify the employer of a probationer or parolee if the probationer or parolee has been convicted of an offense involving theft from an employer.

History: En. Sec. 8, Ch. 153, L. 1955; Sec. 94-9828, R.C.M. 1947; redes. 95-3210 by Sec. 29, Ch. 513, L. 1973; amd. Sec. 85, Ch. 120, L. 1974; Sec. 95-3210, R.C.M. 1947; amd. and redes. 95-3303 by Sec. 9, Ch. 333, L. 1975; R.C.M. 1947, 95-3303; amd. Sec. 1, Ch. 499, L. 1995.

Cross-References

Interstate supervision of probation and parole, Title 46, ch. 23, part 11.

46-23-1005. Misdemeanor probation offices — officers — costs. (1) A local government may establish a misdemeanor probation office associated with a justice's court, municipal court, or city court. The misdemeanor probation office shall monitor offenders for misdemeanor sentence compliance and restitution payments. An offender is considered a fugitive under the conditions provided in 46-23-1014.

(2) A local government may appoint misdemeanor probation officers and other employees necessary to administer this section. Misdemeanor probation officers:

(a) must have the minimum training required in 46-23-1003;

(b) shall follow the supervision guidelines required in 46-23-1011; and

(c) may order the arrest of an offender as provided in 46-23-1012.

(3) An offender who is convicted of the offense of partner or family member assault under 45-5-206 or of a violation of an order of protection under 45-5-626 and who is ordered to be supervised by misdemeanor probation must be ordered to pay for the cost of the misdemeanor probation. The actual cost of probation supervision over the offender's sentence must be paid by the offender unless the offender can show that the offender is unable to pay those costs. The costs of misdemeanor probation are in addition to any other fines, restitution, or counseling ordered.

History: En. Sec. 18, Ch. 350, L. 1995.

Cross-References

Partner and family member assault, sexual assault, and stalking — safety and protection of victims, Title 40, ch. 15.

46-23-1006 through 46-23-1010 reserved.

46-23-1011. Supervision on probation. (1) The department shall supervise offenders during their probation period in accord with the conditions set by a sentencing judge.

(2) A copy of the conditions of probation must be signed by the probationer and given to the probationer and the probationer's probation and parole officer, who shall report on the probationer's progress under rules of the sentencing judge. Any probation agreement signed by the probationer may contain a clause waiving extradition.

(3) The probation and parole officer shall regularly advise and consult with the probationer to encourage the probationer to improve the probationer's condition and conduct and shall inform the probationer of the restoration of rights on successful completion of the sentence.

(4) The probation and parole officer may recommend and a judge may modify any condition of probation or suspension of sentence at any time. Notice must be given to the probation and parole officer before any condition is modified, and the officer must be given an opportunity to present the officer's ideas or recommendations on any modification. A copy of a modification of conditions must be delivered to the probation and parole officer and the probationer. Waiver or modification of restitution may be ordered only as provided under the provisions of 46-18-246.

(5) The probation and parole officer shall keep records as the department or the sentencing judge may require.

(6) (a) Upon recommendation of the probation and parole officer, a judge may conditionally discharge a probationer from supervision before expiration of the probationer's sentence if:

(i) the judge determines that a conditional discharge from supervision:

(A) is in the best interests of the probationer and society; and

(B) will not present unreasonable risk of danger to the victim of the offense; and

(ii) the offender has paid all restitution and court-ordered financial obligations in full.

(b) Subsection (6)(a) does not prohibit a judge from revoking the order suspending execution or deferring imposition of sentence, as provided in 46-18-203, for a probationer who has been conditionally discharged from supervision.

(c) If the department certifies to the sentencing judge that the workload of a district probation and parole office has exceeded the optimum workload for the district over the preceding 60 days, the judge may not place an offender on probation under supervision by that district office unless the judge grants a conditional discharge to a probationer being supervised by that district office. The department may recommend probationers to the judge for conditional discharge. The judge may accept or reject the recommendations of the department. The department shall determine the optimum workload for each district probation and parole office.

History: En. 95-3304 by Sec. 10, Ch. 333, L. 1975; R.C.M. 1947, 95-3304; amd. Sec. 1, Ch. 195, L. 1989; amd. Sec. 5, Ch. 579, L. 1993; amd. Sec. 26, Ch. 125, L. 1995; amd. Sec. 13, Ch. 52, L. 1999; amd. Sec. 2, Ch. 505, L. 1999.

Compiler's Comments

1999 Amendments — Composite Section: Chapter 52 throughout section substituted references to sentencing judge for references to court; in (1) substituted "offenders" for "persons"; in (2) inserted second sentence allowing a clause waiving extradition in a probation agreement; and made minor changes in style. Amendment effective October 1, 1999.

Chapter 505 inserted (6)(a)(ii) authorizing court to conditionally discharge probationer from supervision before expiration of sentence if offender has paid restitution and court-ordered financial obligations; and made minor changes in style. Amendment effective April 28, 1999.

Applicability: Section 13(2), Ch. 505, L. 1999, provided: "[Section 2] [46-23-1011] applies to all persons under probation or parole supervision on or after [the effective date of this act]." Effective April 28, 1999.

46-23-1012. Arrest when violations of probation alleged — probation compliance plan — probation violator prison diversion program. (1) At any time during probation or suspension of sentence, a court may issue a warrant for the arrest of the defendant for violation of any of the conditions of release or a notice to appear to answer to a charge of violation. The notice must be personally served upon the defendant. The warrant must authorize all officers named in the warrant to return the defendant to the custody of the court or to any suitable detention facility designated by the court.

(2) Any probation and parole officer may arrest the defendant without a warrant or may deputize any other officer with power of arrest to do so by giving the officer oral authorization and within 12 hours delivering to the place of detention a written statement setting forth that the defendant has, in the judgment of the probation and parole officer, violated the conditions of the defendant's release. A written statement or oral authorization delivered with the defendant by the arresting officer to the official in charge of a county detention center or other place of detention is sufficient warrant for the detention of the defendant if the probation and parole officer delivers the written statement within 12 hours of the defendant's arrest. The probation and

parole officer, after making an arrest, shall present to the detaining authorities a similar statement of the circumstances of violation.

(3) Provisions regarding release on bail of a person charged with a crime are applicable to the defendants arrested under these provisions.

(4) Any probation and parole officer may hold a defendant arrested under subsection (1) without bail for 72 hours. After the arrest of the defendant pursuant to this subsection, a hearings officer for the probation and parole bureau shall hold a hearing within 36 hours of the defendant's arrest. The hearings officer shall determine whether there is probable cause to believe that the defendant has violated a condition of probation and, if probable cause exists, notify the sentencing court and determine an appropriate plan to ensure the defendant's compliance with the conditions of probation. An appropriate plan may include:

(a) holding the defendant for a period of time up to 30 days, with credit for any time served from the time of the arrest to the time of the hearing to determine probable cause;

(b) a request to the court pursuant to 46-23-1011 to modify the defendant's terms or conditions of probation; or

(c) a notification to the court with jurisdiction over the defendant pursuant to 46-23-1013.

(5) The department shall adopt policies and procedures to implement a probation violator prison diversion program. If the department is able to sufficiently sanction a defendant with a term in a detention center as provided in subsection (4)(a) for a proven technical violation that could result in the revocation of a suspended or deferred sentence, the department may pay the expense of the detention center costs and pursue payment of costs by the defendant as provided in 7-32-2245. If the action plan developed for the defendant proceeds as provided in subsection (4)(b) or (4)(c), the expenses of the detention must be paid as provided in 7-32-2242.

History: En. Sec. 11, Ch. 153, L. 1955; Sec. 94-9831, R.C.M. 1947; redes. 95-3213 by Sec. 29, Ch. 513, L. 1973; Sec. 95-3213, R.C.M. 1947; redes. 95-3305 by Sec. 15, Ch. 333, L. 1975; R.C.M. 1947, 95-3305(part); amd. Sec. 3, Ch. 505, L. 1999.

Compiler's Comments

1999 Amendment: Chapter 505 in first sentence in (2) after "giving" inserted "the officer oral authorization and within 12 hours delivering to the place of detention" and in second sentence after "statement" inserted "or oral authorization", after "county" substituted "detention center" for "jail", and after "defendant" inserted "if the probation and parole officer delivers the written statement within 12 hours of the defendant's arrest"; inserted (4) authorizing probation and parole officer to hold arrested defendant without bail for 72 hours, providing for hearing, notification, and determination of appropriate plan, and outlining contents of appropriate plan; inserted (5) requiring department to adopt policies and procedures for probation violation prison diversion program and authorizing payment of detention center expenses; and made minor changes in style. Amendment effective April 28, 1999.

46-23-1013. Action of court after arrest. (1) Upon such arrest and detention, the probation and parole officer shall immediately notify the court with jurisdiction over such prisoner and shall submit in writing a report showing in what manner the defendant has violated the conditions of release. Thereupon, or upon an arrest by warrant as herein provided, the court shall cause the defendant to be brought before it without unnecessary delay for a hearing on the violation charged. The hearing may be informal or summary.

(2) If the violation is established, the court may continue to revoke the probation or suspension of sentence and may require him to serve the sentence imposed or any lesser sentence and, if imposition of sentence was suspended, may impose any sentence which might originally have been imposed.

(3) If it shall appear that he has violated the provisions of his release, whether the time from the issuing of such warrant to the date of his arrest or any part of it shall be counted as time served on probation or suspended sentence shall be determined by the court.

History: En. Sec. 11, Ch. 153, L. 1955; Sec. 94-9831, R.C.M. 1947; redes. 95-3213 by Sec. 29, Ch. 513, L. 1973; Sec. 95-3213, R.C.M. 1947; redes. 95-3305 by Sec. 15, Ch. 333, L. 1975; R.C.M. 1947, 95-3305(part).

46-23-1014. When probationer considered a fugitive. A probationer or defendant under suspension of sentence for whose return a warrant has been issued by the court shall after the issuance of the warrant, if it is found that such warrant cannot be served, be deemed a fugitive from or to have fled from justice.

History: En. Sec. 11, Ch. 153, L. 1955; Sec. 94-9831, R.C.M. 1947; redes. 95-3213 by Sec. 29, Ch. 513, L. 1973; Sec. 95-3213, R.C.M. 1947; redes. 95-3305 by Sec. 15, Ch. 333, L. 1975; R.C.M. 1947, 95-3305(part).

46-23-1015 through 46-23-1020 reserved.

46-23-1021. Supervision on parole. (1) The department shall retain custody of all persons placed on parole and shall supervise the persons during their parole periods in accordance with the conditions set by the board.

(2) The department shall assign personnel to assist a person who is eligible for parole in preparing a parole plan. Department personnel shall make a report of their efforts and findings to the board prior to its consideration of the case of the eligible person.

(3) A copy of the conditions of parole must be signed by the parolee and given to the parolee and to the parolee's probation and parole officer, who shall report on the parolee's progress under the rules of the board.

(4) The probation and parole officer shall regularly advise and consult with the parolee, assist the parolee in adjusting to community life, and inform the parolee of the restoration of rights on successful completion of the sentence.

(5) The probation and parole officer shall keep records as the board or department may require. All records must be entered in the master file of the individual.

(6) (a) Upon recommendation of the probation and parole officer, the board may conditionally discharge a parolee from supervision before expiration of the parolee's sentence if the board determines that a conditional discharge from supervision is in the best interests of the parolee and society and will not present unreasonable risk of danger to the victim of the offense.

(b) Subsection (6)(a) does not prohibit the board from revoking the parole, as provided in 46-23-1025, of a parolee who has been conditionally discharged from supervision.

(c) If the department certifies to the board that the workload of a district probation and parole office has exceeded the optimum workload for the district over the preceding 60 days, the board may not parole a prisoner to that district office unless it grants a conditional discharge to a parolee being supervised by that district office. The department may recommend parolees to the board for conditional discharge. The board may accept or reject the recommendations of the department. The department shall determine the optimum workload for each district probation and parole office.

History: **En. 95-3306 by Sec. 11, Ch. 333, L. 1975; amd. Sec. 62, Ch. 184, L. 1977; R.C.M. 1947, 95-3306; amd. Sec. 2, Ch. 195, L. 1989; amd. Sec. 6, Ch. 579, L. 1993; amd. Sec. 27, Ch. 125, L. 1995.**

46-23-1022. Parole services. (1) To assist parolees the department may, in addition to other services, provide the following:

(a) employment counseling, job placement, and assistance in residential placement;

(b) family and individual counseling and treatment placement;

(c) financial counseling;

(d) vocational and educational counseling and placement; and

(e) referral services to any other state or local agencies.

(2) The department may purchase necessary services for a parolee if they are otherwise unavailable and the parolee is unable to pay for them. It may assess all or part of the costs of such services to a parolee in accordance with his ability to pay for them.

History: **En. 95-3307 by Sec. 12, Ch. 333, L. 1975; R.C.M. 1947, 95-3307.**

46-23-1023. Arrest of alleged parole violator. (1) At any time during release on parole or conditional release, the department may issue a warrant for the arrest of the parolee for violation of any of the conditions of release or a notice to appear to answer to a charge of violation. The notice must be served personally upon the parolee. The warrant must authorize all officers named in the warrant to return the parolee to the actual custody of the penal institution from which the parolee was released or to any other suitable detention facility designated by the department.

(2) Any probation and parole officer may arrest the parolee without a warrant or may deputize any other officer with power to arrest to do so by giving the officer oral authorization and within 12 hours delivering to the place of detention a written statement setting forth that the parolee has, in the judgment of the probation and parole officer, violated the conditions of the parolee's release. A written statement or oral authorization delivered with the parolee by the arresting officer to the official in charge of the institution from which the parolee was released or other place of detention is sufficient warrant for the detention of the parolee or conditional releasee if the probation and parole officer delivers a written statement within 12 hours of the arrest. The probation and parole officer, after making an arrest, shall present to the detaining authorities a similar statement of the circumstances of violation.

(3) Pending a hearing, as provided in 46-23-1024 and 46-23-1025, upon any charge of violation the parolee may, if circumstances warrant, be incarcerated in the institution.

History: **En. Sec. 18, Ch. 153, L. 1955; Sec. 94-9838, R.C.M. 1947; amd. Sec. 1, Ch. 140, L. 1973; redes. 95-3220 by Sec. 29, Ch. 513, L. 1973; Sec. 95-3220, R.C.M. 1947; amd. and redes. 95-3308 by Sec. 13, Ch. 333, L. 1975; amd. Sec. 63, Ch. 184, L. 1977; R.C.M. 1947, 95-3308(1); amd. Sec. 5, Ch. 505, L. 1999.**

Compiler's Comments

1999 Amendment: Chapter 505 throughout section substituted "parolee" for "prisoner"; in first sentence in (2) after "giving" inserted "the officer oral authorization and within 12 hours delivering to the place of detention" and in second sentence after "statement" inserted "or oral authorization" and after "releasee" inserted "if the probation and parole officer delivers a written statement within 12 hours of the arrest"; and made minor changes in style. Amendment effective April 28, 1999.

Cross-References

Duration of parole not to exceed maximum sentence — exception for fugitive, 46-23-216.

46-23-1024. Initial hearing after arrest. (1) After the arrest of the parolee, a hearing must be held within a reasonable time, unless:

(a) the hearing is waived by the parolee; or

(b) the parolee has been charged in any court with a violation of the law.

(2) The hearing is an onsite hearing and must be held to determine whether there is probable cause or reasonable grounds to believe that the arrested parolee has committed acts that would constitute a violation of parole conditions. An independent officer, who need not be a judicial officer, shall preside over the hearing. The hearing must be conducted at or reasonably near the place of the alleged parole violation or arrest and as promptly as convenient after arrest. The parolee must be given notice of the hearing and must be allowed to appear and speak in the parolee's own behalf and introduce relevant information to the hearings officer.

(3) The hearings officer shall make a summary of what transpires at the hearing in terms of the responses and position of the parolee and the substance of the documents or evidence given in support of parole revocation. Based on the information given to the hearings officer, the hearings officer shall determine whether there is probable cause to hold the parolee for the final decision of the board of pardons and parole as provided in 46-23-1025.

History: En. Sec. 18, Ch. 153, L. 1955; Sec. 94-9838, R.C.M. 1947; amd. Sec. 1, Ch. 140, L. 1973; redes. 95-3220 by Sec. 29, Ch. 513, L. 1973; Sec. 95-3220, R.C.M. 1947; amd. and redes. 95-3308 by Sec. 13, Ch. 333, L. 1975; amd. Sec. 63, Ch. 184, L. 1977; R.C.M. 1947, 95-3308(2); amd. Sec. 234, Ch. 546, L. 1995; amd. Sec. 6, Ch. 505, L. 1999.

Compiler's Comments

1999 Amendment: Chapter 505 in (1) substituted "parolee" for "prisoner"; inserted (1)(b) providing exception of hearing within reasonable time after arrest if parolee was charged in court with violation of law; at beginning of (2) inserted "The hearing is an onsite hearing and must be held"; and made minor changes in style. Amendment effective April 28, 1999.

46-23-1025. Report to and action by board. (1) If the hearings officer determines that there is probable cause to believe that the prisoner has violated a condition of parole, the probation and parole officer shall immediately notify the board and shall submit in writing a report showing in what manner the prisoner has violated the conditions of release. This report must be accompanied by the findings of the hearings officer.

(2) Upon receipt of a report, the board shall cause the prisoner to be promptly brought before it for a hearing on the violation charged under rules that the board may adopt. If the violation is established, the board may continue or revoke the parole or conditional release or may enter an order as it sees fit.

(3) If the prisoner has violated a condition of release requiring the payment of restitution, the board shall notify the victim of the offense prior to the hearing required by subsection (2) and give the victim an opportunity to be heard. If the board finds that due to circumstances beyond the prisoner's control, the prisoner is unable to make the required restitution payments, the board may not revoke the prisoner's parole for failure to pay restitution. The board may modify the time or method of making restitution and may extend

the restitution schedule, but the schedule may not be extended beyond the period of state supervision over the prisoner.

(4) If it appears that the prisoner has violated the provisions of release, the board shall determine whether the time from the issuing of the warrant to the date of the prisoner's arrest or any part of it will be counted as time served under the sentence.

History: En. Sec. 18, Ch. 153, L. 1955; Sec. 94-9838, R.C.M. 1947; amd. Sec. 1, Ch. 140, L. 1973; redes. 95-3220 by Sec. 29, Ch. 513, L. 1973; Sec. 95-3220, R.C.M. 1947; amd. and redes. 95-3308 by Sec. 13, Ch. 333, L. 1975; amd. Sec. 63, Ch. 184, L. 1977; R.C.M. 1947, 95-3308(3); amd. Sec. 28, Ch. 125, L. 1995.

46-23-1026. When prisoner considered a fugitive. A prisoner for whose return a warrant has been issued shall, after the issuance of the warrant, if it is found that the warrant cannot be served, be considered a fugitive or to have fled from justice.

History: En. Sec. 18, Ch. 153, L. 1955; Sec. 94-9838, R.C.M. 1947; amd. Sec. 1, Ch. 140, L. 1973; redes. 95-3220 by Sec. 29, Ch. 513, L. 1973; Sec. 95-3220, R.C.M. 1947; amd. and redes. 95-3308 by Sec. 13, Ch. 333, L. 1975; amd. Sec. 63, Ch. 184, L. 1977; R.C.M. 1947, 95-3308(4).

Cross-References

Duration of parole not to exceed maximum sentence — exception for fugitive, 46-23-216.

46-23-1027 through 46-23-1030 reserved.

46-23-1031. Supervisory fees — account established. (1) (a) Except as provided in subsection (1)(b), a probationer or parolee shall pay a supervisory fee of no less than $120 a year and no more than $360 a year, prorated at no less than $10 a month for the number of months under supervision. The fee must be collected by the clerk of the district court with jurisdiction during the probationer's or parolee's period of supervision under this part.

(b) The court or the board may reduce or waive the fee or suspend the monthly payment of the fee if it determines that the payment would cause the probationer or parolee a significant financial hardship.

(2) (a) There is an account in the state special revenue fund for the fees collected under the provisions of this section.

(b) District court clerks shall deduct from the total fees collected pursuant to subsection (1) the administrative cost of collecting and accounting for the fees and shall deposit the remaining amount into the state special revenue account established in subsection (2)(a).

History: En. Sec. 1, Ch. 577, L. 1993; amd. Sec. 7, Ch. 505, L. 1999.

Compiler's Comments

1999 Amendment: Chapter 505 in (1)(a) after "fee" substituted "of no less than $120 a year and no more than $360 a year" for "of $120 a year" and after "prorated at" inserted "no less than". Amendment effective April 28, 1999.

46-23-1032. Federal forfeiture funds — use. (1) Money forfeited under federal law and provided to the department of corrections may be deposited in an account in the federal special revenue fund.

(2) Money from federal forfeiture funds deposited in the account may be used for training probation and parole officers, for the purchase of equipment for probation and parole officers, or for other criminal justice purposes upon appropriation by the legislature.

History: En. Sec. 1, Ch. 219, L. 1995.

46-23-1033. Program evaluation — report to legislature. The department shall develop evaluation measures to determine and shall report to the 57th and 58th legislatures whether the probation violator prison diversion program:

(1) enhanced the department's ability to sanction probation violators and divert them from prison;

(2) demonstrated a decline in prison admissions for probation violators; and

(3) demonstrated policies and procedures of graduated sanctions that increased compliance with the conditions of probation and decreased technical violations among probation violators for whom the detention center sanction was used.

History: En. Sec. 4, Ch. 505, L. 1999.

Compiler's Comments

Effective Date: Section 12, Ch. 505, L. 1999, provided that this section is effective on passage and approval. Approved April 28, 1999.

Part 11

Interstate Supervision of Probation and Parole

Part Cross-References

Duties of Department of Corrections to administer interstate compact, 46-23-1004.

46-23-1101. Short title. This part may be cited as the "Uniform Act for Out-of-State Parolee Supervision".

History: En. Sec. 4, Ch. 189, L. 1937; Sec. 94-7902, R.C.M. 1947; redes. 95-3202 by Sec. 29, Ch. 513, L. 1973; R.C.M. 1947, 95-3202.

46-23-1102. Authority of governor to make interstate compact regarding probation and parole — terms. The governor of this state is hereby authorized and directed to enter into a compact on behalf of the state of Montana with any of the United States legally joining therein in the form substantially as follows:

A COMPACT. Entered into by and among the contracting states, signatories hereto, with the consent of the Congress of the United States of America, granted by an act entitled "An Act Granting the Consent of Congress to Any Two or More States to Enter into Agreements or Compacts for Cooperative Effort and Mutual Assistance in the Prevention of Crime and for Other Purposes."

The contracting states solemnly agree:

(1) that it shall be competent for the duly constituted judicial and administrative authorities of a state party to this compact (herein called "sending state") to permit any person convicted of an offense within such state and placed on probation or released on parole to reside in any other state party to this compact (herein called "receiving state") while on probation or parole, if:

(a) such person is in fact a resident of or has his family residing within the receiving state and can obtain employment there;

(b) though not a resident of the receiving state and not having his family residing there, the receiving state consents to such person being sent there.

Before granting such permission, opportunity shall be granted to the receiving state to investigate the home and prospective employment of such person.

A resident of the receiving state, within the meaning of this section, is one who has been an actual inhabitant of such state continuously for more than 1 year prior to his coming to the sending state and has not resided within the sending state more than 6 continuous months immediately preceding the commission of the offense for which he has been convicted.

(2) that each receiving state will assume the duties of visitation and of supervision over the probationers or parolees of any sending state and in the exercise of those duties will be governed by the same standards that prevail for its own probationers and parolees;

(3) that duly accredited officers of a sending state may at all times enter a receiving state and there apprehend and retake any person on probation or parole. For that purpose no formality will be required other than establishing the authority of the officer and the identity of the person to be retaken. All legal requirements to obtain extradition of fugitives from justice are hereby expressly waived on the part of states party hereto as to such persons. The decision of the sending state to retake a person on probation or parole shall be conclusive upon and not reviewable within the receiving state; provided, however, that if at the time when a state seeks to retake a probationer or parolee there should be pending against him within the receiving state any criminal charge or he should be suspected of having committed within such state a criminal offense, he shall not be retaken without the consent of the receiving state until discharged from prosecution or from imprisonment for such offense.

(4) that the duly accredited officers of the sending state will be permitted to transport prisoners being retaken through any and all states parties to this compact without interference;

(5) that the governor of each state may designate an officer who, acting jointly with like officers of other contracting states, if and when appointed, shall promulgate such rules and regulations as may be deemed necessary to more effectively carry out the terms of this compact;

(6) that this compact shall become operative immediately upon its ratification by any state as between it and any other state or states so ratifying. When ratified it shall have the full force and effect of law within such state, the form of ratification to be in accordance with the laws of the ratifying state.

(7) that this compact shall continue in force and remain binding upon each ratifying state until renounced by it. The duties and obligations hereunder of a renouncing state shall continue as to parolees or probationers residing therein at the time of withdrawal until retaken or finally discharged by the sending state. Renunciation of this compact shall be by the same authority which ratified it, by sending 6 months' notice in writing of its intention to withdraw from the compact to the other states party hereto.

History: En. Sec. 1, Ch. 189, L. 1937; Sec. 94-7901, R.C.M. 1947; redes. 95-3201 by Sec. 29, Ch. 513, L. 1973; R.C.M. 1947, 95-3201.

46-23-1103. Arranging for sending state to retake or reincarcerate violator. (1) Where supervision of a parolee or probationer is being administered pursuant to the interstate compact for the supervision of parolees and probationers, the appropriate judicial or administrative authorities in this state shall notify the compact administrator of the sending state whenever in their view consideration should be given to retaking or reincarceration for a parole or probation violation.

(2) Prior to the giving of any such notification, a hearing shall be held in accordance with this part within a reasonable time unless such hearing is waived by the parolee or probationer. Following termination of any such hearing, the appropriate officer or officers of this state shall, as soon as practicable, report to the sending state, furnish a copy of the hearing record, and make recommendations regarding the disposition to be made of the parolee or probationer by the sending state.

(3) Pending any proceeding pursuant to this section, the appropriate officers of this state may take custody of and detain the parolee or probationer involved for a period not to exceed 15 days prior to the hearing and for such reasonable period after the hearing or waiver as may be necessary to arrange for the retaking or reincarceration if it appears to the hearings officer or officers that retaking or reincarceration is likely to follow.

History: **En. Sec. 1, Ch. 75, L. 1973; R.C.M. 1947, 95-3202.1.**

46-23-1104. Hearings officers — who eligible. Any hearing pursuant to this part may be held before the administrator of the interstate compact for the supervision of parolees and probationers, a deputy of such administrator, or any other person authorized pursuant to the laws of this state to hear cases of alleged parole or probation violation, except that no hearings officer shall be the person making the allegation of violation.

History: **En. Sec. 2, Ch. 75, L. 1973; R.C.M. 1947, 95-3202.2.**

46-23-1105. Rights of parolee or probationer regarding hearing. With respect to any hearing pursuant to this part, the parolee or probationer:

(1) shall have reasonable notice in writing of the nature and content of the allegations to be made, including notice that its purpose is to determine whether there is probable cause to believe that he has committed a violation that may lead to a revocation of parole or probation;

(2) shall be permitted to consult with any persons whose assistance he reasonably desires prior to the hearing;

(3) shall have the right to confront and examine any persons who have made allegations against him unless the hearings officer determines that such confrontation would present a substantial present or subsequent danger of harm to such person or persons;

(4) may admit, deny, or explain the violation alleged and may present proof, including affidavits and other evidence, in support of his contentions. A record of the proceedings shall be made and preserved.

History: **En. Sec. 3, Ch. 75, L. 1973; R.C.M. 1947, 95-3202.3.**

46-23-1106. Hearing in another state — record, effect. In any case of alleged parole or probation violation by a person being supervised in another state pursuant to the interstate compact for the supervision of parolees and probationers, any appropriate judicial or administrative officer or agency in another state is authorized to hold a hearing on the alleged violation. Upon receipt of the record of a parole or probation violation hearing held in another state pursuant to a statute substantially similar to this part, such record shall have the same standing and effect as though the proceeding of which it is a record was had before the appropriate officer or officers in this state and any recommendations contained in or accompanying the record shall be fully considered by the appropriate officer or officers of this state in making disposition of the matter.

History: **En. Sec. 4, Ch. 75, L. 1973; R.C.M. 1947, 95-3202.4.**

CHAPTER 24

TREATMENT OF VICTIMS AND WITNESSES

Part 1 — General Provisions

46-24-101. Purpose.
46-24-102. Training in victim assistance.
46-24-103. Duty of attorney general.
46-24-104. Consultation with victim of certain offenses.
46-24-105. No cause of action for damages.

Part 2 — Services to Victim, Witness

46-24-201. Services to victims of crime.
46-24-202. Notification of available protective services.
46-24-203. Prompt notification to victims and witnesses of certain offenses.
46-24-204. Scheduling changes.
46-24-205. Notification to employer or creditor — limitations on employer.
46-24-206. Property return — right to be heard on disposition of evidence.
46-24-207. Renumbered 41-5-1416.
46-24-208 through 46-24-210 reserved.
46-24-211. Information concerning appeal or postconviction remedies.
46-24-212. Information concerning confinement.
46-24-213. General requirements for information.

Chapter Cross-References

Crimes, Title 45.

Witnesses, Title 46, ch. 15, part 1.

Sentence — restitution and victims' compensation, 46-18-241 through 46-18-249.

The Crime Victims Compensation Act of Montana, Title 53, ch. 9, part 1.

Part 1

General Provisions

46-24-101. Purpose. The legislature declares that the purposes of this chapter are to:

(1) protect the role of crime victims and witnesses in the criminal justice process;

(2) assure that victims and witnesses of crime receive fair and proper treatment from law enforcement agencies and prosecutors; and

(3) provide a standard of conduct governing the treatment of victims and witnesses in criminal cases.

History: **En. Sec. 1, Ch. 554, L. 1985.**

Cross-References

Statutory provisions on evidence — witness defined, 26-1-101.

Crimes — general principles of liability — witness defined, 45-2-101.

46-24-102. Training in victim assistance. The Montana law enforcement academy shall offer education and training in victim assistance to law enforcement officers and prosecuting attorneys and shall provide such education and training in its regular curriculum, so that victims may be properly assisted.

History: En. Sec. 9, Ch. 554, L. 1985.

Cross-References

Law Enforcement Academy, Title 44, ch. 10.

46-24-103. Duty of attorney general. The attorney general shall ensure that victims and witnesses of crime receive fair and proper treatment in the criminal justice system. The attorney general shall prepare a written notice of the rights and services available to victims of crime under this chapter. The notice must be distributed to local law enforcement agencies in the state. In addition, the attorney general shall ensure that victims and witnesses are provided important services and assistance as required under this chapter.

History: En. Sec. 10, Ch. 554, L. 1985; amd. Sec. 29, Ch. 125, L. 1995.

Cross-References

Attorney General — general duties, 2-15-501.

The Crime Victims Compensation Act of Montana, Title 53, ch. 9, part 1.

46-24-104. Consultation with victim of certain offenses. As soon as possible prior to disposition of the case, the prosecuting attorney in a criminal case shall consult with the victim of a felony offense or a misdemeanor offense involving actual, threatened, or potential bodily injury to the victim or, in the case of a minor child victim or homicide victim, with the family of the victim in order to obtain the views of the victim or the victim's family regarding the disposition of the case, including:

(1) dismissal of the case;
(2) release of the accused pending judicial proceedings;
(3) plea negotiations; and
(4) pretrial diversion of the case from the judicial process.

History: En. Sec. 6, Ch. 554, L. 1985; amd. Sec. 30, Ch. 125, L. 1995.

Cross-References

Crimes — general principles of liability — felony defined, 45-2-101.

46-24-105. No cause of action for damages. Nothing in this chapter may be construed to create a cause of action for damages against the state or one of its political subdivisions.

History: En. Sec. 11, Ch. 554, L. 1985.

Cross-References

Governmental entity — liability exposure and insurance coverage, Title 2, ch. 9.

Part 2

Services to Victim, Witness

46-24-201. Services to victims of crime. (1) Law enforcement personnel shall ensure that a victim of a crime receives emergency social and medical services as soon as possible and that the victim is given written notice, in the form supplied by the attorney general, of the following:

(a) the availability of crime victim compensation;

(b) access by the victim and the defendant to information about the case;

(c) the role of the victim in the criminal justice process, including what the victim can expect from the system, as well as what the system expects from the victim; and

(d) stages in the criminal justice process of significance to a crime victim and the manner in which information about the stages may be obtained.

(2) In addition to the information supplied under subsection (1), law enforcement personnel shall provide the victim with written information on community-based victim treatment programs, including medical, housing, counseling, and emergency services available in the community.

(3) As soon as possible, law enforcement personnel shall give to the victim the following information:

(a) the name, office address, and telephone number of a law enforcement officer assigned to investigate the case; and

(b) the prosecuting attorney's name, office address, and telephone number.

History: En. Sec. 2, Ch. 554, L. 1985; amd. Sec. 31, Ch. 125, L. 1995.

Cross-References

Child abuse, neglect, and dependency — protective care, Title 41, ch. 3, part 3.

Restitution to victims, 46-18-241 through 46-18-251.

The Crime Victims Compensation Act of Montana, Title 53, ch. 9, part 1.

46-24-202. Notification of available protective services. Law enforcement officers and prosecuting attorneys shall provide a victim or witness information on the availability of services to protect the victim or witness from intimidation, including the process for obtaining a protective order from the court.

History: En. Sec. 3, Ch. 554, L. 1985; amd. Sec. 32, Ch. 125, L. 1995.

Cross-References

Protection of witnesses, Title 26, ch. 2, part 4.

Detaining witnesses — criminal — material witness, 46-11-601.

46-24-203. Prompt notification to victims and witnesses of certain offenses. (1) A person described in subsection (2) who provides the appropriate official with a current address and telephone number must receive prompt advance notification, if possible, of proceedings relating to the person's case, including:

(a) the arrest of an accused;

(b) the release of the accused pending judicial proceedings;

(c) the crime with which the accused has been charged, including an explanation of the elements of the offense when necessary to an understanding of the nature of the crime;

(d) proceedings in the prosecution of the accused, including entry of a plea of guilty or nolo contendere and the setting of a trial date;

(e) if the accused is convicted or pleads guilty or nolo contendere, the function of a presentence report; the name, office address, and telephone number of the person preparing the report; and the convicted person's right of access to the report, as well as the victim's right under 46-18-115 to present a statement in writing or orally at the sentencing proceeding and the convicted person's right to be present at the sentencing proceeding and to have access to the victim's statement;

(f) the date, time, and place of any sentencing hearing, the sentence imposed, and the term of imprisonment, if imposed; and

(g) the right under 46-24-212 of a victim of a felony offense to receive information from the department of corrections concerning the convicted person's incarceration.

(2) A person entitled to notification under subsection (1) must be a victim or witness of a felony offense or a misdemeanor offense involving actual, threatened, or potential bodily injury to the victim, a relative of a victim or witness who is a minor, or a relative of a homicide victim.

History: En. Sec. 5, Ch. 554, L. 1985; amd. Sec. 33, Ch. 125, L. 1995; amd. Sec. 22, Ch. 395, L. 1999.

Compiler's Comments

1999 Amendment: Chapter 395 in (1)(d) and near beginning of (1)(e) inserted "or nolo contendere"; and made minor changes in style. Amendment effective October 1, 1999.

Cross-References

Crimes — general principles of liability — felony defined, 45-2-101.

46-24-204. Scheduling changes. (1) As soon as practicable, the prosecuting attorney shall notify a victim or witness of any scheduling changes that may affect the appearance of the victim or witness at a criminal justice proceeding that he is scheduled to attend.

(2) For the purpose of providing notification, the prosecuting attorney shall have available a system for promptly alerting a victim or witness that a scheduling change has been made.

History: En. Sec. 4, Ch. 554, L. 1985.

46-24-205. Notification to employer or creditor — limitations on employer. (1) The law enforcement agency or prosecuting attorney in a criminal case shall assist a victim or witness who requests assistance in informing an employer that the need for victim and witness cooperation in the prosecution of the case may necessitate absence of the victim or witness from the place of employment.

(2) A law enforcement agency or prosecuting attorney shall assist a victim or witness who, as a direct result of a crime or because of cooperation with the law enforcement agency or prosecuting attorney, is subjected to serious financial strain. The agency or prosecuting attorney shall assist the victim or witness by explaining to creditors the reason for the serious financial strain.

(3) An employer may not discharge or discipline a victim or a member of the victim's family for participation at the prosecuting attorney's request in preparation for or attendance at a criminal justice proceeding.

(4) As used in this section, "member of the victim's family" means the victim's spouse, child by birth or adoption, stepchild, parent, stepparent, or sibling, but does not include a person who is accountable for the crime or accountable for a crime arising from the same transaction.

History: En. Sec. 8, Ch. 554, L. 1985; amd. Sec. 34, Ch. 125, L. 1995.

46-24-206. Property return — right to be heard on disposition of evidence. (1) A law enforcement agency or prosecuting attorney shall promptly return any of the victim's property held for evidentiary purposes, unless there is a compelling law enforcement reason for retaining the property.

(2) Before the destruction, disposal, or use of evidence that is not the victim's property, the court shall, as provided in 46-5-308, give the victim an opportunity to be heard as to the appropriate disposition of the evidence.

History: En. Sec. 7, Ch. 554, L. 1985; amd. Sec. 6, Ch. 186, L. 1997.

Cross-References

Disposition of property of deceased, 7-4-2917.

Montana Youth Court Act, Title 41, ch. 5.

Custody and disposition of items seized by peace officer without search warrant, 46-5-311.

46-24-207. Renumbered 41-5-1416. Sec. 77, Ch. 550, L. 1997.

46-24-208 through 46-24-210 reserved.

46-24-211. Information concerning appeal or postconviction remedies. If the defendant appeals, pursues a postconviction remedy, or the district court grants a hearing under part 25, the attorney general, or the county attorney if the case has not been referred to the attorney general, shall promptly inform the victim of the notice of appeal, hearing under part 25, or postconviction petition, of the date, time, and place of any hearing, and of the decision.

History: En. Sec. 35, Ch. 125, L. 1995; amd. Sec. 14, Ch. 532, L. 1999.

Compiler's Comments

1999 Amendment: Chapter 532 in two places inserted reference to hearing under part 25. Amendment effective October 1, 1999.

46-24-212. Information concerning confinement. Upon request of a victim of a felony offense, the department of corrections or the board of pardons and parole, as applicable, shall:

(1) promptly inform the victim of the following information concerning a prisoner committing the offense:

(a) the custody level;

(b) the projected discharge or parole eligibility date;

(c) the actual date of the prisoner's discharge from confinement or parole, if reasonably ascertainable;

(d) the time and place of a parole hearing concerning the prisoner and of the victim's right to submit a statement to the board of pardons and parole under 46-23-202; and

(e) the community in which the prisoner will reside after parole;

(2) provide reasonable advance notice to the victim before release of the defendant on furlough or to a work-release program, halfway house, or other community-based program or correctional facility; and

(3) promptly inform the victim of the occurrence of any of the following events concerning the prisoner:

(a) an escape from a correctional or mental health facility or community program;

(b) a recapture;

(c) a decision of the board of pardons and parole;

(d) a decision of the governor to commute the sentence or to grant executive clemency;

(e) a release from confinement and any conditions attached to the release; and

(f) the prisoner's death.

History: En. Sec. 36, Ch. 125, L. 1995; amd. Sec. 203, Ch. 42, L. 1997; amd. Sec. 12, Ch. 189, L. 1997.

46-24-213. General requirements for information. (1) Unless specifically stated otherwise, the requirements of 44-2-601, 46-24-104, 46-24-201 through 46-24-203, 46-24-211, and 46-24-212 to provide information to the victim may be satisfied by either written or oral communication with the victim or the victim's designee.

(2) The person responsible for providing information required by 44-2-601, 46-24-104, 46-24-201 through 46-24-203, 46-24-211, and 46-24-212 shall promptly inform the victim of significant changes in the information.

(3) The obligation to furnish information to a victim under 44-2-601, 46-24-104, 46-24-201 through 46-24-203, 46-24-211, and 46-24-212 is conditioned upon the victim informing the appropriate agency in writing of the name, address, and telephone number of the person to whom the information should be provided and of any change of name, address, or telephone number.

History: En. Sec. 37, Ch. 125, L. 1995.

CHAPTERS 25 THROUGH 29

RESERVED

CHAPTER 30

UNIFORM CRIMINAL EXTRADITION ACT

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46-30-101. Definitions.
46-30-102. Nonwaiver by this state.

Part 2 — Extradition to Another State From This State

46-30-201. Fugitives from justice — duty of governor.
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46-30-203. Extradition of persons who left demanding state involuntarily.
46-30-204. Extradition of persons not present in demanding state when crime committed.
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46-30-411. Expenses of bringing fugitives back to this state.
46-30-412. Restrictions on compensation for assisting return of fugitive.
46-30-413. Penalty for illegal compensation.

Part 1

General Provisions

46-30-101. Definitions. Where appearing in this chapter, the term:

(1) "executive authority" includes the governor and any person performing the functions of governor in a state other than this state or the chairman of a recognized Indian tribe within the state of Montana;

(2) "governor" includes any person performing the functions of governor by authority of the law of this state;

(3) "state", referring to a state other than this state, includes any other state or territory, organized or unorganized, of the United States of America or an Indian reservation within the state of Montana.

History: En. 95-3101 by Sec. 14, Ch. 513, L. 1973; R.C.M. 1947, 95-3101; amd. Sec. 1, Ch. 379, L. 1991.

46-30-102. Nonwaiver by this state. Nothing contained in this chapter may be considered a waiver by this state of its right, power, or privilege to try the demanded person for a crime committed within this state or of its right, power, or privilege to regain custody of the person by extradition proceedings or otherwise for the purpose of trial, sentence, or punishment for a crime committed within this state; nor may any proceedings had under this chapter which result in or fail to result in extradition be considered in any way a waiver by this state of any of its rights, privileges, or jurisdiction.

History: En. 95-3129 by Sec. 14, Ch. 513, L. 1973; amd. Sec. 58, Ch. 184, L. 1977; R.C.M. 1947, 95-3129.

Part 2

Extradition to Another State From This State

46-30-201. Fugitives from justice — duty of governor. Subject to the provisions of this chapter, the provisions of the constitution of the United States controlling, and any and all acts of congress enacted in pursuance thereof, it is the duty of the governor of this state to have arrested and delivered up to the executive authority of any other state of the United States any person charged in that state with treason, felony, or other crime who has fled from justice and is found in this state.

History: **En. 95-3102 by Sec. 14, Ch. 513, L. 1973; R.C.M. 1947, 95-3102.**

Cross-References

Treason — of what it consists, Art. II, sec. 30, Mont. Const.

46-30-202. Prosecution pending in this state at time of requisition. If a criminal prosecution has been instituted against such person under the laws of this state and is still pending, the governor, in his discretion, either may surrender him on demand of the executive authority of another state or hold him until he has been tried and discharged or convicted and punished in this state.

History: **En. 95-3119 by Sec. 14, Ch. 513, L. 1973; R.C.M. 1947, 95-3119.**

46-30-203. Extradition of persons who left demanding state involuntarily. The governor of this state may also surrender on demand of the governor of any other state any person in this state who is charged in the manner provided in 46-30-401 with having violated the laws of the state whose governor is making the demand, even though such person left the demanding state involuntarily.

History: **En. 95-3105 by Sec. 14, Ch. 513, L. 1973; R.C.M. 1947, 95-3105(part).**

46-30-204. Extradition of persons not present in demanding state when crime committed. The governor of this state may also surrender, on demand of the executive authority of any other state, any person in this state charged in such other state in the manner provided in 46-30-211 with committing an act in this state or in a third state intentionally resulting in a crime in the state whose executive authority is making the demand. The provisions of this chapter not otherwise inconsistent shall apply to such cases, even though the accused was not in that state at the time of the commission of the crime and has not fled therefrom.

History: **En. 95-3106 by Sec. 14, Ch. 513, L. 1973; R.C.M. 1947, 95-3106.**

Cross-References

Exception to commitment to await requisition, 46-30-302.

46-30-205 through 46-30-210 reserved.

46-30-211. Demand — form. (1) No demand for the extradition of a person charged with crime in another state shall be recognized by the governor unless in writing alleging that the accused was present in the demanding state at the time of the commission of the alleged crime and that thereafter he fled from the state, except in cases arising under 46-30-204, and accompanied by:

(a) a copy of an indictment found or information supported by affidavit in the state having jurisdiction of the crime;

(b) a copy of an affidavit made before a magistrate there, together with a copy of any warrant which was issued thereon; or

(c) a copy of a judgment of conviction or of a sentence imposed in execution thereof, together with a statement by the executive authority of the demanding state that the person claimed has escaped from confinement or has broken the terms of his bail, probation, or parole.

(2) The indictment, information, or affidavit made before the magistrate must substantially charge the person demanded with having committed a crime under the law of that state. The copy of the indictment, information, affidavit, judgment of conviction, or sentence must be authenticated by the executive authority making the demand.

History: En. 95-3103 by Sec. 14, Ch. 513, L. 1973; R.C.M. 1947, 95-3103.

46-30-212. Investigation by governor. When a demand shall be made upon the governor of this state by the executive authority of another state for the surrender of a person so charged with crime, the governor may call upon the attorney general or any prosecuting officer in this state to investigate or assist in investigating the demand and to report to him the situation and circumstances of the person so demanded and whether he ought to be surrendered.

History: En. 95-3104 by Sec. 14, Ch. 513, L. 1973; R.C.M. 1947, 95-3104.

46-30-213. Issuance of arrest warrant by governor. If the governor decides that the demand should be complied with, he shall sign a warrant of arrest, which shall be sealed with the state seal and be directed to any peace officer or other person whom he may think fit to entrust with the execution thereof. The warrant must substantially recite the facts necessary to the validity of its issuance.

History: En. 95-3107 by Sec. 14, Ch. 513, L. 1973; R.C.M. 1947, 95-3107.

46-30-214. Recall of warrant or alias warrant. The governor may recall his warrant of arrest or may issue another warrant whenever he deems proper.

History: En. 95-3121 by Sec. 14, Ch. 513, L. 1973; R.C.M. 1947, 95-3121.

46-30-215. Execution of warrant. Such warrant shall authorize the peace officer or other person to whom directed to arrest the accused at any time and any place where he may be found within the state, to command the aid of all peace officers or other persons in the execution of the warrant, and to deliver the accused, subject to the provisions of this chapter, to the duly authorized agent of the demanding state.

History: En. 95-3108 by Sec. 14, Ch. 513, L. 1973; R.C.M. 1947, 95-3108.

46-30-216. Authority of arresting officer. Every such peace officer or other person empowered to make the arrest shall have the same authority to command assistance in arresting the accused as peace officers have by law in the execution of any criminal process directed to them, with like penalties against those who refuse their assistance.

History: En. 95-3109 by Sec. 14, Ch. 513, L. 1973; R.C.M. 1947, 95-3109.

Cross-References

Assisting peace officer in making arrest, 45-7-304, 46-6-402.

46-30-217. Rights of accused persons — habeas corpus. (1) No person arrested upon such warrant may be delivered over to the agent whom the executive authority demanding him has appointed to receive him unless he is first taken without delay before a judge of a court of record in this state, who shall inform him of the demand made for his surrender and of the crime with which he is charged and that he has the right to demand and procure legal counsel.

(2) If the prisoner or his counsel states that he or they desire to test the legality of his arrest, the judge of the court of record shall fix a reasonable time to be allowed him within which to apply for a writ of habeas corpus. When the writ is applied for, notice thereof and of the time and place of hearing thereon shall be given to the prosecuting officer of the county in which the arrest was made and in which the accused is in custody and to the agent of the demanding state.

History: En. 95-3110 by Sec. 14, Ch. 513, L. 1973; amd. Sec. 52, Ch. 184, L. 1977; R.C.M. 1947, 95-3110.

Cross-References

Duty of court to advise at initial appearance, 46-7-102.

Right to counsel, 46-8-101.

Court to advise defendant of rights, 46-12-210.

Habeas corpus, Title 46, ch. 22.

46-30-218. Penalty for violating accused's rights. Any officer who shall deliver to the agent for extradition of the demanding state a person in his custody under the governor's warrant in willful disobedience of 46-30-217 shall be guilty of a misdemeanor and on conviction shall be fined not more than $1,000 or be imprisoned not more than 6 months, or both.

History: En. 95-3111 by Sec. 14, Ch. 513, L. 1973; R.C.M. 1947, 95-3111.

46-30-219 through 46-30-224 reserved.

46-30-225. Guilt or innocence of accused, when inquired into. The guilt or innocence of the accused as to the crime of which he is charged may not be inquired into by the governor or in any proceeding after the demand for extradition provided for in 46-30-211 has been presented to the governor except as it may be involved in identifying the person held as the person charged with the crime.

History: En. 95-3120 by Sec. 14, Ch. 513, L. 1973; amd. Sec. 55, Ch. 184, L. 1977; R.C.M. 1947, 95-3120.

46-30-226. Confinement of accused in jail on route. (1) The officer or persons executing the governor's warrant of arrest or the agent of the demanding state to whom the prisoner may have been delivered may, when necessary, confine the prisoner in the jail of any county or city through which he may pass. The keeper of such jail must receive and safely keep the prisoner until the officer or person having charge of him is ready to proceed on his route, such officer or person, however, being chargeable with the expense of keeping.

(2) The officer or agent of a demanding state to whom a prisoner may have been delivered following extradition proceedings in another state or to whom a prisoner may have been delivered after waiving extradition in such other state and who is passing through this state with such a prisoner for the purpose of immediately returning such prisoner to the demanding state may, when necessary, confine the prisoner in the jail of any county or city through which he may pass. The keeper of such jail must receive and safely keep the prisoner until the officer or agent having charge of him is ready to proceed on his route, such officer or agent, however, being chargeable with the expense of keeping; provided, however, that such officer or agent shall produce and show to the keeper of such jail satisfactory written evidence of the fact that he is actually transporting such prisoner to the demanding state after a requisition by the

executive authority of such demanding state. Such prisoner shall not be entitled to demand a new requisition while in this state.

History: En. 95-3112 by Sec. 14, Ch. 513, L. 1973; R.C.M. 1947, 95-3112.

46-30-227. Arrest of accused before making of requisition. (1) A judge or magistrate of this state shall issue a warrant directed to any peace officer commanding the officer to apprehend the person named therein wherever the person may be found in this state and to bring the person before the same or any other judge, magistrate, or court who or which may be available in or convenient of access to the place where the arrest is made to answer the charge or complaint and affidavit whenever:

(a) a person within this state is charged on the oath of a credible person before the judge or magistrate with the commission of a crime in another state and, except in cases arising under 46-30-204, with having fled from justice or with having been convicted of a crime in that state and having escaped from confinement or having broken the terms of his bail, probation, or parole; or

(b) a complaint is made before the judge or magistrate setting forth on the affidavit of a credible person in another state that a crime has been committed in the other state and that the accused is believed to be in this state and has been charged in the other state with:

(i) the commission of the crime and, except in cases arising under 46-30-204, having fled from justice; or

(ii) having been convicted of a crime in that state and having escaped from bail, probation, or parole.

(2) A certified copy of the sworn charge or complaint and affidavit upon which the warrant is issued shall be attached to the warrant.

History: En. 95-3113 by Sec. 14, Ch. 513, L. 1973; amd. Sec. 53, Ch. 184, L. 1977; R.C.M. 1947, 95-3113.

Cross-References

Arrest of accused without warrant, 46-30-301.

46-30-228. Written waiver of extradition proceedings. (1) Any person of this state charged with having committed any crime in another state or alleged to have escaped from confinement or broken the terms of his bail, probation, or parole may waive the issuance and service of the warrant provided for in 46-30-213 and 46-30-215 and all other procedures incidental to extradition proceedings by executing or subscribing in the presence of a judge of any court of record within this state a writing which states that he consents to return to the demanding state. Before such waiver shall be executed or subscribed by such person, it shall be the duty of such judge to inform such person of his rights to the issuance and service of a warrant of extradition and to obtain a writ of habeas corpus as provided for in 46-30-217.

(2) If and when such consent has been duly executed, it shall forthwith be forwarded to the office of the governor of this state and filed therein. The judge shall direct the officer having such person in custody to deliver forthwith such person to the duly accredited agent or agents of the demanding state and shall deliver or cause to be delivered to such agent or agents a copy of such consent.

(3) Nothing in this section shall be deemed to limit the rights of the accused person to return voluntarily and without formality to the demanding state, nor shall this waiver procedure be deemed to be an exclusive procedure

or to limit the powers, rights, or duties of the officers of the demanding state or of this state.

History: En. 95-3128 by Sec. 14, Ch. 513, L. 1973; R.C.M. 1947, 95-3128.

46-30-229. Prior waiver of extradition. (1) A person who is alleged to have violated the terms of his bail, probation, parole, or any other conditional release from another state and who is held in this state may be released to the duly authorized agent of that other state without the warrant provided for in 46-30-213 if the following has occurred:

(a) a district court in this state has held a hearing at which the state has presented:

(i) a certified copy of an agreement to waive extradition, signed by the person, or an order from the other state releasing the person on the condition that he waive extradition;

(ii) a certified copy of the warrant or order from the other state directing the return of the person for violating the terms of his release; and

(iii) evidence that the person is the same person named in the warrant or order; and

(b) the district court has found that there is probable cause to believe that the person is the same person charged in the warrant or order. Whenever a district court makes this finding, it shall, except as provided in subsection (2), order that the person be remanded to custody and delivered to agents of the other state. The court shall also advise the person of his right to contest the order by filing a writ of habeas corpus.

(2) If the person wishes to test the validity of the order issued pursuant to subsection (1)(b), the court shall fix a reasonable time for him to apply for a writ of habeas corpus before he may be released to agents from the other state.

History: En. Sec. 1, Ch. 392, L. 1987.

Part 3

Procedure for Arresting Accused Without Warrant

46-30-301. Arrest of accused without warrant. The arrest of a person may be lawfully made also by any peace officer or a private person without a warrant upon reasonable information that the accused stands charged in the courts of a state with a crime punishable by death or imprisonment for a term of 1 year or more. When arrested under this section, the accused must be taken before a judge or magistrate with all practicable speed and complaint must be made against him under oath setting forth the ground for the arrest as in 46-30-227. After the complaint is made, his answer must be heard as if he had been arrested on a warrant.

History: En. 95-3114 by Sec. 14, Ch. 513, L. 1973; R.C.M. 1947, 95-3114; amd. Sec. 17, Ch. 79, L. 1983; amd. Sec. 2, Ch. 379, L. 1991.

Cross-References

Manner of arrest without warrant, 46-6-312.

46-30-302. Commitment to await requisition. If from the examination before the judge or magistrate it appears that the person held is the person charged with having committed the crime alleged and, except in cases arising under 46-30-204, that he has fled from justice, the judge or magistrate must by a warrant reciting the accusation commit him to the county jail for such a time not exceeding 30 days and specified in the warrant as will enable the arrest of the accused to be made under a warrant of the governor on a requisition of the executive authority of the state having jurisdiction of the offense, unless the accused give bail as provided in 46-30-303 or until he shall be legally discharged.

History: **En. 95-3115 by Sec. 14, Ch. 513, L. 1973; R.C.M. 1947, 95-3115.**

46-30-303. Bail while awaiting requisition. Unless the offense with which the prisoner is charged is shown to be an offense punishable by death or life imprisonment under the laws of the state in which it was committed, a judge or magistrate in this state may admit the person arrested to bail by bond or undertaking with sufficient sureties and in such sum as he deems proper, conditioned for his appearance before him at a time specified in such bond or undertaking and for his surrender to be arrested upon the warrant of the governor of this state.

History: **En. 95-3116 by Sec. 14, Ch. 513, L. 1973; R.C.M. 1947, 95-3116.**

Cross-References

Bail, Title 46, ch. 9.

46-30-304. Extension of time of commitment or bail. If the accused is not arrested under the warrant of the governor by the expiration of the time specified in the warrant, bond, or undertaking, a judge or magistrate may discharge him or may recommit him for a further period of 60 days or a supreme court justice or district court judge may again take bail for his appearance and surrender, as provided in 46-30-303, for a period not to exceed 60 days after the date of the new bond or undertaking.

History: **En. 95-3117 by Sec. 14, Ch. 513, L. 1973; amd. Sec. 54, Ch. 184, L. 1977; R.C.M. 1947, 95-3117.**

46-30-305. Forfeiture of bail. If the prisoner is admitted to bail and fails to appear and surrender himself according to the conditions of his bond, the judge or magistrate by proper order shall declare the bond forfeited and order his immediate arrest without warrant if he be within this state. Recovery may be had on such bond in the name of the state as in the case of other bonds or undertakings given by the accused in criminal proceedings within this state.

History: **En. 95-3118 by Sec. 14, Ch. 513, L. 1973; R.C.M. 1947, 95-3118.**

Cross-References

Recovery by state on forfeited bond, 46-9-503, 46-9-512.

Part 4
Extradition to This State From Another State

46-30-401. Application for issuance of requisition. (1) When the return to this state of a person charged with a crime in this state is required, the prosecuting attorney shall present to the governor a written application for a requisition for the return of the person charged. The application must state the name of the person charged, the crime charged against the person, the approximate time, place, and circumstances of its commission, and the state in which the person is believed to be, including the location of the accused in that state at the time the application is made. The application must certify that in the opinion of the prosecuting attorney the ends of justice require the arrest and return of the accused to this state for trial and that the proceeding is not being instituted to enforce a private claim.

(2) When the return to this state is required of a person who has been convicted of a crime in this state and has escaped from confinement or broken the terms of bail, probation, or parole, the prosecuting attorney of the county in which the offense was committed, the board of pardons and parole, or the warden of the institution or sheriff of the county from which the escape was made shall present to the governor a written application for a requisition for the return of the person. The application must state the name of the person, the crime of which the person was convicted, the circumstances of the person's escape from confinement or of the breach of the terms of bail, probation, or parole, and the state in which the person is believed to be, including the location of the person in that state at the time the application is made.

(3) The application must be verified by affidavit, executed in duplicate, and accompanied by two certified copies of the:

(a) indictment returned;

(b) information and affidavit filed;

(c) complaint made to the judge or magistrate stating the offense with which the accused is charged;

(d) judgment of conviction; or

(e) sentence.

(4) The prosecuting officer, board of pardons and parole, warden, or sheriff may also attach further affidavits and other documents in duplicate that are considered proper to be submitted with the application.

(5) One copy of the application, with the action of the governor indicated by endorsement on the application, and one of the certified copies of the indictment, complaint, information and affidavits, judgment of conviction, or sentence must be filed in the office of the secretary of state to remain of record in that office. The other copies of all papers must be forwarded with the governor's requisition.

History: En. 95-3123 by Sec. 14, Ch. 513, L. 1973; amd. Sec. 56, Ch. 184, L. 1977; R.C.M. 1947, 95-3123; amd. Sec. 172, Ch. 575, L. 1981; amd. Sec. 204, Ch. 42, L. 1997.

Cross-References

Extradition of persons who left demanding state involuntarily, 46-30-203.

46-30-402. Requisition by governor. Whenever the governor of this state shall demand a person charged with crime or with escaping from confinement or breaking the terms of his bail, probation, or parole in this state from the chief executive of any other state or from the chief justice or an associate justice of the supreme court of the District of Columbia authorized to receive such demand under the laws of the United States, he shall issue a warrant under the seal of this state to some agent commanding him to receive the person so charged if delivered to him and convey him to the proper officer of the county in this state in which the offense was committed.

History: En. 95-3122 by Sec. 14, Ch. 513, L. 1973; R.C.M. 1947, 95-3122.

46-30-403. Extradition of persons held in another state. When it is desired to have returned to this state a person charged in this state with a crime and such person is imprisoned or is held under criminal proceedings then pending against him in another state, the governor of this state may agree with the executive authority of such other state for the extradition of such person before the conclusion of such proceedings or his term of sentence in such other state, upon condition that such person be returned to such other state at the expense of this state as soon as the prosecution in this state is terminated.

History: **En. 95-3105 by Sec. 14, Ch. 513, L. 1973; R.C.M. 1947, 95-3105(part).**

46-30-404. Immunity from service of civil process. A person brought into this state on or after waiver of extradition based on a criminal charge shall not be subject to service of personal process in civil actions arising out of the same facts as the criminal proceeding to answer which he is being or has been returned until he has been convicted in the criminal proceedings or, if acquitted, until he has had reasonable opportunity to return to the state from which he was extradited.

History: **En. 95-3127 by Sec. 14, Ch. 513, L. 1973; R.C.M. 1947, 95-3127.**

46-30-405. No immunity from other criminal prosecutions. After a person has been brought back to this state by extradition proceedings, he may be tried in this state for other crimes which he may be charged with having committed here as well as that specified in the requisition for his extradition.

History: **En. 95-3130 by Sec. 14, Ch. 513, L. 1973; R.C.M. 1947, 95-3130.**

46-30-406 through 46-30-410 reserved.

46-30-411. Expenses of bringing fugitives back to this state. (1) When the governor of this state, in the exercise of the authority conferred by section 2, Article IV, of the constitution of the United States or by the laws of this state, demands from the executive authority of any state of the United States or of any foreign government the surrender to the authorities of this state of a fugitive from justice who has been found and arrested in such state or foreign government, the accounts of the person employed by him to bring back such fugitive must be audited by the attorney general and paid out of the state treasury.

(2) An agent of this state authorized to return a fugitive from justice to this state may utilize commercial transportation, aircraft, or motor vehicle to return the fugitive. The agent shall be paid travel expenses, as provided for in 2-18-501 through 2-18-503, as amended, incurred in returning the fugitive to this state.

History: **(1)En. 95-3124 by Sec. 14, Ch. 513, L. 1973; amd. Sec. 18, Ch. 343, L. 1977; Sec. 95-3124, R.C.M. 1947; (2)En. Sec. 1, Ch. 331, L. 1975; amd. Sec. 31, Ch. 453, L. 1977; Sec. 95-3124.1, R.C.M. 1947; R.C.M. 1947, 95-3124, 95-3124.1; amd. Sec. 3, Ch. 446, L. 1979.**

Cross-References

Mileage allowed when private vehicle used, 2-18-503.

46-30-412. Restrictions on compensation for assisting return of fugitive. No compensation, fee, or reward of any kind may be paid to or received by a public officer of this state or other person for a service rendered in procuring from the governor the demand mentioned in 46-30-411(1), for the surrender of the fugitive, or for conveying him to this state or detaining him therein, except as provided in 46-30-411.

History: **En. 95-3125 by Sec. 14, Ch. 513, L. 1973; amd. Sec. 57, Ch. 184, L. 1977; R.C.M. 1947, 95-3125.**

46-30-413. Penalty for illegal compensation. Every person who violates any of the provisions of 46-30-412 is guilty of a misdemeanor.

History: **En. 95-3126 by Sec. 14, Ch. 513, L. 1973; R.C.M. 1947, 95-3126.**

Cross-References

When no penalty specified, 46-18-212.

CHAPTER 31

INTERSTATE AGREEMENT ON DETAINERS

Part 1 — Contents of Agreement

46-31-101. Agreement on detainers — enactment and text.
46-31-102. Jurisdiction of district courts.

Part 2 — Enforcement of Agreement

46-31-201. Public agencies to cooperate in enforcement.
46-31-202. Warden to give over inmate.
46-31-203. Coordinator of agreement.
46-31-204. Penalty for escape from custody on detainer.

Chapter Cross-References

Extradition of persons held in another state, 46-30-403.

Part 1
Contents of Agreement

46-31-101. Agreement on detainers — enactment and text. The agreement on detainers is hereby enacted into law and entered into by this state with all other jurisdictions legally joining therein in the form substantially as follows:

The contracting states solemnly agree that:

Article I

The party states find that charges outstanding against a prisoner, detainers based on untried indictments, informations, or complaints, and difficulties in securing speedy trial of persons already incarcerated in other jurisdictions produce uncertainties which obstruct programs of prisoner treatment and rehabilitation. Accordingly, it is the policy of the party states and the purpose of this agreement to encourage the expeditious and orderly disposition of such charges and determination of the proper status of any and all detainers based on untried indictments, informations, or complaints. The party states also find that proceedings with reference to such charges and detainers, when emanating from another jurisdiction, cannot properly be had in the absence of cooperative procedures. It is the further purpose of this agreement to provide such cooperative procedures.

Article II

As used in this agreement:

(1) "state" shall mean a state of the United States, the United States of America, a territory or possession of the United States, the District of Columbia, the Commonwealth of Puerto Rico;

(2) "sending state" shall mean a state in which a prisoner is incarcerated at the time that he initiates a request for final disposition pursuant to Article III hereof or at the time that a request for custody or availability is initiated pursuant to Article IV hereof;

(3) "receiving state" shall mean the state in which trial is to be had on an indictment, information, or complaint pursuant to Article III or Article IV hereof.

Article III

(1) Whenever a person has entered upon a term of imprisonment in a penal or correctional institution of a party state and whenever during the continuance of the term of imprisonment there is pending in any other party state any untried indictment, information, or complaint on the basis of which a detainer has been lodged against the prisoner, he shall be brought to trial within 180 days after he shall have caused to be delivered to the prosecuting officer and the appropriate court of the prosecuting officer's jurisdiction written notice of the place of his imprisonment and his request for a final disposition to be made of the indictment, information, or complaint; provided that for good cause shown in open court, the prisoner or his counsel being present, the court having jurisdiction of the matter may grant any necessary or reasonable continuance. The request of the prisoner shall be accompanied by a certificate of the appropriate official having custody of the prisoner, stating the term of commitment under which the prisoner is being held, the time already served, the time remaining to be served on the sentence, the amount of good time earned, the time of parole eligibility of the prisoner, and any decisions of the state parole agency relating to the prisoner.

(2) The written notice and request for final disposition referred to in subsection (1) hereof shall be given or sent by the prisoner to the warden, commissioner of corrections, or other official having custody of him, who shall promptly forward it together with the certificate to the appropriate prosecuting official and court by registered or certified mail, return receipt requested.

(3) The warden, commissioner of corrections, or other official having custody of the prisoner shall promptly inform him of the source and contents of any detainer lodged against him and shall also inform him of his right to make a request for final disposition of the indictment, information, or complaint on which the detainer is based.

(4) Any request for final disposition made by a prisoner pursuant to subsection (1) hereof shall operate as a request for final disposition of all untried indictments, informations, or complaints on the basis of which detainers have been lodged against the prisoner from the state to whose prosecuting official the request for final disposition is specifically directed. The warden, commissioner of corrections, or other official having custody of the prisoner shall forthwith notify all appropriate prosecuting officers and courts

in the several jurisdictions within the state to which the prisoner's request for final disposition is being sent of the proceeding being initiated by the prisoner. Any notification sent pursuant to this subsection shall be accompanied by copies of the prisoner's written notice, request, and the certificate. If trial is not had on any indictment, information, or complaint contemplated hereby prior to the return of the prisoner to the original place of imprisonment, such indictment, information, or complaint shall not be of any further force or effect, and the court shall enter an order dismissing the same with prejudice.

(5) Any request for final disposition made by a prisoner pursuant to subsection (1) hereof shall also be deemed to be a waiver of extradition with respect to any charge or proceeding contemplated thereby or included therein by reason of subsection (4) hereof and a waiver of extradition to the receiving state to serve any sentence there imposed upon him after completion of his term of imprisonment in the sending state. The request for final disposition shall also constitute a consent by the prisoner to the production of his body in any court where his presence may be required in order to effectuate the purposes of this agreement and a further consent voluntarily to be returned to the original place of imprisonment in accordance with the provisions of this agreement. Nothing in this paragraph shall prevent the imposition of a concurrent sentence if otherwise permitted by law.

(6) Escape from custody by the prisoner subsequent to his execution of the request for final disposition referred to in subsection (1) hereof shall void the request.

Article IV

(1) The appropriate officer of the jurisdiction in which an untried indictment, information, or complaint is pending shall be entitled to have a prisoner against whom he has lodged a detainer and who is serving a term of imprisonment in any party state made available in accordance with Article V(1) hereof upon presentation of a written request for temporary custody or availability to the appropriate authorities of the state in which the prisoner is incarcerated; provided that the court having jurisdiction of such indictment, information, or complaint shall have duly approved, recorded, and transmitted the request; and provided further that there shall be a period of 30 days after receipt by the appropriate authorities before the request be honored, within which period the governor of the sending state may disapprove the request for temporary custody or availability either upon his own motion or upon motion of the prisoner.

(2) Upon receipt of the officer's written request as provided in subsection (1) hereof, the appropriate authorities having the prisoner in custody shall furnish the officer with a certificate stating the term of commitment under which the prisoner is being held, the time already served, the time remaining to be served on the sentence, the amount of good time earned, the time of parole eligibility of the prisoner, and any decisions of the state parole agency relating to the prisoner. Said authorities simultaneously shall furnish all other officers and appropriate courts in the receiving state who have lodged detainers against the prisoner with similar certificates and with notices informing them of the request for custody or availability and of the reasons therefor.

(3) In respect of any proceeding made possible by this article, trial shall be commenced within 120 days of the arrival of the prisoner in the receiving state, but for good cause shown in open court, the prisoner or his counsel being present, the court having jurisdiction of the matter may grant any necessary or reasonable continuance.

(4) Nothing contained in this article shall be construed to deprive any prisoner of any right which he may have to contest the legality of his delivery as provided in subsection (1), but such delivery may not be opposed or denied on the ground that the executive authority of the sending state has not affirmatively consented to or ordered such delivery.

(5) If trial is not had on any indictment, information, or complaint contemplated hereby prior to the prisoner's being returned to the original place of imprisonment pursuant to Article V(5) hereof, such indictment, information, or complaint shall not be of any further force or effect and the court shall enter an order dismissing the same with prejudice.

Article V

(1) In response to a request made under Article III or Article IV hereof, the appropriate authority in a sending state shall offer to deliver temporary custody of such prisoner to the appropriate authority in the state where such indictment, information, or complaint is pending against such person in order that speedy and efficient prosecution may be had. If the request for final disposition is made by the prisoner, the offer of temporary custody shall accompany the written notice provided for in Article III of this agreement. In the case of a federal prisoner, the appropriate authority in the receiving state shall be entitled to temporary custody as provided by this agreement or to the prisoner's presence in federal custody at the place for trial, whichever custodial arrangement may be approved by the custodian.

(2) The officer or other representative of a state accepting an offer of temporary custody shall present the following upon demand:

(a) proper identification and evidence of his authority to act for the state into whose temporary custody the prisoner is to be given;

(b) a duly certified copy of the indictment, information, or complaint on the basis of which the detainer has been lodged and on the basis of which the request for temporary custody of the prisoner has been made.

(3) If the appropriate authority shall refuse or fail to accept temporary custody of said person or in the event that an action on the indictment, information, or complaint on the basis of which the detainer has been lodged is not brought to trial within the periods provided by this chapter, the appropriate court of the jurisdiction where the indictment, information, or complaint has been pending shall enter an order dismissing the same with prejudice and any detainer based thereon shall cease to be of any force or effect.

(4) The temporary custody referred to in this agreement shall be only for the purpose of permitting prosecution on the charge or charges contained in one or more untried indictments, informations, or complaints which form the basis of the detainer or detainers or for prosecution on any other charge or charges arising out of the same transaction. Except for his attendance at court and while being transported to or from any place at which his presence may be

required, the prisoner shall be held in a suitable jail or other facility regularly used for persons awaiting prosecution.

(5) At the earliest practicable time consonant with the purposes of this agreement, the prisoner shall be returned to the sending state.

(6) During the continuance of temporary custody or while the prisoner is otherwise being made available for trial as required by this agreement, time being served on the sentence shall continue to run, but good time shall be earned by the prisoner only if, and to the extent that, the law and practice of the jurisdiction which imposed the sentence may allow.

(7) For all purposes other than that for which temporary custody as provided in this agreement is exercised, the prisoner shall be deemed to remain in the custody of and subject to the jurisdiction of the sending state and any escape from temporary custody may be dealt with in the same manner as an escape from the original place of imprisonment or in any other manner permitted by law.

(8) From the time that a party state receives custody of a prisoner pursuant to this agreement until such prisoner is returned to the territory and custody of the sending state, the state in which the one or more untried indictments, informations, or complaints are pending or in which trial is being had shall be responsible for the prisoner and shall also pay all costs of transporting, caring for, keeping, and returning the prisoner. The provisions of this subsection shall govern unless the states concerned shall have entered into a supplementary agreement providing for a different allocation of costs and responsibilities as between or among themselves. Nothing herein contained shall be construed to alter or affect any internal relationship among the departments, agencies, and officers of and in the government of a party state or between a party state and its subdivisions as to the payment of costs or responsibilities therefor.

Article VI

(1) In determining the duration and expiration dates of the time periods provided in Articles III and IV of this agreement, the running of said time periods shall be tolled whenever and for as long as the prisoner is unable to stand trial, as determined by the court having jurisdiction of the matter.

(2) No provision of this agreement and no remedy made available by this agreement shall apply to any person who is adjudged to be mentally ill.

Article VII

Each state party to this agreement shall designate an officer who, acting jointly with like officers of other party states, shall promulgate rules and regulations to carry out more effectively the terms and provisions of this agreement and who shall provide within and without the state information necessary to the effective operation of this agreement.

Article VIII

This agreement shall enter into full force and effect as to a party state when such state has enacted the same into law. A state party to this agreement may withdraw herefrom by enacting a statute repealing the same. However, the withdrawal of any state shall not affect the status of any proceedings already initiated by inmates or by state officers at the time such withdrawal takes effect, nor shall it affect their rights in respect thereof.

Article IX

This agreement shall be liberally construed so as to effectuate its purposes. The provisions of this agreement shall be severable, and if any phrase, clause, sentence, or provision of this agreement is declared to be contrary to the constitution of any party state or of the United States or the applicability thereof to any government, agency, person, or circumstances is held invalid, the validity of the remainder of this agreement and the applicability thereof to any government, agency, person, or circumstance shall not be affected thereby. If this agreement shall be held contrary to the constitution of any state party hereto, the agreement shall remain in full force and effect as to the remaining states and in full force and effect as to the state affected as to all severable matters.

History: En. Sec. 1, Ch. 215, L. 1963; Sec. 94-1101-1, R.C.M. 1947; redes. 95-3131 by Sec. 29, Ch. 513, L. 1973; R.C.M. 1947, 95-3131; amd. Sec. 1, Ch. 346, L. 1985.

46-31-102. Jurisdiction of district courts. The phrase "appropriate court", as used in the agreement on detainers, shall with reference to the courts of this state mean district courts.

History: En. Sec. 2, Ch. 215, L. 1963; Sec. 94-1101-2, R.C.M. 1947; redes. 95-3132 by Sec. 29, Ch. 513, L. 1973; R.C.M. 1947, 95-3132.

Part 2
Enforcement of Agreement

46-31-201. Public agencies to cooperate in enforcement. All courts, departments, agencies, officers, and employees of this state and its political subdivisions are hereby directed to enforce the agreement on detainers and to cooperate with one another and with other party states in enforcing the agreement and effectuating its purpose.

History: En. Sec. 3, Ch. 215, L. 1963; Sec. 94-1101-3, R.C.M. 1947; redes. 95-3133 by Sec. 29, Ch. 513, L. 1973; R.C.M. 1947, 95-3133.

46-31-202. Warden to give over inmate. It shall be lawful and mandatory upon the warden or other official in charge of a penal or correctional institution in this state to give over the person of any inmate thereof whenever so required by the operation of the agreement on detainers.

History: En. Sec. 5, Ch. 215, L. 1963; Sec. 94-1101-5, R.C.M. 1947; redes. 95-3135 by Sec. 29, Ch. 513, L. 1973; R.C.M. 1947, 95-3135.

46-31-203. Coordinator of agreement. The governor shall appoint an officer of this state as coordinator of this agreement who, acting jointly with like officers of party states, shall promulgate rules to carry out more effectively the terms and provisions of this chapter and who shall provide within and without the state information necessary to the effective operation of this agreement.

History: En. Sec. 6, Ch. 215, L. 1963; Sec. 94-1101-6, R.C.M. 1947; redes. 95-3136 by Sec. 29, Ch. 513, L. 1973; R.C.M. 1947, 95-3136.

46-31-204. Penalty for escape from custody on detainer. Every prisoner confined in state prison for a term less than for life who has been lawfully delivered into the temporary custody of appropriate officers of a party state for trial on a charge or detainer based on an untried indictment, information, or complaint and who escapes therefrom is punishable by a fine in an amount not to exceed $50,000, or by imprisonment in the state prison for a term of not less than 1 year or more than 10 years, or by both, said second term of imprisonment to commence from the time he would otherwise have been discharged from said prison.

History: En. Sec. 4, Ch. 215, L. 1963; Sec. 94-1101-4, R.C.M. 1947; redes. 95-3134 by Sec. 29, Ch. 513, L. 1973; R.C.M. 1947, 95-3134; amd. Sec. 7, Ch. 198, L. 1981.

TITLES 47 AND 48

RESERVED

TITLE 49

HUMAN RIGHTS

Ch.
1. Basic Rights.
2. Illegal Discrimination.
3. Governmental Code of Fair Practices.
4. Rights of the Handicapped.

CHAPTER 1

BASIC RIGHTS

Part 1 — Basic Personal Rights

49-1-101. Right of protection from personal injury.
49-1-102. Freedom from discrimination.
49-1-103. Right to use force.

Part 2 — Basic Political Rights

49-1-201. Right to state's protection.
49-1-202. Right to hold elected office.
49-1-203. Rights and duties of electors as compared to nonelectors.
49-1-204. Rights and duties of citizens of other states.

Chapter Cross-References

Inalienable rights, Art. II, sec. 3, Mont. Const.

Individual dignity — equal protection — prohibition on discrimination, Art. II, sec. 4, Mont. Const.; amend. 14, U.S. Const. (see anno. vol. 1, Federal Materials).

Freedom of religion, Art. II, sec. 5, Mont. Const.; 39-31-204.

Freedom of assembly, Art. II, sec. 6, Mont. Const.

Freedom of speech, expression, and press, Art. II, sec. 7, Mont. Const.

Right to bear arms, Art. II, sec. 12, Mont. Const.

Adult rights, Art. II, sec. 14, Mont. Const.

Rights of persons not adults, Art. II, sec. 15, Mont. Const.

Access to courts, Art. II, sec. 16, Mont. Const.

Due process of law, Art. II, sec. 17, Mont. Const.; amend. 14, U.S. Const. (see anno. vol. 1, Federal Materials).

Ex post facto, obligation of contracts, and irrevocable privileges, Art. II, sec. 31, Mont. Const.

Unenumerated rights, Art. II, sec. 34, Mont. Const.; amend. 9, U.S. Const. (see anno. vol. 1, Federal Materials).

Freedom of religion, speech, press, assembly, and petition, amend. 1, U.S. Const. (see anno. vol. 1, Federal Materials).

Double jeopardy, self-incrimination, and due process of law, amend. 5, U.S. Const. (see anno. vol. 1, Federal Materials).

State Coordinator of Indian Affairs, 2-15-217, 90-11-101, 90-11-102.

Rights and obligations of minors, Title 41, ch. 1.

"Baby Jane Doe law" — right of infants to medical treatment, 41-3-102 (see definition of adequate health care and withholding of medically indicated treatment).

Effect of former status as mental patient, 53-21-189.

Part 1

Basic Personal Rights

Part Cross-References

Right of privacy, Art. II, sec. 10, Mont. Const.

Search and seizure, Art. II, sec. 11, Mont. Const.; amend. 4, U.S. Const. (see anno. vol. 1, Federal Materials); Title 46, ch. 5.

Quartering soldiers, Art. II, sec. 32, Mont. Const.; amend. 3, U.S. Const. (see anno. vol. 1, Federal Materials).

Husband and wife, Title 40, ch. 2.

Montana Rights of the Terminally Ill Act, Title 50, ch. 9.

Rights of nonsmokers, Title 50, ch. 40.

Employee and Community Hazardous Chemical Information Act, Title 50, ch. 78.

49-1-101. Right of protection from personal injury. Besides the personal rights mentioned or recognized in other statutes and subject to the qualifications and restrictions provided by law, every person has the right of protection from bodily restraint or harm, personal insult, defamation, and injury to his personal relations.

History: En. Sec. 30, Civ. C. 1895; re-en. Sec. 3600, Rev. C. 1907; re-en. Sec. 5688, R.C.M. 1921; Cal. Civ. C. Sec. 43; Field Civ. C. Sec. 27; re-en. Sec. 5688, R.C.M. 1935; R.C.M. 1947, 64-201; amd. Sec. 1, Ch. 177, L. 1979.

Cross-References

Habeas corpus, Art. II, sec. 19, Mont. Const.

Bail, Art. II, sec. 21, Mont. Const.; amend. 8, U.S. Const. (see anno. vol. 1, Federal Materials).

Excessive sanctions, Art. II, sec. 22, Mont. Const.; amend. 8, U.S. Const. (see anno. vol. 1, Federal Materials).

Detention to secure testimony, Art. II, sec. 23, Mont. Const.

Rights of accused, Art. II, sec. 24, Mont. Const.; amend. 6, U.S. Const. (see anno. vol. 1, Federal Materials).

Self-incrimination and double jeopardy, Art. II, sec. 25, Mont. Const.

Trial by jury, Art. II, sec. 26, Mont. Const.

Imprisonment for debt, Art. II, sec. 27, Mont. Const.

Habeas corpus, bill of attainder, and ex post facto, Art. I, sec. 9, U.S. Const. (see anno. vol. 1, Federal Materials).

Slavery, amend. 13, U.S. Const. (see anno. vol. 1, Federal Materials).

Limit on rights, 1-3-205.

Consent, 1-3-206.

Remedy, 1-3-214.

Voter information pamphlet — rejection of defamatory matter, 13-27-408.

Code of fair campaign practices, Title 13, ch. 35, part 3.

Availability of remedies — liability, Title 27, ch. 1.

Abolition of certain causes of action, Title 27, ch. 1, part 6.

Libel and slander, Title 27, ch. 1, part 8.

Actions against consumer reporting agencies, 31-3-141.

Defaming insurer prohibited, 33-18-302.

Defaming competitors — hearing aid dispensers, 37-16-411.

Marital status irrelevant to parent-child relationship, 40-6-103.

Use of force in defense of person, 45-3-102.

Mistreatment of prisoners, 45-5-204.

False imprisonment, 45-5-301.

Criminal defamation, 45-8-212.

Bail, Title 46, ch. 9.

Mental competency of criminal defendants, Title 46, ch. 14.

Criminal defamation — jury to decide law, 46-16-103.

Habeas corpus, Title 46, ch. 22.

Treatment of developmentally disabled, Title 53, ch. 20, part 1.

Treatment of seriously mentally ill, Title 53, ch. 21, part 1.

49-1-102. Freedom from discrimination. (1) The right to be free from discrimination because of race, creed, religion, color, sex, physical or mental disability, age, or national origin is recognized as and declared to be a civil right. This right must include but not be limited to:

(a) the right to obtain and hold employment without discrimination; and

(b) the right to the full enjoyment of any of the accommodation facilities or privileges of any place of public resort, accommodation, assemblage, or amusement.

(2) This section does not prevent the nonarbitrary consideration in adoption proceedings of relevant information concerning the factors listed in subsection (1). Consideration of religious factors by a licensed child-placing agency that is affiliated with a particular religious faith is not arbitrary consideration of religion within the meaning of this section.

History: **En. Sec. 1, Ch. 201, L. 1965; amd. Sec. 1, Ch. 39, L. 1971; amd. Sec. 1, Ch. 77, L. 1974; amd. Sec. 1, Ch. 524, L. 1975; amd. Sec. 6, Ch. 38, L. 1977; R.C.M. 1947, 64-301; amd. Sec. 2, Ch. 682, L. 1991; amd. Sec. 1, Ch. 407, L. 1993.**

Cross-References

Classified service employees — municipal commission-manager government, 7-3-4415.

Employment by county Board of Park Commissioners — discrimination prohibited, 7-16-2326.

Work-study program — antidiscrimination, 20-25-707.

Exclusion of handicapped from minimum wage and overtime compensation laws, 39-3-406.

Women in employment, Title 39, ch. 7.

Exemption from association with labor organization on religious grounds, 39-31-204.

Health care facilities — discrimination prohibited, 50-5-105.

Furnishing of medical assistance — discrimination prohibited, 53-6-105.

49-1-103. Right to use force. Any necessary force may be used to protect from wrongful injury the person or property of one's self, of a wife, husband, child, parent, or other relative or member of one's family, or of a ward, servant, master, or guest.

History: **En. Sec. 36, Civ. C. 1895; re-en. Sec. 3606, Rev. C. 1907; re-en. Sec. 5694, R.C.M. 1921; Cal. Civ. C. Sec. 50; Based on Field Civil C. Sec. 33; re-en. Sec. 5694, R.C.M. 1935; R.C.M. 1947, 64-210.**

Cross-References

Justifiable use of force, Title 45, ch. 3.

Part 2
Basic Political Rights

Part Cross-References

Popular sovereignty, Art. II, sec. 1, Mont. Const.

Self-government, Art. II, sec. 2, Mont. Const.

Right of participation in government, Art. II, sec. 8, Mont. Const.

Right to know, Art. II, sec. 9, Mont. Const.

Right of suffrage, Art. II, sec. 13, Mont. Const.

Criminal justice policy — rights of convicted, Art. II, sec. 28, Mont. Const.

Civilian control of military, Art. II, sec. 32, Mont. Const.

Importation of armed persons, Art. II, sec. 33, Mont. Const.

Initiative and referendum, Art. III, sec. 4 through 6, Mont. Const.

Suffrage and elections, Art. IV, Mont. Const.

Initiative and referendum — local government, Art. XI, sec. 8, Mont. Const.

Right to vote — race, sex, poll tax, age 18, amend. 15, 19, 24, 26, U.S. Const. (see anno. vol. 1, Federal Materials).

Citizenship, Title 1, ch. 1, part 4.

Public participation in governmental operations, Title 2, ch. 3.

Access to public records, 2-6-102, 2-6-104, 2-6-207, 2-6-307.

United States citizenship — naturalization records, 3-5-514.

United States citizenship — naturalization fees, 3-5-515.

Access to public records — docket of lobbyists, 5-7-202.

Public participation in municipal government, 7-1-4131, 7-1-4141 through 7-1-4143, 7-3-1218, 7-3-4323.

Access to municipal public records, 7-1-4144.

Duty of citizens to aid in law enforcement, 7-4-4303, 45-7-304.

Citizen participation — proposals of Interlocal Cooperation Commission, 7-11-225.

Participation in home guard, 10-1-701.

Elections, Title 13.

Qualifications of voters, 13-1-111, 13-2-206.

Rights of convicted persons, 46-18-801.

49-1-201. Right to state's protection. Every person while within the jurisdiction of this state is entitled to its protection.

History: **En. Sec. 80, Pol. C. 1895; re-en. Sec. 33, Rev. C. 1907; re-en. Sec. 34, R.C.M. 1921; Cal. Pol. C. Sec. 54; re-en. Sec. 34, R.C.M. 1935; R.C.M. 1947, 83-401.**

Cross-References

Powers of municipalities with general powers, 7-1-4123, 7-1-4124.

Child abuse, neglect, and dependency, Title 41, ch. 3.

Battered spouses, Title 52, ch. 6.

49-1-202. Right to hold elected office. Every elector is eligible to the office for which he is an elector, except where otherwise specially provided.

History: En. Sec. 84, Pol. C. 1895; re-en. Sec. 37, Rev. C. 1907; re-en. Sec. 38, R.C.M. 1921; Cal. Pol. C. Sec. 58; re-en. Sec. 38, R.C.M. 1935; R.C.M. 1947, 83-405.

Cross-References

Qualifications of legislators, Art. V, sec. 4, Mont. Const.

Qualifications of executive officers, Art. VI, sec. 3, Mont. Const.

Qualifications of judicial officers, Art. VII, sec. 9, Mont. Const.

Qualifications of U.S. Representatives, Art. I, sec. 2, U.S. Const. (see anno. vol. 1, Federal Materials).

Qualifications of U.S. Senators, Art. I, sec. 3, U.S. Const. (see anno. vol. 1, Federal Materials).

Qualifications of U.S. President, Art. II, sec. 1, U.S. Const. (see anno. vol. 1, Federal Materials).

No religious test to hold public office, Art. VI, U.S. Const. (see anno. vol. 1, Federal Materials).

Eligibility to hold civil office, 2-16-102.

Qualifications of voters, 13-1-111, 13-2-206.

49-1-203. Rights and duties of electors as compared to nonelectors. An elector has no rights or duties beyond those of a citizen not an elector, except the right and duty of holding and electing to office.

History: En. Sec. 85, Pol. C. 1895; re-en. Sec. 38, Rev. C. 1907; re-en. Sec. 39, R.C.M. 1921; Cal. Pol. C. Sec. 59; re-en. Sec. 39, R.C.M. 1935; R.C.M. 1947, 83-406.

49-1-204. Rights and duties of citizens of other states. A citizen of the United States who is not a citizen of this state has the same rights and duties as a citizen of this state not an elector.

History: En. Sec. 86, Pol. C. 1895; re-en. Sec. 39, Rev. C. 1907; re-en. Sec. 40, R.C.M. 1921; Cal. Pol. C. Sec. 60; re-en. Sec. 40, R.C.M. 1935; R.C.M. 1947, 83-407.

Cross-References

Privileges and immunities, Art. IV, sec. 2, U.S. Const. (see anno. vol. 1, Federal Materials).

Determination of residence, 1-1-215.

Qualifications and residence of notary public, 1-5-402.

Qualifications for membership on licensing boards, 2-15-1841, 2-15-1842, 2-15-1844, 2-15-1851, 2-15-1873, 2-15-1881.

Qualifications for membership on agricultural research and marketing committees, 2-15-3002.

Membership on Judicial Standards Commission, 3-1-1101.

Right to initiate investigation of judicial officer, 3-1-1106.

Qualifications of Supreme Court Justice, 3-2-102.

Qualifications of District Court Judge, 3-5-202.

Qualifications of Justice of the Peace, 3-10-204.

Composition of juries, 3-15-101 through 3-15-105.

Membership on Districting and Apportionment Commission, 5-1-101.

Qualifications for county office, 7-4-2201.

Qualifications for district or township office, 7-4-2202.

Qualifications for County Attorney in large counties, 7-4-2701.

Qualifications for municipal office, 7-4-4104.

Permits for commercial timber harvest, 7-8-2609.

Qualifications of reserve police officers, 7-32-213.

Deferral of property taxes of Montana citizen serving in military, 10-1-606.

Participation in home guard, 10-1-701.

Eligibility for liquor license, 16-4-401.

Public contracts — preference to Montana bidders, 18-1-102.

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Eligibility to be auctioneer, 30-11-508, 30-11-509.

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Qualifications for outfitter's or professional guide's license, 37-47-302, 37-47-303.

Qualifications to be licensed as private investigator or patrol operator, 37-60-304.

Qualifications of highway patrol officers, 44-1-401.

Eligibility to be state coal mine inspector, 50-73-401.

Interstate Compact on Mental Health, 53-22-101.

Eligibility of railroad personnel to act as law officers, 69-14-1003.

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CHAPTER 2

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Part 1
General Provisions

49-2-101. Definitions. As used in this chapter, unless the context requires otherwise, the following definitions apply:

(1) "Age" means number of years since birth. It does not mean level of maturity or ability to handle responsibility. These latter criteria may represent legitimate considerations as reasonable grounds for discrimination without reference to age.

(2) "Aggrieved party" means a person who can demonstrate a specific personal and legal interest, as distinguished from a general interest, and who has been or is likely to be specially and injuriously affected by a violation of this chapter.

(3) "Commission" means the commission for human rights provided for in 2-15-1706.

(4) "Commissioner" means the commissioner of labor and industry provided for in 2-15-1701.

(5) "Credit" means the right granted by a creditor to a person to defer payment of a debt, to incur debt and defer its payment, or to purchase property or services and defer payment. It includes without limitation the right to incur and defer debt that is secured by residential real property.

(6) "Credit transaction" means any invitation to apply for credit, application for credit, extension of credit, or credit sale.

(7) "Creditor" means a person who, regularly or as a part of the person's business, arranges for the extension of credit for which the payment of a financial charge or interest is required, whether in connection with loans, sale of property or services, or otherwise.

(8) "Department" means the department of labor and industry provided for in 2-15-1701.

(9) "Educational institution" means a public or private institution and includes an academy; college; elementary or secondary school; extension course; kindergarten; nursery; school system; university; business, nursing, professional, secretarial, technical, or vocational school; or agent of an educational institution.

(10) "Employee" means an individual employed by an employer.

(11) "Employer" means an employer of one or more persons or an agent of the employer but does not include a fraternal, charitable, or religious association or corporation if the association or corporation is not organized either for private profit or to provide accommodations or services that are available on a nonmembership basis.

(12) "Employment agency" means a person undertaking to procure employees or opportunities to work.

(13) "Financial institution" means a commercial bank, trust company, savings bank, finance company, savings and loan association, credit union, investment company, or insurance company.

(14) "Housing accommodation" means a building or portion of a building, whether constructed or to be constructed, that is or will be used as the sleeping quarters of its occupants.

(15) "Labor organization" means an organization or an agent of an organization organized for the purpose, in whole or in part, of collective bargaining, of dealing with employers concerning grievances or terms or conditions of employment, or of other mutual aid and protection of employees.

(16) "National origin" means ancestry.

(17) (a) "Organization" means a corporation, association, or any other legal or commercial entity that engages in advocacy of, enforcement of, or compliance with legal interests affected by this chapter.

(b) The term does not include a labor organization.

(18) "Person" means one or more individuals, labor unions, partnerships, associations, corporations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated employees' associations, employers, employment agencies, organizations, or labor organizations.

(19) (a) "Physical or mental disability" means:

(i) a physical or mental impairment that substantially limits one or more of a person's major life activities;

(ii) a record of such an impairment; or

(iii) a condition regarded as such an impairment.

(b) Discrimination based on, because of, on the basis of, or on the grounds of physical or mental disability includes the failure to make reasonable accommodations that are required by an otherwise qualified person who has a physical or mental disability. An accommodation that would require an undue hardship or that would endanger the health or safety of any person is not a reasonable accommodation.

(20) (a) "Public accommodation" means a place that caters or offers its services, goods, or facilities to the general public subject only to the conditions and limitations established by law and applicable to all persons. It includes without limitation a public inn, restaurant, eating house, hotel, roadhouse, place where food or alcoholic beverages or malt liquors are sold for consumption, motel, soda fountain, soft drink parlor, tavern, nightclub, trailer park, resort, campground, barbershop, beauty parlor, bathroom, resthouse, theater, swimming pool, skating rink, golf course, cafe, ice cream parlor, transportation company, or hospital and all other public amusement and business establishments.

(b) Public accommodation does not include an institution, club, or place of accommodation that proves that it is by its nature distinctly private. An institution, club, or place of accommodation may not be considered by its nature distinctly private if it has more than 100 members, provides regular meal service, and regularly receives payment for dues, fees, use of space, facilities, services, meals, or beverages, directly or indirectly, from or on behalf of nonmembers, for the furtherance of trade or business. For the purposes of this subsection (20), any lodge of a recognized national fraternal organization is considered by its nature distinctly private.

History: En. 64-305 by Sec. 1, Ch. 283, L. 1974; amd. Sec. 1, Ch. 121, L. 1975; amd. Sec. 2, Ch. 524, L. 1975; amd. Sec. 1, Ch. 35, L. 1977; R.C.M. 1947, 64-305; amd. Sec. 2, Ch. 177, L. 1979; amd. Sec. 1, Ch. 543, L. 1989; amd. Sec. 1, Ch. 241, L. 1991; amd. Sec. 1, Ch. 235, L. 1993; amd. Sec. 2, Ch. 407, L. 1993; amd. Sec. 4, Ch. 467, L. 1997.

49-2-102. Records to be kept. The state, employers, labor organizations, and employment agencies shall maintain records on age, sex, and race that are required to administer the civil rights laws and regulations. These records are confidential and available only to federal and state personnel legally charged with administering civil rights laws and regulations. However, statistical information compiled from records on age, sex, and race shall be made available to the general public.

History: En. 64-306.1 by Sec. 4, Ch. 524, L. 1975; amd. Sec. 1, Ch. 27, L. 1977; R.C.M. 1947, 64-306.1(2).

Cross-References

Right to know, Art. II, sec. 9, Mont. Const.

Right of privacy, Art. II, sec. 10, Mont. Const.

Access to public records, 2-6-102, 2-6-104, 2-6-207, 2-6-307.

Part 2
Commission for Human Rights

Part Cross-References

Membership — allocation, 2-15-1706.

49-2-201. Repealed. Sec. 18, Ch. 467, L. 1997.

History: (1)En. 64-311 by Sec. 8, Ch. 283, L. 1974; amd. Sec. 9, Ch. 524, L. 1975; Sec. 64-311, R.C.M. 1947;(2)En. 64-308 by Sec. 5, Ch. 283, L. 1974; amd. Sec. 6, Ch. 524, L. 1975; Sec. 64-308, R.C.M. 1947; R.C.M. 1947, 64-308(part), 64-311.

49-2-202. Authority to require posted notice. The commission may require any employer, employment agency, labor union, educational institution, or financial institution or the owner, lessee, manager, agent, or employee of any public accommodation or housing accommodation subject to this chapter to post, in a conspicuous place on his premises or in the accommodation, a notice to be prepared or approved by the commission containing relevant information that the commission considers necessary to explain this chapter. Any person or institution subject to this section who refuses to comply with an order of the commission respecting the posting of a notice is guilty of a misdemeanor and punishable by a fine of not more than $50.

History: En. 64-314 by Sec. 12, Ch. 524, L. 1975; R.C.M. 1947, 64-314; amd. Sec. 3, Ch. 177, L. 1979.

49-2-203. Subpoena power. (1) The commission may subpoena witnesses, take the testimony of any person under oath, administer oaths, and, in connection therewith, require the production for examination of books, papers, or other tangible evidence relating to a matter in question before the commission.

(2) The department's staff may request that a subpoena relating to a matter under investigation be issued by the commissioner or the commissioner's authorized representative. The authorized representative may not be involved in enforcement of human rights. The commissioner may subpoena witnesses, take testimony under oath, administer oaths, and require the production, for examination, of books, papers, or other intangible evidence.

(3) A party may request subpoenas from the commissioner for the purposes provided in subsection (2).

(4) Subpoenas issued pursuant to this section may be enforced as provided in 2-4-104 of the Montana Administrative Procedure Act.

History: En. 64-313 by Sec. 11, Ch. 524, L. 1975; R.C.M. 1947, 64-313; amd. Sec. 5, Ch. 467, L. 1997.

49-2-204. Rules. (1) The commission shall adopt procedural and substantive rules necessary to implement the commission's responsibilities under this chapter. Rulemaking procedures must comply with the requirements of the Montana Administrative Procedure Act. At a minimum, the commission shall adopt as part of its procedural rules all applicable portions of the Montana Rules of Civil Procedure and the Montana Rules of Evidence. The commission may adopt the procedural provisions of Title 46 as it considers appropriate.

(2) The department shall adopt procedural and substantive rules necessary to implement the department's responsibilities under this chapter. Rules adopted under this chapter must comply with the Montana Administrative Procedure Act. For contested case hearings conducted pursuant to 49-2-505, the department shall adopt all applicable portions of the Montana Rules of Civil Procedure and the Montana Rules of Evidence.

History: En. 64-315 by Sec. 13, Ch. 524, L. 1975; R.C.M. 1947, 64-315; amd. Sec. 6, Ch. 467, L. 1997.

Cross-References

Montana Administrative Procedure Act, Title 2, ch. 4.

49-2-205. Purpose. It is the intent of the legislature that the commission sit in independent judgment of complaints of alleged discrimination in Montana and that the staff operate under the direction and control of the commissioner. The staff is not independent of the commissioner. It is the intent of the legislature that the commission and the department not favor, directly or indirectly, complainants or respondents with procedural or substantive matters of discrimination in Montana. The commission and the department shall maintain the highest standards of objectivity and impartiality when judging cases asserting alleged discrimination in Montana. It is not the intent of the legislature that the department be prohibited from dismissing matters, from referring matters to other agencies following an initial inquiry and interview, or from reaching a decision in an investigation or contested case hearing.

History: En. Sec. 1, Ch. 467, L. 1997.

49-2-206 through 49-2-209 reserved.

49-2-210. Enforcement. (1) When a possible violation of this chapter comes to the attention of the department, the commissioner may initiate a complaint on behalf of the department. The complaint must be signed by the commissioner.

(2) A person is not subject to penalties under this chapter if compliance with the provisions of this chapter would cause the person to violate the provisions of another state law.

History: En. Sec. 15, Ch. 467, L. 1997.

Part 3

Prohibited Discriminatory Practices

Part Cross-References

Price discrimination, Title 30, ch. 14, part 9.

Unfair discrimination prohibited — life insurance, annuities, and disability insurance, 33-18-206.

No discrimination based on evaluation or treatment relating to mental illness, 53-21-189.

49-2-301. Retaliation prohibited. It is an unlawful discriminatory practice for a person, educational institution, financial institution, or governmental entity or agency to discharge, expel, blacklist, or otherwise discriminate against an individual because he has opposed any practices forbidden under this chapter or because he has filed a complaint, testified, assisted, or participated in any manner in an investigation or proceeding under this chapter.

History: Ap.p. Sec. 2, Ch. 283, L. 1974; amd. Sec. 2, Ch. 121, L. 1975; amd. Sec. 3, Ch. 524, L. 1975; amd. Sec. 7, Ch. 38, L. 1977; Sec. 64-306, R.C.M. 1947; Ap.p. Sec. 9, Ch. 283, L. 1974; amd. Sec. 10, Ch. 524, L. 1975; Sec. 64-312, R.C.M. 1947; R.C.M. 1947, 64-306(9), 64-312(2); amd. Sec. 4, Ch. 177, L. 1979.

49-2-302. Aiding, coercing, or attempting. It is unlawful for a person, educational institution, financial institution, or governmental entity or agency to aid, abet, incite, compel, or coerce the doing of an act forbidden under this chapter or to attempt to do so.

History: En. 64-312 by Sec. 9, Ch. 283, L. 1974; amd. Sec. 10, Ch. 524, L. 1975; R.C.M. 1947, 64-312(1); amd. Sec. 5, Ch. 177, L. 1979.

Cross-References

When accountability exists, 45-2-302.

Inchoate offenses, Title 45, ch. 4.

49-2-303. Discrimination in employment. (1) It is an unlawful discriminatory practice for:

(a) an employer to refuse employment to a person, to bar a person from employment, or to discriminate against a person in compensation or in a term, condition, or privilege of employment because of race, creed, religion, color, or national origin or because of age, physical or mental disability, marital status, or sex when the reasonable demands of the position do not require an age, physical or mental disability, marital status, or sex distinction;

(b) a labor organization or joint labor management committee controlling apprenticeship to exclude or expel any person from its membership or from an apprenticeship or training program or to discriminate in any way against a member of or an applicant to the labor organization or an employer or employee because of race, creed, religion, color, or national origin or because of age, physical or mental disability, marital status, or sex when the reasonable demands of the program do not require an age, physical or mental disability, marital status, or sex distinction;

(c) an employer or employment agency to print or circulate or cause to be printed or circulated a statement, advertisement, or publication or to use an employment application that expresses, directly or indirectly, a limitation, specification, or discrimination as to sex, marital status, age, physical or mental disability, race, creed, religion, color, or national origin or an intent to make the limitation, unless based upon a bona fide occupational qualification;

(d) an employment agency to fail or refuse to refer for employment, to classify, or otherwise to discriminate against any individual because of sex, marital status, age, physical or mental disability, race, creed, religion, color, or national origin, unless based upon a bona fide occupational qualification.

(2) The exceptions permitted in subsection (1) based on bona fide occupational qualifications must be strictly construed.

(3) Compliance with 2-2-302 and 2-2-303, which prohibit nepotism in public agencies, may not be construed as a violation of this section.

(4) The application of a hiring preference as provided for in 2-18-111 and 18-1-110 may not be construed to be a violation of this section.

(5) It is not a violation of the prohibition against marital status discrimination in this section for an employer or labor organization to provide greater or additional contributions to a bona fide group insurance plan for employees with dependents than to those employees without dependents or with fewer dependents.

History: En. 64-306 by Sec. 2, Ch. 283, L. 1974; amd. Sec. 2, Ch. 121, L. 1975; amd. Sec. 3, Ch. 524, L. 1975; amd. Sec. 7, Ch. 38, L. 1977; R.C.M. 1947, 64-306(1), (2); amd. Sec. 1, Ch. 279, L. 1983; amd. Sec. 1, Ch. 342, L. 1985; amd. Sec. 3, Ch. 506, L. 1991; amd. Sec. 3, Ch. 13, L. 1993; amd. Sec. 3, Ch. 407, L. 1993.

Cross-References

Work-study program, 20-25-707.

Equal pay for women for equivalent service, 39-3-104.

Exclusion of handicapped from minimum wage and overtime compensation laws, 39-3-406.

Women in employment, Title 39, ch. 7.

Exemption from association with labor organization on religious grounds, 39-31-204.

Right to refuse to participate in sterilization, Title 50, ch. 5, part 5.

Right to refuse to participate in abortion, 50-20-111.

49-2-304. Discrimination in public accommodations. (1) Except when the distinction is based on reasonable grounds, it is an unlawful discriminatory practice for the owner, lessee, manager, agent, or employee of a public accommodation:

(a) to refuse, withhold from, or deny to a person any of its services, goods, facilities, advantages, or privileges because of sex, marital status, race, age, physical or mental disability, creed, religion, color, or national origin;

(b) to publish, circulate, issue, display, post, or mail a written or printed communication, notice, or advertisement which states or implies that any of the services, goods, facilities, advantages, or privileges of the public accommodation will be refused, withheld from, or denied to a person of a certain race, creed, religion, sex, marital status, age, physical or mental disability, color, or national origin.

(2) Except when the distinction is based on reasonable grounds, it is an unlawful discriminatory practice for a licensee under Title 16, chapter 4, to

exclude from its membership or from its services, goods, facilities, advantages, privileges, or accommodations any individual on the grounds of race, color, religion, creed, sex, marital status, age, physical or mental disability, or national origin. This subsection does not apply to any lodge of a recognized national fraternal organization.

(3) Nothing in this section prohibits public accommodations from giving or providing special benefits, incentives, discounts, or promotions for the benefit of individuals based on age.

History: En. 64-306 by Sec. 2, Ch. 283, L. 1974; amd. Sec. 2, Ch. 121, L. 1975; amd. Sec. 3, Ch. 524, L. 1975; amd. Sec. 7, Ch. 38, L. 1977; R.C.M. 1947, 64-306(3); amd. Sec. 1, Ch. 3, L. 1989; amd. Sec. 2, Ch. 543, L. 1989; amd. Sec. 1, Ch. 454, L. 1991; amd. Sec. 4, Ch. 407, L. 1993.

Cross-References

Health care facilities — discrimination prohibited, 50-5-105.

Furnishing of medical assistance — discrimination prohibited, 53-6-105.

Rights while in residential facility, 53-20-142.

Rights of persons admitted to mental health facilities, 53-21-142.

49-2-305. Discrimination in housing — exemptions. (1) It is an unlawful discriminatory practice for the owner, lessee, or manager having the right to sell, lease, or rent a housing accommodation or improved or unimproved property or for any other person:

(a) to refuse to sell, lease, or rent the housing accommodation or property to a person because of sex, marital status, race, creed, religion, color, age, familial status, physical or mental disability, or national origin;

(b) to discriminate against a person because of sex, marital status, race, creed, religion, age, familial status, physical or mental disability, color, or national origin in a term, condition, or privilege relating to the use, sale, lease, or rental of the housing accommodation or property;

(c) to make an inquiry of the sex, marital status, race, creed, religion, age, familial status, physical or mental disability, color, or national origin of a person seeking to buy, lease, or rent a housing accommodation or property for the purpose of discriminating on the basis of sex, marital status, race, creed, religion, age, familial status, physical or mental disability, color, or national origin;

(d) to refuse to negotiate for a sale or to otherwise make unavailable or deny a housing accommodation or property because of sex, marital status, race, creed, religion, age, familial status, physical or mental disability, color, or national origin;

(e) to represent to a person that a housing accommodation or property is not available for inspection, sale, or rental because of that person's sex, marital status, race, creed, religion, age, familial status, physical or mental disability, color, or national origin when the housing accommodation or property is in fact available; or

(f) for profit, to induce or attempt to induce a person to sell or rent a housing accommodation or property by representations regarding the entry or prospective entry into the neighborhood of a person or persons of a particular sex, marital status, race, creed, religion, age, familial status, physical or mental disability, color, or national origin.

(2) The rental of sleeping rooms in a private residence designed for single-family occupancy in which the owner also resides is excluded from the provisions of subsection (1), provided that the owner rents no more than three sleeping rooms within the residence.

(3) It is an unlawful discriminatory practice to make, print, or publish or cause to be made, printed, or published any notice, statement, or advertisement that indicates any preference, limitation, or discrimination that is prohibited by subsection (1) or any intention to make or have a prohibited preference, limitation, or discrimination.

(4) It is an unlawful discriminatory practice for a person to discriminate because of a physical or mental disability of a buyer, lessee, or renter; a person residing in or intending to reside in or on the housing accommodation or property after it is sold, leased, rented, or made available; or any person associated with that buyer, lessee, or renter:

(a) in the sale, rental, or availability of the housing accommodation or property;

(b) in the terms, conditions, or privileges of a sale or rental of the housing accommodation or property; or

(c) in the provision of services or facilities in connection with the housing accommodation or property.

(5) For purposes of subsections (1) and (4), discrimination because of physical or mental disability includes:

(a) refusal to permit, at the expense of the person with a disability, reasonable modifications of existing premises occupied or to be occupied by the person with a disability if the modifications may be necessary to allow the person full enjoyment of the premises, except that in the case of a lease or rental, the landlord may, when it is reasonable to do so, condition permission for a modification on the lessor's or renter's agreement to restore the interior of the premises to the condition that existed before the modification, except for reasonable wear and tear;

(b) refusal to make reasonable accommodations in rules, policies, practices, or services when the accommodations may be necessary to allow the person equal opportunity to use and enjoy a housing accommodation or property; or

(c) (i) except as provided in subsection (5)(c)(ii), in connection with the design and construction of a covered multifamily housing accommodation, a failure to design and construct the housing accommodation in a manner that:

(A) provides at least one accessible building entrance on an accessible route;

(B) makes the public use and common use portions of the housing accommodation readily accessible to and usable by a person with a disability;

(C) provides that all doors designed to allow passage into and within all premises within the housing accommodation are sufficiently wide to allow passage by a person with a disability who uses a wheelchair; and

(D) ensures that all premises within the housing accommodation contain the following features of adaptive design:

(I) an accessible route into and through the housing accommodation;

(II) light switches, electrical outlets, thermostats, and other environmental controls in accessible locations;

(III) reinforcements in bathroom walls to allow later installation of grab bars; and

(IV) usable kitchens and bathrooms that allow an individual who uses a wheelchair to maneuver about the space;

(ii) a covered multifamily housing accommodation that does not have at least one building entrance on an accessible route because it is impractical to do so due to the terrain or unusual characteristics of the site is not required to comply with the requirements of subsection (5)(c)(i).

(6) For purposes of subsection (5), the term "covered multifamily housing accommodation" means:

(a) a building consisting of four or more dwelling units if the building has one or more elevators; and

(b) ground floor units in a building consisting of four or more dwelling units.

(7) (a) It is an unlawful discriminatory practice for any person or other entity whose business includes engaging in residential real estate-related transactions to discriminate because of sex, marital status, race, creed, religion, age, familial status, physical or mental disability, color, or national origin against a person in making available a transaction or in the terms or conditions of a transaction.

(b) For purposes of this subsection (7), the term "residential real estate-related transaction" means any of the following:

(i) the making or purchasing of loans or providing other financial assistance:

(A) for purchasing, constructing, improving, repairing, or maintaining a housing accommodation or property; or

(B) secured by residential real estate; or

(ii) the selling, brokering, or appraising of residential real property.

(8) It is an unlawful discriminatory practice to deny a person access to or membership or participation in a multiple-listing service; real estate brokers' organization; or other service, organization, or facility relating to the business of selling, leasing, or renting housing accommodations or property or to discriminate against the person in the terms or conditions of access, membership, or participation because of sex, marital status, race, creed, religion, age, familial status, physical or mental disability, color, or national origin.

(9) It is an unlawful discriminatory practice to coerce, intimidate, threaten, or interfere with a person in the exercise or enjoyment of or because of the person having exercised or enjoyed or having aided or encouraged any other person in the exercise or enjoyment of a right granted or protected by this section.

(10) The prohibitions of this section against discrimination because of age and familial status do not extend to housing for older persons. "Housing for older persons" means housing:

(a) provided under any state or federal program specifically designed and operated to assist elderly persons;

(b) intended for, and solely occupied by, persons 62 years of age or older; or

(c) intended and operated for occupancy by at least one person 55 years of age or older per unit in accordance with the provisions of 42 U.S.C. 3607(b)(2)(C) and (b)(3) through (b)(5), as those provisions read on March 31, 1996.

(11) The prohibitions of subsection (1) against discrimination because of age and familial status do not extend to rooms or units in dwellings containing living quarters occupied or intended to be occupied by no more than two families living independently of each other, if the owner actually maintains and occupies one of the living quarters as the owner's residence.

(12) For purposes of this section, "familial status" means having a child or children who live or will live with a person. A distinction based on familial status includes one that is based on the age of a child or children who live or will live with a person.

History: En. 64-306 by Sec. 2, Ch. 283, L. 1974; amd. Sec. 2, Ch. 121, L. 1975; amd. Sec. 3, Ch. 524, L. 1975; amd. Sec. 7, Ch. 38, L. 1977; R.C.M. 1947, 64-306(4); amd. Sec. 6, Ch. 177, L. 1979; amd. Sec. 1, Ch. 335, L. 1981; amd. Sec. 1, Ch. 503, L. 1989; amd. Sec. 1, Ch. 328, L. 1991; amd. Sec. 2, Ch. 454, L. 1991; amd. Sec. 1, Ch. 801, L. 1991; amd. Sec. 5, Ch. 407, L. 1993; amd. Sec. 1, Ch. 194, L. 1997.

Cross-References

Urban renewal — discrimination prohibited, 7-15-4207.

49-2-306. Discrimination in financing and credit transactions. (1) It is an unlawful discriminatory practice for a financial institution, upon receiving an application for financial assistance, to permit an official or employee, during the execution of that person's duties, to discriminate against the applicant because of sex, marital status, race, creed, religion, age, physical or mental disability, color, or national origin in a term, condition, or privilege relating to the obtainment or use of the institution's financial assistance, unless based on reasonable grounds.

(2) It is an unlawful discriminatory practice for a creditor to discriminate on the basis of race, color, religion, creed, national origin, age, mental or physical disability, sex, or marital status against any person in any credit transaction that is subject to the jurisdiction of any state or federal court of record.

History: En. 64-306 by Sec. 2, Ch. 283, L. 1974; amd. Sec. 2, Ch. 121, L. 1975; amd. Sec. 3, Ch. 524, L. 1975; amd. Sec. 7, Ch. 38, L. 1977; R.C.M. 1947, 64-306(5), (8); amd. Sec. 6, Ch. 407, L. 1993.

Cross-References

State District Court jurisdiction, Title 3, ch. 5, part 3.

Municipal Court jurisdiction, 3-6-103.

Power to contract, Title 28, ch. 2, part 2.

No discrimination by certain insurers, 33-18-210.

Medical and health insurance — continuation of coverage for handicapped child, 33-22-304, 33-22-506, 33-30-1003, 33-30-1004.

Minors' power to contract, Title 41, ch. 1, part 3.

49-2-307. Discrimination in education. It is an unlawful discriminatory practice for an educational institution:

(1) to exclude, expel, limit, or otherwise discriminate against an individual seeking admission as a student or an individual enrolled as a student in the terms, conditions, or privileges of the institution because of race, creed, religion, sex, marital status, color, age, physical disability, or national origin or because of mental disability, unless based on reasonable grounds;

(2) to make or use a written or oral inquiry or form of application for admission that elicits or attempts to elicit information or to make or keep a record concerning the race, color, sex, marital status, age, creed, religion, physical or mental disability, or national origin of an applicant for admission, except as permitted by regulations of the commission;

(3) to print, publish, or cause to be printed or published a catalog or other notice or advertisement indicating a limitation, specification, or discrimination based on the race, color, creed, religion, age, physical or mental disability, sex, marital status, or national origin of an applicant for admission; or

(4) to announce or follow a policy of denial or limitation of educational opportunities of a group or its members, through a quota or otherwise, because of race, color, sex, marital status, age, creed, religion, physical or mental disability, or national origin.

History: En. 64-306 by Sec. 2, Ch. 283, L. 1974; amd. Sec. 2, Ch. 121, L. 1975; amd. Sec. 3, Ch. 524, L. 1975; amd. Sec. 7, Ch. 38, L. 1977; R.C.M. 1947, 64-306(7); amd. Sec. 7, Ch. 407, L. 1993.

Cross-References

Aid prohibited to sectarian schools, Art. X, sec. 6, Mont. Const.

Nondiscrimination in education, Art. X, sec. 7, Mont. Const.

Exemption from immunization requirements on medical or religious grounds, 20-5-405.

49-2-308. Discrimination by the state. (1) It is an unlawful discriminatory practice for the state or any of its political subdivisions:

(a) to refuse, withhold from, or deny to a person any local, state, or federal funds, services, goods, facilities, advantages, or privileges because of race, creed, religion, sex, marital status, color, age, physical or mental disability, or national origin, unless based on reasonable grounds;

(b) to publish, circulate, issue, display, post, or mail a written or printed communication, notice, or advertisement which states or implies that any local, state, or federal funds, services, goods, facilities, advantages, or privileges of the office or agency will be refused, withheld from, or denied to a person of a certain race, creed, religion, sex, marital status, color, age, physical or mental disability, or national origin or that the patronage of a person of a particular race, creed, religion, sex, marital status, color, age, or national origin or possessing a physical or mental disability is unwelcome or not desired or solicited, unless based on reasonable grounds;

(c) to refuse employment to a person, to bar a person from employment, or to discriminate against a person in compensation or in a term, condition, or privilege of employment because of that person's political beliefs. However, this prohibition does not apply to policymaking positions on the immediate staff of an elected officer of the executive branch provided for in Article VI, section 1, of the Montana constitution, to the appointment by the governor of a director of a principal department provided for in Article VI, section 7, of the Montana constitution, or to the immediate staff of the majority and minority leadership of the Montana legislature.

(2) This section does not prevent the nonarbitrary consideration in adoption proceedings of relevant information concerning the factors listed in subsection (1).

History: En. 64-306 by Sec. 2, Ch. 283, L. 1974; amd. Sec. 2, Ch. 121, L. 1975; amd. Sec. 3, Ch. 524, L. 1975; amd. Sec. 7, Ch. 38, L. 1977; R.C.M. 1947, 64-306(6); amd. Sec. 3, Ch. 682, L. 1991; amd. Sec. 8, Ch. 407, L. 1993.

Cross-References

Special consideration for military personnel and veterans, Art. II, sec. 35, Mont. Const.

Aid prohibited to sectarian schools, Art. X, sec. 6, Mont. Const.

Executive Branch officers and agencies, Title 2, ch. 15.

Classified service employees — municipal commission-manager government, 7-3-4415.

Sex discrimination — records of military discharges, 7-4-2614.

Urban renewal — discrimination prohibited, 7-15-4207.

Employment by county Board of Park Commissioners — discrimination prohibited, 7-16-2326.

Use of hospital district facilities — discrimination prohibited, 7-34-2123.

Sheltered workshops — public contracts to purchase, Title 18, ch. 5, part 1.

Special education supervisor, 20-3-103.

Exemption from school immunization requirements on medical or religious grounds, 20-5-405.

Special education for exceptional children, Title 20, ch. 7, part 4.

Surrogate parent to represent interests of handicapped student, 20-7-461 through 20-7-463.

Educational programs for gifted children, Title 20, ch. 7, part 9.

State School for the Deaf and Blind, Title 20, ch. 8.

Work-study program, 20-25-707.

Library services for handicapped, 22-1-103.

Religious beliefs of witness not relevant to credibility, Rule 610, M.R.Ev. (see Title 26, ch. 10).

Marital status irrelevant to parent-child relationship, 40-6-103.

Right to refuse to participate in sterilization, Title 50, ch. 5, part 5.

Exemption from prenatal blood tests on religious grounds, 50-19-109.

Right to refuse to participate in abortion, 50-20-111.

Furnishing of medical assistance — discrimination prohibited, 53-6-105.

Community programs and homes for physically disabled, Title 53, ch. 19, part 1.

Community-based services for persons with developmental disabilities, 53-20-212.

Community mental health centers, 53-21-206.

Veterans' benefits, Title 61, ch. 3, part 4.

Ineligibility of handicapped for driver's license, 61-5-105.

Homestead exemption, Title 70, ch. 32, part 2.

Surviving spouse exempt from inheritance tax, 72-16-313.

Exceptions to fishing and hunting license requirements and regulations, Title 87, ch. 2, part 8.

49-2-309. Discrimination in insurance and retirement plans. (1) It is an unlawful discriminatory practice for a financial institution or person to discriminate solely on the basis of sex or marital status in the issuance or operation of any type of insurance policy, plan, or coverage or in any pension or retirement plan, program, or coverage, including discrimination in regard to rates or premiums and payments or benefits.

(2) This section does not apply to any insurance policy, plan, or coverage or to any pension or retirement plan, program, or coverage in effect prior to October 1, 1985.

(3) It is not a violation of the prohibition against marital status discrimination in this section for an employer to provide greater or additional contributions to a bona fide group insurance plan for employees with dependents than to those employees without dependents or with fewer dependents.

History: En. Secs. 1, 3, Ch. 531, L. 1983; amd. Sec. 4, Ch. 13, L. 1993.

Cross-References

Insurance forms — discriminatory provisions as grounds for disapproval, 33-1-502.

49-2-310. Maternity leave — unlawful acts of employers. It shall be unlawful for an employer or his agent to:

(1) terminate a woman's employment because of her pregnancy;

(2) refuse to grant to the employee a reasonable leave of absence for such pregnancy;

(3) deny to the employee who is disabled as a result of pregnancy any compensation to which she is entitled as a result of the accumulation of disability or leave benefits accrued pursuant to plans maintained by her employer, provided that the employer may require disability as a result of pregnancy to be verified by medical certification that the employee is not able to perform her employment duties; or

(4) require that an employee take a mandatory maternity leave for an unreasonable length of time.

History: En. 41-2602 by Sec. 2, Ch. 320, L. 1975; R.C.M. 1947, 41-2602(1); amd. Sec. 1, Ch. 285, L. 1983; MCA 1981, 39-7-203; redes. 49-2-310 by Sec. 2, Ch. 285, L. 1983.

Cross-References

Parental leave for state employees, 2-18-606.

Wrongful discharge from employment, Title 39, ch. 2, part 9.

49-2-311. Reinstatement to job following pregnancy-related leave of absence. Upon signifying her intent to return at the end of her leave of absence, such employee shall be reinstated to her original job or to an equivalent position with equivalent pay and accumulated seniority, retirement, fringe benefits, and other service credits unless, in the case of a private employer, the employer's circumstances have so changed as to make it impossible or unreasonable to do so.

History: En. 41-2602 by Sec. 2, Ch. 320, L. 1975; R.C.M. 1947, 41-2602(2); MCA 1981, 39-7-204; redes. 49-2-311 by Sec. 2, Ch. 285, L. 1983.

Part 4

Exceptions to Prohibitions

49-2-401. Repealed. Sec. 11, Ch. 801, L. 1991.

History: En. 64-306.1 by Sec. 4, Ch. 524, L. 1975; amd. Sec. 1, Ch. 27, L. 1977; R.C.M. 1947, 64-306.1(1); amd. Sec. 7, Ch. 177, L. 1979.

49-2-402. "Reasonable" to be strictly construed. Any grounds urged as a "reasonable" basis for an exemption under any section of this chapter shall be strictly construed.

History: En. 64-306 by Sec. 2, Ch. 283, L. 1974; amd. Sec. 2, Ch. 121, L. 1975; amd. Sec. 3, Ch. 524, L. 1975; amd. Sec. 7, Ch. 38, L. 1977; R.C.M. 1947, 64-306(10).

49-2-403. Specific limits on justification. (1) Except as permitted in 49-2-303(3) through (5) and 49-3-201(5), sex, marital status, age, physical or mental disability, race, creed, religion, color, or national origin may not comprise justification for discrimination except for the legally demonstrable purpose of correcting a previous discriminatory practice.

(2) Age or mental disability may represent a legitimate discriminatory criterion in credit transactions only as it relates to a person's capacity to make or be bound by contracts or other obligations.

History: En. 64-307 by Sec. 3, Ch. 283, L. 1974; amd. Sec. 3, Ch. 121, L. 1975; amd. Sec. 5, Ch. 524, L. 1975; amd. Sec. 8, Ch. 38, L. 1977; R.C.M. 1947, 64-307(1), (2); amd. Sec. 2, Ch. 342, L. 1985; amd. Sec. 4, Ch. 506, L. 1991; amd. Sec. 5, Ch. 13, L. 1993; amd. Sec. 9, Ch. 407, L. 1993.

Cross-References

Power to contract, Title 28, ch. 2, part 2.

Minors' power to contract, Title 41, ch. 1, part 3.

49-2-404. Distinctions permitted for modesty or privacy. Separate lavatory, bathing, or dressing facilities based on the distinction of sex may be maintained for the purpose of modesty or privacy.

History: En. 64-307 by Sec. 3, Ch. 283, L. 1974; amd. Sec. 3, Ch. 121, L. 1975; amd. Sec. 5, Ch. 524, L. 1975; amd. Sec. 8, Ch. 38, L. 1977; R.C.M. 1947, 64-307(3).

Cross-References

Right of privacy, Art. II, sec. 10, Mont. Const.

49-2-405. Veterans' and persons with disabilities employment preference. The application of an employment preference as provided for in Title 39, chapter 29 or 30, and 10-2-402 by a public employer as defined in 39-29-101 and 39-30-103 may not be construed to constitute a violation of this chapter.

History: En. Sec. 12, Ch. 1, Sp. L. 1983; amd. Sec. 15, Ch. 646, L. 1989.

Part 5

Enforcement

49-2-501. Filing complaints. (1) A complaint may be filed with the department by any party claiming to be aggrieved by any discriminatory practice prohibited by this chapter.

(2) A complaint may be filed on behalf of a party claiming to be aggrieved by a discriminatory practice prohibited by this chapter if the person acting on behalf of the aggrieved party is the aggrieved party's guardian, attorney, or duly authorized representative or an advocacy group, labor organization, or other organization acting as an authorized representative.

(3) The complaint must be in the form of a written, verified complaint stating the name and address of the party, educational institution, financial institution, or governmental entity or agency alleged to have engaged in the discriminatory practice and the particulars of the alleged discriminatory practice.

(4) (a) Except as provided in 49-2-510 and subsection (4)(b) of this section, a complaint under this chapter must be filed with the department within 180 days after the alleged unlawful discriminatory practice occurred or was discovered.

(b) If the complainant has initiated efforts to resolve the dispute underlying the complaint by filing a grievance in accordance with any grievance procedure established by a collective bargaining agreement, contract, or written rule or policy, the complaint may be filed within 180 days after the conclusion of the grievance procedure if the grievance procedure concludes within 120 days after the alleged unlawful discriminatory practice occurred or was discovered. If the grievance procedure does not conclude within 120 days, the complaint must be filed within 300 days after the alleged unlawful discriminatory practice occurred or was discovered.

(c) Any complaint not filed within the times set forth in this section may not be considered by the commission or the department.

History: En. 64-308 by Sec. 5, Ch. 283, L. 1974; amd. Sec. 6, Ch. 524, L. 1975; R.C.M. 1947, 64-308(1); amd. Sec. 8, Ch. 177, L. 1979; amd. Sec. 1, Ch. 415, L. 1987; amd. Sec. 3, Ch. 801, L. 1991; amd. Sec. 7, Ch. 467, L. 1997.

49-2-502. Repealed. Sec. 18, Ch. 467, L. 1997.

History: En. 64-308 by Sec. 5, Ch. 283, L. 1974; amd. Sec. 6, Ch. 524, L. 1975; R.C.M. 1947, 64-308(part).

49-2-503. Temporary relief by court order. At any time after a complaint is filed under this chapter, a district court may, upon the application of the commissioner or the complainant, enter a preliminary injunction against a respondent in the case. The procedure for granting the order is as provided by statute for preliminary injunctions in civil actions.

History: En. 64-308 by Sec. 5, Ch. 283, L. 1974; amd. Sec. 6, Ch. 524, L. 1975; R.C.M. 1947, 64-308(3); amd. Sec. 4, Ch. 801, L. 1991; amd. Sec. 8, Ch. 467, L. 1997.

Cross-References

Injunctions, Title 27, ch. 19.

49-2-504. Informal investigation and conciliation. (1) (a) The department shall informally investigate the matters set out in the complaint promptly and impartially. If the department determines that the allegations are supported by a preponderance of the evidence, it shall attempt to achieve a resolution of the complaint by conference, conciliation, and persuasion that, in addition to providing redress for the complaint, includes conditions that eliminate the discriminatory practice, if any, identified in the investigation. The department shall, within 10 business days following receipt of a filed complaint, notify a respondent that the respondent is the subject of a filed complaint. The notification must be in writing and must include a copy of the filed complaint. If requested, the department shall also provide the parties with all other information related to the complaint in the possession of the department that is not currently in the possession of the parties or a party. The department shall make known to the parties the fact that information is available upon request. The department may not investigate a complaint until it has received notice that the respondent has received the department's notification of the complaint.

(b) If a complaint is filed relative to an employment-related complaint and if the commissioner decides that the inclusion of documents or information contained in the complaint would seriously impede the rights of a person or the proper investigation of the complaint, the information may be excluded from the notification by providing a written summary of the information contained in the complaint. The written summary must include sufficient information to give maximum effect to the intent of this chapter.

(2) The respondent shall file an answer to a complaint filed with the department within 10 business days of the respondent's receipt of the complaint. An answer may be a response simply admitting or denying the allegations without further specificity or requesting additional information from the department. The time for filing an answer may be extended by a showing of good cause.

(3) The department shall commence proceedings within 30 days after receipt of a complaint.

(4) The department shall make a finding regarding the merit or nonmerit of the complaint within 180 days after a complaint is filed, except that the department shall make the finding within 120 days after a complaint is filed under 49-2-305.

History: En. 64-308 by Sec. 5, Ch. 283, L. 1974; amd. Sec. 6, Ch. 524, L. 1975; R.C.M. 1947, 64-308(4); amd. Sec. 9, Ch. 467, L. 1997.

49-2-505. Contested case hearing. (1) If the informal efforts to eliminate the alleged discrimination are unsuccessful, the department shall hold a hearing on the complaint. The department shall serve notice of the hearing and a copy of the complaint on the parties.

(2) (a) If the parties mutually agree to permit the department to retain jurisdiction of the case under this chapter for a period of time that exceeds 12 months after the complaint was filed, then the parties shall stipulate to a schedule for proceedings to be established by the department.

(b) The department shall, not later than 395 days after the complaint was filed, set a date for an administrative hearing in the case.

(c) The case must be heard no later than 90 days after the date is set by the department. The department may, in its sole discretion, issue a continuance of the hearing date only upon a showing of good cause.

(3) (a) The hearing must be held by the department in the county where the unlawful conduct is alleged to have occurred unless a party charged in the complaint requests and is granted a change of venue for good cause shown. The case in support of the complaint may be presented before the department by the complainant or an attorney representing the complainant. The hearing and any subsequent proceedings under this chapter must be held in accordance with the applicable portions of the Montana Rules of Civil Procedure as adopted by the department.

(b) Upon request of the hearings officer, the department may present evidence with regard to activity conducted. However, except in cases brought pursuant to 42 U.S.C. 3601, et seq., the department may not represent either party in a contested case hearing.

(4) A party may appeal a decision of the hearings officer to the commission. A party shall provide notice of its appeal to the commission, the department, and all parties within 10 business days of receipt of the notice of decision of the administrative hearing. The commission shall hear all appeals within 120 days of receipt of notice of appeal. The commission shall render a decision within 90 days of hearing the appeal.

(5) All hearings conducted under this section may, upon stipulation of the parties, be heard telephonically.

(6) The commission may make provisions for defraying the expenses of an indigent party in a contested case hearing held pursuant to this chapter.

(7) The prevailing party in a hearing under this section may bring an action in district court for attorney fees. The court in its discretion may allow the prevailing party reasonable attorney fees. An action under this section must comply with the Montana Rules of Civil Procedure.

History: En. 64-308 by Sec. 5, Ch. 283, L. 1974; amd. Sec. 6, Ch. 524, L. 1975; R.C.M. 1947, 64-308(5), (6); amd. Sec. 9, Ch. 177, L. 1979; amd. Sec. 1, Ch. 709, L. 1979; amd. Sec. 10, Ch. 467, L. 1997.

Cross-References

Montana Administrative Procedure Act, Title 2, ch. 4.

Montana Rules of Civil Procedure, Title 25, ch. 20.

49-2-506. Procedure upon a finding of discrimination. (1) If the commission or the department, after a hearing, finds that a party against whom a complaint was filed has engaged in the discriminatory practice alleged in the complaint, the commission or the department shall order the party to refrain from engaging in the discriminatory conduct. The order may:

(a) prescribe conditions on the accused's future conduct relevant to the type of discriminatory practice found;

(b) require any reasonable measure to correct the discriminatory practice and to rectify any harm, pecuniary or otherwise, to the person discriminated against;

(c) require a report on the manner of compliance.

(2) Except as provided in 49-2-510, the order may not require the payment of punitive damages.

(3) Whenever a commission or department order or conciliation agreement requires inspection by the department for a period of time to determine if the respondent is complying with that order or agreement, the period of time may not be more than 1 year.

History: En. 64-309 by Sec. 6, Ch. 283, L. 1974; amd. Sec. 7, Ch. 524, L. 1975; R.C.M. 1947, 64-309(1), (2), (4); amd. Sec. 10, Ch. 177, L. 1979; amd. Sec. 5, Ch. 801, L. 1991; amd. Sec. 11, Ch. 467, L. 1997.

49-2-507. Procedure upon failure to find discrimination. If the commission finds that a person, institution, entity, or agency against whom or which a complaint was filed has not engaged in the discriminatory practice alleged in the complaint, it shall issue and cause to be served on the complainant an order dismissing the complaint.

History: En. 64-309 by Sec. 6, Ch. 283, L. 1974; amd. Sec. 7, Ch. 524, L. 1975; R.C.M. 1947, 64-309(3); amd. Sec. 11, Ch. 177, L. 1979.

49-2-508. Enforcement of commission or department order or conciliation agreement. If the order issued under 49-2-506 is not obeyed, the commissioner or a party may petition the district court in the county where the discriminatory practice occurred or in which the respondent resides or transacts business to enforce the commission's or department's order by any appropriate order. The commissioner or a party may also commence a civil action in an appropriate district court for relief for a breach of a conciliation agreement.

History: En. 64-310 by Sec. 7, Ch. 283, L. 1974; amd. Sec. 8, Ch. 524, L. 1975; R.C.M. 1947, 64-310; amd. Sec. 1, Ch. 539, L. 1985; amd. Sec. 12, Ch. 467, L. 1997.

Cross-References

Venue in civil actions, Title 25, ch. 2.

Injunctions, Title 27, ch. 19.

49-2-509. Conclusion of complaint — filing in district court. (1) Except as provided in subsection (2), the department shall, at the request of either party, conclude the administrative proceedings if:

(a) the department has completed its investigation of a complaint filed pursuant to 49-2-305; or

(b) 12 months have elapsed since the complaint was filed.

(2) The department may not refuse to conclude the administrative proceedings unless:

(a) the party requesting the conclusion of the administrative proceedings has waived the right to request filing in the district court;

(b) more than 30 days have elapsed since service of notice of hearing under 49-2-505, unless the department fails to schedule a hearing to be held within 90 days of service of notice of hearing; or

(c) the party requesting conclusion of the administrative proceedings has unsuccessfully attempted through court litigation to prevent the department from investigating the complaint.

(3) The department shall dismiss a complaint filed under this chapter and the complainant may file a discrimination action in district court if:

(a) the commission or the department lacks jurisdiction over the complaint;

(b) the complainant fails to cooperate in the investigation of the complaint or fails to keep the department advised of changes of address;

(c) the department determines that the allegations of the complaint are not supported by a preponderance of the evidence; or

(d) the department determines that the commission or the department will not or cannot hold a hearing within 12 months after the filing of the complaint.

(4) A decision of the department to dismiss a complaint brought under this chapter or to refuse to permit removal to the district court is final unless a party seeks review by filing objections within 14 days after the decision is served on the party. The commission shall review the decision in informal proceedings under 2-4-604. A party may ask the district court to review a decision of the commission made under this section. The review must be de novo.

(5) Within 90 days after receipt of a notice under subsection (1) or (3) or an order under subsection (4) of affirmance of a dismissal, whichever occurs later, or of a letter issued under subsection (1), the complainant may commence a civil action in the district court in the district in which the alleged violation occurred for appropriate relief. Except as provided in 49-2-510, if the complainant fails to commence a civil action in the district court within 90 days after receipt of the letter, notice, or order issued by the commission or the department, the claim is barred.

(6) If the district court finds, in an action under this section, that a person, institution, entity, or agency against whom or which a complaint was filed has engaged in the unlawful discriminatory practice alleged in the complaint, the court may provide the same relief as described in 49-2-506 for a commission order. In addition, the court may in its discretion allow the prevailing party reasonable attorney fees.

(7) The provisions of this chapter establish the exclusive remedy for acts constituting an alleged violation of chapter 3 or this chapter, including acts that may otherwise also constitute a violation of the discrimination provisions of Article II, section 4, of the Montana constitution or 49-1-102. A claim or request for relief based upon the acts may not be entertained by a district court other than by the procedures specified in this chapter.

History: En. Sec. 1, Ch. 505, L. 1983; amd. Sec. 1, Ch. 511, L. 1987; amd. Sec. 6, Ch. 801, L. 1991; amd. Sec. 13, Ch. 467, L. 1997.

49-2-510. Procedures and remedies for enforcement of housing discrimination laws. (1) A complaint may be filed with the department by or on behalf of a party claiming to be aggrieved by any discriminatory practice prohibited by 49-2-305. The complaint must be in written form, verified by the aggrieved party, and must be filed with the department within 180 days after the alleged unlawful discriminatory practice occurred or was discovered.

(2) If the department, on appeal, or the commission, in a hearing under 49-2-505, finds that a party against whom a complaint was filed under this part has engaged in a discriminatory practice in violation of 49-2-305, the department or the commission may, in addition to the remedies and injunctive and other equitable relief provided by 49-2-506, to vindicate the public interest, assess a civil penalty:

(a) in an amount not exceeding $10,000 if the respondent has not been adjudged in any prior judicial or formal administrative proceeding to have committed any prior discriminatory housing practice in violation of 49-2-305; and

(b) in an amount not exceeding $25,000 if the respondent has been adjudged in any prior judicial or formal administrative proceedings to have committed one or more similar discriminatory housing practices in repeated violation of a subsection of 49-2-305 during the 5-year period ending on the date of the filing of the written complaint.

(3) In the case of an order with respect to a discriminatory housing practice in violation of 49-2-305 that occurred in the course of a business subject to licensing or regulation by a governmental agency, the commission shall, no later than 30 days after the date of the issuance of the order or, if the order is judicially reviewed, no later than 30 days after the order is affirmed send copies of the findings of fact, the conclusions of law, and the order to the licensing or regulatory agency.

(4) (a) When a complaint is filed under 49-2-305, a complainant or a respondent may elect to have the claims decided in a civil action in lieu of a hearing under 49-2-505. The election must be made no later than 20 days after receipt by the electing person of service of notice of certification for hearing under 49-2-505. The person making the election shall give notice to the department and to all complainants and other respondents named in the complaint. Within 30 days after the election is made, the complainant, the commissioner, or the aggrieved party may commence a civil action in an appropriate district court on behalf of the aggrieved party if the department has made a finding that the allegations of the complaint are supported by a preponderance of the evidence. If the department has made a finding that the allegations of the complaint are not supported by a preponderance of the evidence, the complainant may commence a civil action in an appropriate district court in accordance with subsection (5). An aggrieved party with respect to the issues to be determined in a civil action brought by the department may intervene in the action.

(b) The department may not continue administrative proceedings on a complaint after an election is made in accordance with subsection (4)(a).

(5) (a) An aggrieved party may commence a civil action in an appropriate district court within 2 years after an alleged unlawful discriminatory practice under 49-2-305 occurred or was discovered or within 2 years of the breach of a conciliation agreement entered into under 49-2-504 in a case alleging a violation of 49-2-305. The computation of the 2-year period does not include any time during which an administrative proceeding under this title was pending with respect to a complaint alleging a violation of 49-2-305. The tolling of the time limit for commencing a civil action does not apply to actions arising from breach of a conciliation agreement.

(b) An aggrieved party may commence a civil action under this subsection for a violation of 49-2-305 whether or not a complaint has been filed under 49-2-501 and without regard to the status of a complaint filed with the department, except as provided in subsection (5)(d). If the department has obtained a conciliation agreement with the consent of the aggrieved party, an action may not be filed under this subsection by the aggrieved party regarding the alleged violation of 49-2-305 that forms the basis for the complaint except for the purpose of enforcing the terms of the agreement.

(c) The commission or the department may not continue administrative proceedings on a complaint after the filing of a civil action commenced by the aggrieved party under this subsection (5) seeking relief with respect to the same alleged violation of 49-2-305.

(d) An aggrieved party may not commence a civil action under this subsection (5) with respect to an alleged violation of 49-2-305 if the commission or the department has commenced a hearing on the record under 49-2-505 regarding the same complaint.

(e) Upon application by a person alleging a violation of 49-2-305 in a civil action under this subsection (5) or by a person against whom the violation is alleged, the court may:

(i) appoint an attorney for the applicant and the respondent; or

(ii) authorize the commencement or continuation of a civil action without the payment of fees, costs, or security if, in the opinion of the court, the party is financially unable to bear the costs of the civil action. As in all actions brought in forma pauperis, the burden of showing lack of financial ability rests with the party claiming financial hardship.

(6) If the court finds that a party against whom a complaint was filed under this section has been adjudicated in a civil or formal administrative proceeding to have engaged in a similar discriminatory practice in violation of a subsection of 49-2-305, the court may, consistent with the provisions of subsection (2), award punitive damages. The court may also award attorney fees to the substantively prevailing party.

(7) (a) Except as provided in subsection (7)(b), all civil and administrative penalties and other revenue generated under this part must be deposited in the state general fund.

(b) Damages or penalties, whether monetary or otherwise, may not inure to an organization unless the organization is an aggrieved party. This section does not affect any amount owed to an aggrieved party.

History: En. Sec. 2, Ch. 801, L. 1991; amd. Sec. 41, Ch. 422, L. 1997; amd. Sec. 14, Ch. 467, L. 1997.

Cross-References

Access to housing accommodations for physically disabled, 49-4-212.

Part 6
Penalties

49-2-601. Criminal penalty. A person, educational institution, or financial institution, either public or private, or a governmental entity or agency who or which willfully engages in an unlawful discriminatory practice prohibited by this chapter or willfully resists, prevents, impedes, or interferes with the commission, the department, or any of its authorized representatives in the performance of a duty under this chapter or who or which willfully violates an order of the commission or willfully violates this chapter in any other manner is guilty of a misdemeanor and is punishable by a fine of not more than $500 or by imprisonment for not more than 6 months, or both.

History: En. 64-312 by Sec. 9, Ch. 283, L. 1974; amd. Sec. 10, Ch. 524, L. 1975; R.C.M. 1947, 64-312(3); amd. Sec. 12, Ch. 177, L. 1979.

Cross-References

Obstructing peace officer or public servant, 45-7-302.

Place of imprisonment, 46-18-211.

49-2-602. Intimidation or interference in right to be free from housing discrimination — penalties. (1) It is unlawful for a person, whether or not acting under color of law, by force or threat of force to purposefully or knowingly injure, intimidate, or interfere with or attempt to injure, intimidate, or interfere with:

(a) a person because of sex, race, creed, religion, age, familial status, physical or mental disability, color, or national origin and because the person is or has been:

(i) selling, purchasing, renting, leasing, financing, or occupying or contracting or negotiating for the sale, purchase, lease, rental, financing, or occupation of any housing accommodation or property; or

(ii) applying for or participating in any service, organization, or facility relating to the business of selling, leasing, or renting housing accommodations or property;

(b) a person because that person is or has been:

(i) participating, without discrimination because of sex, race, creed, religion, age, familial status, physical or mental disability, color, or national origin in any of the activities, services, organizations, or facilities described in this subsection (1); or

(ii) affording another person or class of persons opportunity or protection to participate in those activities, services, organizations, or facilities; or

(c) a citizen because the citizen is or has been, or in order to discourage that citizen or any other citizen from, lawfully aiding or encouraging other persons to participate in any of the activities, services, organizations, or facilities described in this subsection (1) or because the citizen is or has been lawfully participating in speech or peaceful assembly opposing any denial of the opportunity to participate.

(2) A person who violates a provision of subsection (1):

(a) shall be fined not more than $1,000 or imprisoned for not more than 1 year, or both;

(b) if bodily injury results, shall be fined not more than $10,000 or imprisoned for not more than 10 years, or both; or

(c) if death results, shall be subject to imprisonment for any term of years or for life.

History: En. Sec. 9, Ch. 801, L. 1991; amd. Sec. 10, Ch. 407, L. 1993.

Cross-References

Access to housing accommodations for physically disabled, 49-4-212.

CHAPTER 3

GOVERNMENTAL CODE OF FAIR PRACTICES

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Chapter Cross-References

Special consideration for military personnel and veterans, Art. II, sec. 35, Mont. Const.

Variation of oath to suit witness's belief, 1-6-103.

Religious beliefs of witness not relevant to credibility, Rule 610, M.R.Ev. (see Title 26, ch. 10).

Marital status irrelevant to parent-child relationship, 40-6-103.

No discrimination based on evaluation or treatment relating to mental illness, 53-21-189.

Part 1

General Provisions

49-3-101. Definitions. As used in this chapter, the following definitions apply:

(1) "Age" means number of years since birth. It does not mean level of maturity or ability to handle responsibility, which may represent legitimate considerations as reasonable grounds for discrimination without reference to age.

(2) "Commission" means the commission for human rights provided for in 2-15-1706.

(3) (a) "Physical or mental disability" means:

(i) a physical or mental impairment that substantially limits one or more of a person's major life activities;

(ii) a record of such an impairment; or

(iii) a condition regarded as such an impairment.

(b) Discrimination based upon, because of, on the basis of, on the grounds of, or with regard to physical or mental disability includes the failure to make reasonable accommodations that are required by an otherwise qualified person who has a physical or mental disability. Any accommodation that would require an undue hardship or that would endanger the health or safety of any person is not a reasonable accommodation.

(4) "State or local governmental agency" means:

(a) any branch, department, office, board, bureau, commission, agency, university unit, college, or other instrumentality of state government; or

(b) a county, city, town, school district, or other unit of local government and any instrumentality of local government.

(5) "Qualifications" means qualifications that are genuinely related to competent performance of the particular occupational task.

History: (1)En. 64-316 by Sec. 1, Ch. 487, L. 1975; Sec. 64-316, R.C.M. 1947; (2)En. 64-319 by Sec. 4, Ch. 487, L. 1975; amd. Sec. 11, Ch. 38, L. 1977; Sec. 64-319, R.C.M. 1947; R.C.M. 1947, 64-316, 64-319(part); amd. Sec. 13, Ch. 177, L. 1979; amd. Sec. 1, Ch. 540, L. 1983; amd. Sec. 2, Ch. 241, L. 1991; amd. Sec. 11, Ch. 407, L. 1993.

49-3-102. What local governmental units affected. Local governmental units affected by this chapter include all political subdivisions of the state, including school districts.

History: En. 64-327 by Sec. 12, Ch. 487, L. 1975; R.C.M. 1947, 64-327.

Cross-References

Applicability to community college districts, 20-15-403.

49-3-103. Permitted distinctions. (1) Nothing in this chapter prohibits any public employer:

(a) from enforcing a differentiation based on marital status, age, or physical or mental disability when based on a bona fide occupational qualification reasonably necessary to the normal operation of the particular business or where the differentiation is based on reasonable factors other than age;

(b) from observing the terms of a bona fide seniority system or any bona fide employee benefit plan, such as a retirement, pension, or insurance plan, that is not a subterfuge to evade the purposes of this chapter, except that an employee benefit plan may not excuse the failure to hire any individual;

(c) from discharging or otherwise disciplining an individual for good cause; or

(d) from providing greater or additional contributions to a bona fide group insurance plan for employees with dependents than to those employees without dependents or with fewer dependents.

(2) The application of an employment preference as provided for in 2-18-111, 10-2-402, 18-1-110, and Title 39, chapter 29 or 30, by a public employer as defined in 39-29-101 and 39-30-103 may not be construed to constitute a violation of this chapter.

History: En. 64-328 by Sec. 13, Ch. 487, L. 1975; R.C.M. 1947, 64-328; amd. Sec. 2, Ch. 279, L. 1983; (2) En. Sec. 13, Ch. 1, Sp. L. 1983; amd. Sec. 16, Ch. 646, L. 1989; amd. Sec. 5, Ch. 506, L. 1991; amd. Sec. 6, Ch. 13, L. 1993; amd. Sec. 12, Ch. 407, L. 1993.

49-3-104. Quotas not required. Nothing in this chapter shall be construed as requiring the institution of a system of quotas for representation of any sex, age, religious, racial, ethnic, or other group affected by this chapter.

History: En. 64-330 by Sec. 15, Ch. 487, L. 1975; R.C.M. 1947, 64-330.

49-3-105. Repealed. Sec. 11, Ch. 801, L. 1991.

History: En. Sec. 4, Ch. 540, L. 1983.

49-3-106. Rulemaking authority. The commission may adopt rules necessary for the implementation of this chapter, in accordance with the Montana Administrative Procedure Act. The rules may include but are not limited to procedural rules for:

(1) filing of complaints;

(2) conducting investigations of complaints;

(3) petitioning for a declaratory ruling; and

(4) conduct of hearings.

History: En. Sec. 2, Ch. 540, L. 1983; amd. Sec. 7, Ch. 801, L. 1991.

Part 2

Duties of Governmental Agencies and Officials

49-3-201. Employment of state and local government personnel. (1) State and local government officials and supervisory personnel shall recruit, appoint, assign, train, evaluate, and promote personnel on the basis of merit and qualifications without regard to race, color, religion, creed, political ideas, sex, age, marital status, physical or mental disability, or national origin.

(2) All state and local governmental agencies shall:

(a) promulgate written directives to carry out this policy and to guarantee equal employment opportunities at all levels of state and local government;

(b) regularly review their personnel practices to assure compliance; and

(c) conduct continuing orientation and training programs with emphasis on human relations and fair employment practices.

(3) The department of administration shall ensure that the entire examination process, including appraisal of qualifications, is free from bias.

(4) Appointing authorities shall exercise care to ensure utilization of minority group persons.

(5) Compliance with 2-2-302 and 2-2-303, which prohibit nepotism in public agencies, may not be construed as a violation of this section.

History: En. 64-317 by Sec. 2, Ch. 487, L. 1975; amd. Sec. 9, Ch. 38, L. 1977; R.C.M. 1947, 64-317; amd. Sec. 14, Ch. 177, L. 1979; amd. Sec. 3, Ch. 342, L. 1985; amd. Sec. 13, Ch. 407, L. 1993.

Cross-References

State employee classification, compensation, and benefits, Title 2, ch. 18.

Classified service employees — municipal commission-manager government, 7-3-4415.

Employment by county Board of Park Commissioners — discrimination prohibited, 7-16-2326.

Work-study program, 20-25-707.

Equal pay for women for equivalent service, 39-3-104.

Exclusion of handicapped from minimum wage and overtime compensation laws, 39-3-406.

Women in employment, Title 39, ch. 7.

Veterans' public employment preference, Title 39, ch. 29.

Persons with disabilities public employment preference, Title 39, ch. 30.

Exemption from association with labor organization on religious grounds, 39-31-204.

Right to refuse to participate in sterilization, Title 50, ch. 5, part 5.

Right to refuse to participate in abortion, 50-20-111.

49-3-202. Employment referrals and placement services. (1) All state and local governmental agencies, including educational institutions, that provide employment referrals or placement services to public or private employers shall accept job orders on a fair practice basis. A job request indicating an intention to exclude a person because of race, color, religion, creed, political ideas, sex, age, marital status, physical or mental disability, or national origin must be rejected.

(2) All state and local governmental agencies shall cooperate in programs developed by the commission for human rights for the purpose of broadening the base of job recruitment and shall further cooperate with employers and unions providing the programs.

(3) The department of labor and industry shall cooperate with the commission for human rights in encouraging and enforcing compliance by employers and labor unions with the policy of this chapter and promotion of equal employment opportunities.

History: En. 64-320 by Sec. 5, Ch. 487, L. 1975; amd. Sec. 12, Ch. 38, L. 1977; R.C.M. 1947, 64-320; amd. Sec. 14, Ch. 407, L. 1993.

Cross-References

State employment service, 39-1-102, 39-51-307.

49-3-203. Educational, counseling, and training programs. All educational, counseling, and vocational guidance programs and all apprenticeship and on-the-job training programs of state and local governmental agencies or in which state and local governmental agencies participate must be open to all persons, who must be accepted on the basis of merit and qualifications without regard to race, color, religion, creed, political ideas, sex, age, marital status, physical or mental disability, or national origin. The programs must be conducted to encourage the full development of the interests, aptitudes, skills, and capacities of all students and trainees, with special attention to the problems of persons who are culturally deprived or who are educationally or economically disadvantaged. Expansion of training opportunities under these programs must be encouraged to involve larger numbers of participants from those segments of the labor force in which the need for upgrading levels of skill is greatest.

History: En. 64-323 by Sec. 8, Ch. 487, L. 1975; amd. Sec. 14, Ch. 38, L. 1977; R.C.M. 1947, 64-323; amd. Sec. 15, Ch. 177, L. 1979; amd. Sec. 15, Ch. 407, L. 1993.

Cross-References

No aid to sectarian schools, Art. X, sec. 6, Mont. Const.

Nondiscrimination in education, Art. X, sec. 7, Mont. Const.

Special education supervisor, 20-3-103.

Exemption from immunization requirements on medical or religious grounds, 20-5-405.

Special education for exceptional children, Title 20, ch. 7, part 4.

Educational programs for gifted children, Title 20, ch. 7, part 9.

State School for the Deaf and Blind, Title 20, ch. 8.

Charges for tuition — waivers, 20-25-421.

Exemption from barber apprenticeship fees, 37-30-307.

Exemption from cosmetology examination and fees, 37-31-308.

49-3-204. Licensing. (1) A state or local governmental agency may not grant, deny, or revoke the license or charter of a person on the grounds of race, color, religion, creed, political ideas, sex, age, marital status, physical or mental disability, or national origin. Each state or local governmental agency shall take appropriate action in the exercise of its licensing or regulatory power as will assure equal treatment of all persons, eliminate discrimination, and enforce compliance with the policy of this chapter. This subsection does not prevent the department of public health and human services from licensing a child-placing agency that gives nonarbitrary consideration in adoption proceedings to relevant information concerning the factors listed in this subsection. Consideration of religious factors by a licensed child-placing agency that is affiliated with a particular religious faith is not arbitrary consideration of religion within the meaning of this section.

(2) The state may not issue or renew a license under Title 16, chapter 4, to an applicant or licensee that excludes from its membership or from its goods, services, facilities, privileges, or advantages any individual on the grounds of race, color, religion, creed, political ideas, sex, age, marital status, physical or mental disability, or national origin. This subsection does not apply to any lodge of a recognized national fraternal organization.

History: En. 64-321 by Sec. 6, Ch. 487, L. 1975; amd. Sec. 13, Ch. 38, L. 1977; R.C.M. 1947, 64-321; amd. Sec. 16, Ch. 177, L. 1979; amd. Sec. 3, Ch. 543, L. 1989; amd. Sec. 4, Ch. 682, L. 1991; amd. Sec. 16, Ch. 407, L. 1993; amd. Sec. 235, Ch. 546, L. 1995.

Cross-References

Restrictions on licensing of former criminal offenders, 23-4-201, 23-5-176, 32-2-409, 37-1-201 through 37-1-205, 37-47-302, 37-47-341.

Professions and Occupations, Title 37.

Licensure of criminal offenders, Title 37, ch. 1, part 2.

Exemptions from licensure as physician — Christian Science practitioners and motels, 37-3-103.

Licensing and standards for spiritual healing institutions, 50-5-104.

Special license plates for disabled veterans, handicapped persons, and ex-prisoners of war, 61-3-446, 61-3-452, 61-3-453.

Ineligibility of handicapped for driver's license, 61-5-105.

Exceptions to fishing and hunting license requirements and regulations, Title 87, ch. 2, part 8.

49-3-205. Governmental services. (1) All services of every state or local governmental agency must be performed without discrimination based upon race, color, religion, creed, political ideas, sex, age, marital status, physical or mental disability, or national origin.

(2) A state or local facility may not be used in the furtherance of any discriminatory practice, nor may a state or local governmental agency become a party to an agreement, arrangement, or plan that has the effect of sanctioning discriminatory practices.

(3) Each state or local governmental agency shall analyze all of its operations to ascertain possible instances of noncompliance with the policy of this chapter and shall initiate comprehensive programs to remedy any defect found to exist.

(4) This section does not prevent the nonarbitrary consideration in adoption proceedings of relevant information concerning the factors listed in this section.

History: En. 64-318 by Sec. 3, Ch. 487, L. 1975; amd. Sec. 10, Ch. 38, L. 1977; R.C.M. 1947, 64-318; amd. Sec. 17, Ch. 177, L. 1979; amd. Sec. 5, Ch. 682, L. 1991; amd. Sec. 17, Ch. 407, L. 1993.

Cross-References

Sex discrimination — records of military discharges, 7-4-2614.

Urban renewal — discrimination prohibited, 7-15-4207.

Use of hospital district facilities — discrimination prohibited, 7-34-2123.

Accessibility of polling places, Title 13, ch. 3, part 2.

Library services for handicapped, 22-1-103.

Health care facilities — discrimination prohibited, 50-5-105.

Exemption from prenatal blood tests on religious grounds, 50-19-109.

Furnishing of medical assistance — discrimination prohibited, 53-6-105.

Rights while in residential facility, 53-20-142.

Community-based services for persons with developmental disabilities, 53-20-212.

Community mental health centers, 53-21-206.

49-3-206. Distribution of governmental funds. Race, color, religion, creed, political ideas, sex, age, marital status, physical or mental disability, or national origin may not be considered as limiting factors with regard to applicants' qualifications for benefits authorized by law in state or locally administered programs involving the distribution of funds; nor may state agencies provide grants, loans, or other financial assistance to public agencies, private institutions, or organizations which engage in discriminatory practices.

History: En. 64-324 by Sec. 9, Ch. 487, L. 1975; amd. Sec. 15, Ch. 38, L. 1977; R.C.M. 1947, 64-324; amd. Sec. 18, Ch. 407, L. 1993.

Cross-References

Furnishing of medical assistance — discrimination prohibited, 53-6-105.

49-3-207. Nondiscrimination provision in all public contracts. Every state or local contract or subcontract for construction of public buildings or for other public work or for goods or services must contain a provision that all hiring must be on the basis of merit and qualifications and a provision that there may not be discrimination on the basis of race, color, religion, creed, political ideas, sex, age, marital status, physical or mental disability, or national origin by the persons performing the contract.

History: En. 64-319 by Sec. 4, Ch. 487, L. 1975; amd. Sec. 11, Ch. 38, L. 1977; R.C.M. 1947, 64-319(part); amd. Sec. 18, Ch. 177, L. 1979; amd. Sec. 19, Ch. 407, L. 1993.

Cross-References

Urban renewal — discrimination prohibited, 7-15-4207.

Public Contracts, Title 18.

49-3-208. Public accommodations laws. No state or local governmental agency may permit any violation of the public accommodations provisions of 49-2-304.

History: En. 64-322 by Sec. 7, Ch. 487, L. 1975; R.C.M. 1947, 64-322; amd. Sec. 19, Ch. 177, L. 1979.

49-3-209. Retaliation prohibited. It is an unlawful discriminatory practice for a state or local governmental agency to discharge, expel, blacklist, or otherwise discriminate against an individual because he has opposed any practices forbidden under this chapter or because he has filed a complaint, testified, assisted, or participated in any manner in an investigation or proceeding under this chapter.

History: En. Sec. 3, Ch. 540, L. 1983.

Part 3
Enforcement and Remedies

49-3-301. Cooperation with commission for human rights. All state and local governmental agencies shall cooperate with the commission for human rights in the commission's enforcement and educational programs. They shall comply with the commission's requests for information concerning practices inconsistent with the state policy against discrimination and shall consider its recommendations for effectuating and implementing that policy. The commission shall continue to augment its enforcement and educational programs which seek to eliminate all discrimination.

History: En. 64-325 by Sec. 10, Ch. 487, L. 1975; R.C.M. 1947, 64-325; amd. Sec. 20, Ch. 177, L. 1979.

49-3-302. Repealed. Sec. 3, Ch. 370, L. 1989.

History: En. 64-326 by Sec. 11, Ch. 487, L. 1975; R.C.M. 1947, 64-326; amd. Sec. 21, Ch. 177, L. 1979.

49-3-303. Repealed. Sec. 14, Ch. 540, L. 1983.

History: En. 64-329 by Sec. 14, Ch. 487, L. 1975; R.C.M. 1947, 64-329; amd. Sec. 1, Ch. 168, L. 1981.

49-3-304 through 49-3-312. Repealed. Sec. 18, Ch. 467, L. 1997.

Compiler's Comments

Histories of Repealed Sections:

49-3-304. En. Sec. 5, Ch. 540, L. 1983; amd. Sec. 2, Ch. 415, L. 1987.

49-3-305. En. Sec. 6, Ch. 540, L. 1983.

49-3-306. En. Sec. 7, Ch. 540, L. 1983; amd. Sec. 8, Ch. 801, L. 1991.

49-3-307. En. Sec. 8, Ch. 540, L. 1983.

49-3-308. En. Sec. 9, Ch. 540, L. 1983.

49-3-309. En. Sec. 10, Ch. 540, L. 1983.

49-3-310. En. Sec. 11, Ch. 540, L. 1983.

49-3-311. En. Sec. 12, Ch. 540, L. 1983; amd. Sec. 2, Ch. 539, L. 1985.

49-3-312. En. Sec. 13, Ch. 540, L. 1983; amd. Sec. 2, Ch. 511, L. 1987.

49-3-313 and 49-3-314 reserved.

49-3-315. Enforcement and remedies. The procedures set forth in chapter 2, part 5, apply to complaints alleging a violation of this chapter.

History: En. Sec. 16, Ch. 467, L. 1997.

CHAPTER 4

RIGHTS OF THE HANDICAPPED

Part 1 — Discrimination in Employment

49-4-101. Discrimination prohibited.
49-4-102. Penalty and civil remedy.

Part 2 — Rights of the Physically Disabled

49-4-201. Repealed.
49-4-202. Policy of the state.
49-4-203. Definitions.
49-4-204 through 49-4-210 reserved.
49-4-211. Right to use public places and accommodations.
49-4-212. Access to housing accommodations.
49-4-213. Use of white or metallic-colored canes restricted to the blind.
49-4-214. Right to be accompanied by service animal — identification for service animals in training.

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49-4-216. Duty and civil liability of pedestrian or driver approaching blind person.
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Part 3 — Special Parking Permits Motorized Wheelchairs

49-4-301. Eligibility for special parking permit.
49-4-302. Privileges of permitholder — privilege for disabled veteran — exemptions from time limits — requirements for special parking spaces.
49-4-303. Applications for permit.
49-4-304. Special license plate or card to be provided and displayed — additional cards allowed for owners of more than one vehicle.
49-4-305. Expiration of permit.
49-4-306. Department of justice to publicize permit.
49-4-307. Penalty.
49-4-308 and 49-4-309 reserved.
49-4-310. Special parking permit for long-term care facility.
49-4-311. Use of motorized wheelchairs on public streets.
49-4-312. Regulation by municipalities.

Part 4 — Preference in Leasing of Concessions (Repealed. Sec. 14, Ch. 175, L. 1981)

Part 5 — Interpreters for the Deaf in Official Proceedings

49-4-501. Policy.
49-4-502. Definitions.
49-4-503. Deaf person as participant in judicial or administrative proceeding — interpreter to be used.
49-4-504. Preliminary determination.
49-4-505. Intermediary interpreter to be used.
49-4-506. Interpreter in full view.
49-4-507. Coordination of interpreter requests.
49-4-508. Oath of interpreter.
49-4-509. Compensation.
49-4-510. Waiver.
49-4-511. Privileged communications.

Chapter Cross-References

Income tax exemption for handicapped child, 15-30-114.

Sheltered workshops — public contracts to purchase, Title 18, ch. 5, part 1.

Special education supervisor, 20-3-103.

Special education for exceptional children, Title 20, ch. 7, part 4.

Surrogate parent to represent interests of handicapped student, 20-7-461 through 20-7-463.

State School for the Deaf and Blind, Title 20, ch. 8.

Library services for handicapped, 22-1-103.

Medical and health insurance — continuation of coverage for handicapped child, 33-22-304, 33-22-506, 33-30-1003, 33-30-1004.

Regulation of speech-language pathologists and audiologists, Title 37, ch. 15.

Exemption from barber apprenticeship fees, 37-30-307.

Exemption from cosmetology examination and fees, 37-31-308.

Exclusion from minimum wage and overtime compensation laws, 39-3-406.

Workers' compensation — vocationally handicapped, Title 39, ch. 71, part 9.

Workers' compensation — vocational rehabilitation, Title 39, ch. 71, part 10.

Adoption of hard-to-place children, Title 42, ch. 10, part 1.

Mental competency of criminal defendants, Title 46, ch. 14.

Duty of state to develop services for handicapped children, 50-1-202.

Accessibility of buildings built with public funds, 50-60-201.

Child rehabilitation, 52-2-113.

Adult services, Title 52, ch. 3.

Vocational rehabilitation, Title 53, ch. 7.

Community programs and homes for physically disabled, Title 53, ch. 19, part 1.

Developmental disabilities, Title 53, ch. 20.

Mentally ill, Title 53, ch. 21.

No discrimination based on evaluation or treatment relating to mental illness, 53-21-189.

Ineligibility for driver's license, 61-5-105.

Advertising by public utilities of special equipment to aid handicapped, 69-3-307.

Exemption from death taxes — property transferred to certain children's hospitals, 72-16-312.

Exceptions to fishing and hunting license requirements and regulations, Title 87, ch. 2, part 8.

Part 1

Discrimination in Employment

49-4-101. Discrimination prohibited. It is unlawful to discriminate, in hiring or employment, against a person because of the person's physical disability. There is no discrimination when the nature or extent of the disability reasonably precludes the performance of the particular employment or when the particular employment may subject the person with a disability or that person's fellow employees to physical harm.

History: En. Sec. 3, Ch. 77, L. 1974; R.C.M. 1947, 64-304(part); amd. Sec. 20, Ch. 407, L. 1993.

49-4-102. Penalty and civil remedy. A person who practices discrimination in violation of 49-4-101 commits a misdemeanor and is also liable in a district court action for civil damages and attorney's fees by the person discriminated against. Should the person who allegedly practiced discrimination prevail in the civil action, he shall be entitled to recover reasonable attorney's fees from the person who alleged the discrimination.

History: En. Sec. 3, Ch. 77, L. 1974; R.C.M. 1947, 64-304(part).

Cross-References

Misdemeanor penalty, 46-18-212.

Part 2

Rights of the Physically Disabled

49-4-201. Repealed. Sec. 11, Ch. 239, L. 1983.

History: En. Sec. 1, Ch. 181, L. 1971; R.C.M. 1947, 71-1303.

49-4-202. Policy of the state. It is the policy of the state to encourage and enable the blind, the visually impaired, the deaf, and the otherwise physically disabled to participate fully in the social and economic life of the state and to engage in remunerative employment. The blind, the visually impaired, the deaf, and the otherwise physically disabled must be employed in the state service, the service of the political subdivisions of the state, the public schools, and all other employment supported in whole or in part by public funds on the same terms and conditions as the able-bodied, unless it is shown that the particular disability prevents the performance of the work involved.

History: En. Sec. 2, Ch. 181, L. 1971; R.C.M. 1947, 71-1304; amd. Sec. 1, Ch. 176, L. 1981; amd. Sec. 21, Ch. 407, L. 1993.

Cross-References

Accessibility of polling places, Title 13, ch. 3, part 2.

49-4-203. Definitions. (1) "Housing accommodation" means any real property or portion of real property that is used or occupied or is intended, arranged, or designed to be used or occupied as the home, residence, or sleeping place of one or more human beings. The term does not include any single-family residence the occupants of which furnish for compensation not more than one room within the residence.

(2) "Service animal" means a dog or other animal individually trained to provide assistance to an individual with a disability.

History: En. 71-1305.1 by Sec. 5, Ch. 266, L. 1975; amd. Sec. 2, Ch. 35, L. 1977; R.C.M. 1947, 71-1305.1(2); amd. Sec. 1, Ch. 394, L. 1997.

49-4-204 through 49-4-210 reserved.

49-4-211. Right to use public places and accommodations. (1) The blind, the visually impaired, and the deaf have the same right as the able-bodied to the full and free use of the streets, highways, sidewalks, walkways, public buildings, public facilities, and other public places.

(2) The blind, the visually impaired, and the deaf are entitled to full and equal accommodations, advantages, facilities, and privileges of all common carriers, as defined in 69-11-101, and all public accommodations, as defined in 49-2-101, subject only to the conditions and limitations established by law and applicable alike to all persons.

History: En. Sec. 3, Ch. 181, L. 1971; amd. Sec. 1, Ch. 266, L. 1975; R.C.M. 1947, 71-1305(2), (3); amd. Sec. 22, Ch. 177, L. 1979; amd. Sec. 2, Ch. 176, L. 1981; amd. Sec. 22, Ch. 407, L. 1993.

Cross-References

Pedestrian traffic laws, Title 61, ch. 8, part 5.

49-4-212. Access to housing accommodations. Blind, visually impaired, and deaf persons are entitled to as full and equal access as other members of the general public to any housing accommodation offered for compensation in this state.

History: En. 71-1305.1 by Sec. 5, Ch. 266, L. 1975; amd. Sec. 2, Ch. 35, L. 1977; R.C.M. 1947, 71-1305.1(1), (3); amd. Sec. 3, Ch. 176, L. 1981; amd. Sec. 10, Ch. 801, L. 1991; amd. Sec. 23, Ch. 407, L. 1993.

Cross-References

Procedures and remedies for enforcement of housing discrimination laws, 49-2-510.

Intimidation or interference in right to be free from housing discrimination — penalties, 49-2-602.

49-4-213. Use of white or metallic-colored canes restricted to the blind. No person, except those wholly or partially blind, shall carry or use on any street or highway or in any other public place a cane or walking stick which is white or metallic in color or white or metallic tipped with red.

History: En. Sec. 3, Ch. 181, L. 1971; amd. Sec. 1, Ch. 266, L. 1975; R.C.M. 1947, 71-1305(1).

49-4-214. Right to be accompanied by service animal — identification for service animals in training. (1) A person with a disability has the right to be accompanied by a service animal or a service animal in training with identification complying with subsection (4) in any of the places mentioned in 49-4-211(2) without being charged extra for the service animal. The person with a disability is liable for any damage done to the property by the animal.

(2) A person with a disability who has a service animal or who obtains a service animal is entitled to full and equal access to all housing accommodations as provided in 49-2-305 and 49-4-212. The person with a disability may not be

required to pay extra compensation for the service animal but is liable for any damage done to the premises by the service animal.

(3) A person who is training a service animal is entitled to the same rights and assumes the same responsibilities granted to a person with a disability in this section.

(4) For the purposes of this section, a service animal in training that is a dog shall wear a leash, collar, cape, harness, or backpack that identifies in writing that the dog is a service animal in training. Other service animals in training must also be identifiable by written identification as a service animal in training. The written identification for service animals in training must be visible and legible from a distance of at least 20 feet.

History: En. Sec. 4, Ch. 181, L. 1971; amd. Sec. 2, Ch. 266, L. 1975; R.C.M. 1947, 71-1306; amd. Sec. 23, Ch. 177, L. 1979; amd. Sec. 4, Ch. 176, L. 1981; amd. Sec. 2, Ch. 394, L. 1997.

49-4-215. Penalty for violating rights. Any person, firm, or corporation or the agent of any person, firm, or corporation who denies or interferes with admittance to or enjoyment of the public facilities enumerated in 49-4-211 or otherwise interferes with the rights of a totally or partially blind, deaf, or otherwise disabled person under 49-4-211 is guilty of a misdemeanor.

History: En. Sec. 4, Ch. 266, L. 1975; R.C.M. 1947, 71-1309; amd. Sec. 5, Ch. 176, L. 1981.

Cross-References

Criminal responsibility of corporations, 45-2-311.

Accountability for conduct of corporation, 45-2-312.

Misdemeanor penalty, 46-18-212.

49-4-216. Duty and civil liability of pedestrian or driver approaching blind person. (1) A pedestrian who is not totally or partially blind or a driver of a vehicle who approaches or comes in contact with a person who is totally or partially blind and is carrying a cane or walking stick predominately white or metallic in color or white tipped with red or is being led by a trained guide dog wearing a harness and walking on either side of or slightly in front of such blind person shall immediately come to a full stop and take such precautions before proceeding as may be necessary to avoid accident or injury to such blind person.

(2) A driver or pedestrian who fails to take such precautions is liable in damages for any injury caused the totally or partially blind person. A totally or partially blind pedestrian who is not carrying such a cane or using a guide dog in any of the places listed in 49-4-211 has all of the rights and privileges conferred by law upon other persons, and the failure of such a pedestrian to carry such a cane or to use a guide dog in any such place may not be held to constitute or be evidence of contributory negligence.

History: En. Sec. 5, Ch. 181, L. 1971; amd. Sec. 3, Ch. 266, L. 1975; R.C.M. 1947, 71-1307; amd. Sec. 24, Ch. 177, L. 1979.

Cross-References

Liability, Title 27, ch. 1, part 7.

Pedestrian traffic laws, Title 61, ch. 8, part 5.

49-4-217. Penalty for violation of duty or unauthorized use of cane. Any person other than a person wholly or partially blind who shall carry a cane or walking stick such as is described in this part, contrary to the provisions of this part, or who shall fail to heed the approach of a person carrying such a cane as is described by this part or who shall fail to come to a full stop when approaching or coming in contact with a person so carrying such a cane or walking stick or being led by a trained guide dog or who shall fail to take precaution against accidents or injury to such person after coming to a stop, as provided for herein, is guilty of a misdemeanor punishable by a fine not to exceed $25.

History: En. Sec. 6, Ch. 181, L. 1971; R.C.M. 1947, 71-1308.

Part 3

Special Parking Permits
Motorized Wheelchairs

49-4-301. Eligibility for special parking permit. (1) The department of justice shall issue a special parking permit to a person who has a disability that limits or impairs the person's mobility and who, as determined by a licensed physician, a licensed chiropractor, or a licensed advanced practice registered nurse, as provided in 37-8-202, meets one of the following criteria:

(a) cannot walk 200 feet without stopping to rest;

(b) is severely limited in ability to walk because of an arthritic, neurological, or orthopedic condition;

(c) is so severely disabled that the person cannot walk without the use of or assistance from a brace, cane, another person, prosthetic device, wheelchair, or other assistive device;

(d) uses portable oxygen;

(e) is restricted by lung disease to the extent that forced expiratory respiratory volume, when measured by spirometry, is less than 1 liter per second or the arterial oxygen tension is less than 60 mm/hg on room air at rest;

(f) has impairment because of cardiovascular disease or a cardiac condition to the extent that the person's functional limitations are classified as class III or IV under standards accepted by the American heart association; or

(g) has a disability resulting from an acute sensitivity to automobile emissions or from another disease or physical condition that limits or impairs the person's mobility and that is documented by the licensed physician, the licensed chiropractor, or the licensed advanced practice registered nurse as being comparable in severity to the other conditions listed in this subsection (1).

(2) A person who has a condition expected to improve within 6 months may be issued a temporary placard for a period not to exceed 6 months but may not be issued a special license plate under 61-3-332(10)(g). If the condition exists after 6 months, a new temporary placard must be issued for the time period prescribed by the applicant's physician, chiropractor, or advanced practice registered nurse, not to exceed 24 months, upon receipt of a new certification from the disabled person's physician, chiropractor, or advanced practice registered nurse that the conditions specified in subsection (1) continue to exist and are expected to continue for the time specified.

(3) The department of justice may issue special parking permits to an agency or business that provides transportation as a service for persons with a disability. The permits must be used only to load and unload persons with a disability in the special parking place provided for in 49-4-302. As used in this

subsection, "disability" means a physical impairment that severely limits a person's ability to walk.

(4) Except as provided in subsection (3), an applicant may not receive more than one permit.

History: En. 53-106.12 by Sec. 1, Ch. 31, L. 1977; R.C.M. 1947, 53-106.12(1), (6); amd. Sec. 1, Ch. 614, L. 1983; amd. Sec. 24, Ch. 407, L. 1993; amd. Sec. 1, Ch. 202, L. 1995; amd. Sec. 1, Ch. 392, L. 1995; amd. Sec. 1, Ch. 280, L. 1997; amd. Sec. 1, Ch. 156, L. 1999.

Compiler's Comments

1999 Amendment: Chapter 156 in throughout section inserted references to advanced practice registered nurse; and made minor changes in style. Amendment effective March 23, 1999.

49-4-302. Privileges of permitholder — privilege for disabled veteran — exemptions from time limits — requirements for special parking spaces. (1) The parking permit issued under this part, when displayed, entitles a person to park a motor vehicle in a special parking space reserved for a person with a disability, whether on public property or on private property available for public use, when the person for whom the permit was issued is using the special parking space to enter or exit the vehicle.

(2) A vehicle may not be parked in a parking space on public or private property that is clearly identified by an official sign as being reserved for use by a person with a disability unless:

(a) the vehicle is lawfully displaying a parking permit issued under this part, a distinguishing license plate or placard for a person with a disability that was issued by a foreign jurisdiction conferring parking privileges similar to those conferred in subsection (1), or a specially inscribed license plate issued under 61-3-332(10)(c)(i)(A) or (10)(g) or 61-3-426(2); and

(b) the reserved parking space is being used by the person for whom the permit, plate, or placard was issued to enter or exit the vehicle.

(3) The governing body of a city, town, or county may exempt vehicles lawfully displaying parking permits issued under this part and vehicles lawfully displaying specially inscribed license plates issued under 61-3-332(10)(c)(i)(A) or (10)(g) or 61-3-426(2) and parked in public places along public streets from any time limitation imposed upon parking, except in areas where:

(a) stopping, standing, or parking of all vehicles is prohibited;

(b) only special vehicles may be parked; or

(c) parking is not allowed during specific periods of the day in order to accommodate heavy traffic.

(4) In accordance with subsection (2), the governing body of a city, town, or county or appropriate state agency may impose all, but not less than all, of the following requirements with respect to any special parking space constructed after September 30, 1985, and reserved for a person with a disability or a permitholder on ways of this state open to the public, as defined in 61-8-101:

(a) The space must be located on a smooth, level surface as near as practicable to building entrances or walkways that have curb cuts and appropriately designed ramps and access lanes to accommodate wheelchairs.

(b) If parallel to curbside, the parking space must be separated from an adjacent space, either in the front or the rear, by at least 5 feet of striped no-parking area.

(c) If at an angle to curbside, the parking space must be at least 8 feet wide and free of obstruction if located at the end of a line of angle parking spaces, and each other angle parking space designated for a person with a disability must be at least 13 feet wide.

(d) A parking space reserved for a person with a disability must be designated by a sign showing the international symbol of accessibility, indicating that a permit is required, and stating the penalty for a violation. In order to meet the penalty statement requirement, signs existing on October 1, 1993, must have attached a decal stating the penalty for a violation. The sign must be attached to a wall or post in a way that it is not obscured by a vehicle parked in the space.

History: En. 53-106.12 by Sec. 1, Ch. 31, L. 1977; R.C.M. 1947, 53-106.12(2); amd. Sec. 2, Ch. 614, L. 1983; amd. Sec. 2, Ch. 71, L. 1985; amd. Sec. 1, Ch. 203, L. 1985; amd. Sec. 1, Ch. 616, L. 1985; amd. Sec. 1, Ch. 187, L. 1987; amd. Sec. 17, Ch. 724, L. 1991; amd. Sec. 1, Ch. 209, L. 1993; amd. Sec. 3, Ch. 406, L. 1993; amd. Sec. 25, Ch. 407, L. 1993; amd. Sec. 2, Ch. 392, L. 1995; amd. Sec. 2, Ch. 489, L. 1995.

Cross-References

Stopping, standing, and parking laws, 61-8-353 through 61-8-357.

49-4-303. Applications for permit. (1) Applications for a special parking permit may be made to the department of justice on forms provided by the department that require sufficient information to determine eligibility for a permit. The application must be accompanied by:

(a) a certificate from a licensed physician, a licensed chiropractor, or a licensed advanced practice registered nurse, as provided in 37-8-202, describing the extent of the applicant's disability; and

(b) a fee of $1.

(2) Applications must be available at the office of the county treasurer in each county and directly from the department.

History: En. 53-106.12 by Sec. 1, Ch. 31, L. 1977; R.C.M. 1947, 53-106.12(4), (5); amd. Sec. 2, Ch. 280, L. 1997; amd. Sec. 2, Ch. 156, L. 1999.

Compiler's Comments

1999 Amendment: Chapter 156 in (1)(a) inserted reference to licensed advanced practice registered nurse; and made minor changes in style. Amendment effective March 23, 1999.

49-4-304. Special license plate or card to be provided and displayed — additional cards allowed for owners of more than one vehicle. (1) The department of justice shall provide a special license plate under 61-3-332(10)(g) or 61-3-426(1) or a card to be displayed on or in a motor vehicle to indicate a parking privilege granted under this part. The special license plate must be affixed to the vehicle according to 61-3-301, or the card must be prominently displayed in the windshield of a vehicle when the parking privilege is being used by the person with a disability in a vehicle other than the one to which a special license plate is affixed.

(2) Subject to the provisions of 49-4-301 through 49-4-305, a person who is eligible to receive a special parking permit and who owns more than one motor vehicle may request and the department of justice shall provide additional cards described in subsection (1) to equal the number of motor vehicles, other than commercial vehicles, owned by the person.

(3) Upon application under 49-4-303, a person with a disability who does not hold a driver's license or does not own a vehicle may receive a card described

in subsection (1) to be displayed in a vehicle in which the person with a disability is being conveyed when the parking privilege is being used.

(4) The card must bear a representation of a wheelchair as the symbol of a person with a disability.

History: En. 53-106.12 by Sec. 1, Ch. 31, L. 1977; R.C.M. 1947, 53-106.12(3); amd. Sec. 3, Ch. 614, L. 1983; amd. Sec. 4, Ch. 159, L. 1985; amd. Sec. 1, Ch. 456, L. 1991; amd. Sec. 17, Ch. 724, L. 1991; amd. Sec. 26, Ch. 407, L. 1993; amd. Sec. 3, Ch. 489, L. 1995.

49-4-305. Expiration of permit. (1) Except as provided in subsection (2), a permit expires on the occurrence of either of the following:

(a) 3 years from the date of issuance, unless the permit was issued to a person who has a condition expected to improve within 6 months. A person may renew a permit if a licensed physician, a licensed chiropractor, or a licensed advanced practice registered nurse, as provided in 37-8-202, certifies that the person's mobility disability still exists and that one of the criteria specified in 49-4-301 continues to be met.

(b) certification by a licensed physician, a licensed chiropractor, or a licensed advanced practice registered nurse that the person's mobility disability no longer exists or that the criteria specified in 49-4-301 can no longer be met.

(2) A permit issued before October 1, 1993, expires on:

(a) the death of the permittee; or

(b) certification by a licensed physician, a licensed chiropractor, or a licensed advanced practice registered nurse that the person's mobility disability no longer exists or that the criteria specified in 49-4-301 can no longer be met.

History: En. 53-106.12 by Sec. 1, Ch. 31, L. 1977; R.C.M. 1947, 53-106.12(7); amd. Sec. 4, Ch. 614, L. 1983; amd. Sec. 4, Ch. 406, L. 1993; amd. Sec. 27, Ch. 407, L. 1993; amd. Sec. 3, Ch. 392, L. 1995; amd. Sec. 3, Ch. 280, L. 1997; amd. Sec. 3, Ch. 156, L. 1999.

Compiler's Comments

1999 Amendment: Chapter 156 throughout section inserted references to licensed advanced practice registered nurse; and made minor changes in style. Amendment effective March 23, 1999.

49-4-306. Department of justice to publicize permit. (1) The department of justice shall publicize the provisions of 49-4-301 through 49-4-305 in a manner designed to inform those eligible for a special parking permit.

(2) The department of justice shall budget sufficient funds to accomplish the requirements of subsection (1).

History: En. Sec. 1, Ch. 32, L. 1981.

49-4-307. Penalty. A person who parks a motor vehicle in violation of 49-4-302(2) is guilty of a misdemeanor and is punishable by a fine of $100. However, a person charged with violating 49-4-302(2) may not be convicted if within 24 hours the person produces in court or the office of the arresting officer a special parking permit that was previously issued to the person and that is valid at the time of arrest.

History: En. Sec. 6, Ch. 614, L. 1983; amd. Sec. 2, Ch. 187, L. 1987; amd. Sec. 5, Ch. 406, L. 1993.

49-4-308 and 49-4-309 reserved.

49-4-310. Special parking permit for long-term care facility. A long-term care facility, as defined in 37-9-101, may apply for a permit issued for special parking spaces under 49-4-302. If granted, the permit entitles the facility to the privileges granted in 49-4-302.

History: En. Sec. 3, Ch. 187, L. 1987.

49-4-311. Use of motorized wheelchairs on public streets. A person who by reason of physical disability is unable to move about as a pedestrian may operate a self-propelled wheelchair or similar vehicle during daylight hours on the streets of a city or town. When operated on public streets, such vehicles must display the slow-moving equipment emblem required in 61-9-415(2) or be equipped with a windwhip displaying a red flag.

History: En. 11-911.1 by Sec. 2, Ch. 369, L. 1974; R.C.M. 1947, 11-911.1.

49-4-312. Regulation by municipalities. Use of self-propelled wheelchairs and similar vehicles may be regulated by cities and towns.

History: En. 11-911.2 by Sec. 3, Ch. 369, L. 1974; R.C.M. 1947, 11-911.2.

Part 4

Preference in Leasing of Concessions (Repealed. Sec. 14, Ch. 175, L. 1981)

Part Compiler's Comments

Histories of Repealed Sections:

49-4-401. En. Sec. 2, Ch. 66, L. 1951; R.C.M. 1947, 71-1302; amd. Sec. 1, Ch. 474, L. 1979.

49-4-402. En. Sec. 1, Ch. 66, L. 1951; R.C.M. 1947, 71-1301(part).

49-4-403. En. Sec. 1, Ch. 66, L. 1951; R.C.M. 1947, 71-1301(part).

49-4-404. En. Sec. 2, Ch. 474, L. 1979.

49-4-405. En. Sec. 3, Ch. 474, L. 1979.

49-4-406. En. Sec. 4, Ch. 474, L. 1979.

Part 5

Interpreters for the Deaf in Official Proceedings

Part Cross-References

State School for the Deaf and Blind, Title 20, ch. 8.

Regulation of speech-language pathologists and audiologists, Title 37, ch. 15.

Workers' compensation for occupational deafness, Title 39, ch. 71, part 8.

49-4-501. Policy. It is the policy of this state to secure the constitutional rights of deaf persons who, because of impairment of hearing or speech, are unable to readily understand or communicate spoken language and who consequently cannot be fully protected in legal proceedings unless qualified interpreters are available to assist them.

History: En. Sec. 1, Ch. 245, L. 1979.

Cross-References

Courts open to all persons for full legal redress, Art. II, sec. 16, Mont. Const.

Rights of accused, Art. II, sec. 24, Mont. Const.

49-4-502. Definitions. As used in this part, the following definitions apply:

(1) "Appointing authority" means the presiding judge or justice of any court, the chairman of any board, commission, or authority, the director or commissioner of any department or agency, or any other person presiding at

any hearing or other proceeding in which a qualified interpreter is required pursuant to this part.

(2) "Deaf person" means a person whose hearing is totally impaired or whose hearing is so seriously impaired as to prohibit the person from understanding oral communications. The term further includes, but is not limited to, a person who, because of loss of hearing, cannot communicate spoken language.

(3) "Intermediary interpreter" means a knowledgeable deaf person who, because of the person's intimate acquaintance with deaf persons who use mainly natural gestures for communicating, can be used as an intermediary between the deaf person and a qualified interpreter.

(4) "Principal party in interest" means a person who is a named party in any proceeding or who will be directly affected by the decision or action which may be made or taken.

(5) "Qualified interpreter" means an interpreter listed by the department of public health and human services as provided in 49-4-507.

History: En. Sec. 2, Ch. 245, L. 1979; amd. Sec. 236, Ch. 546, L. 1995.

49-4-503. Deaf person as participant in judicial or administrative proceeding — interpreter to be used. A qualified interpreter shall be appointed as follows:

(1) In any case before any court or a grand jury in which a deaf person is a party, either as a complainant, defendant, or witness, the court shall appoint a qualified interpreter to interpret the proceedings to the deaf person and interpret his testimony or statements and to assist in preparation with counsel.

(2) At all stages in any proceeding of a judicial or quasi-judicial nature before any agency of the state or governing body or agency of a local government in which a deaf person is a principal party in interest, either as a complainant, defendant, witness, or supplicant, the agency or governing body shall appoint a qualified interpreter to interpret the proceedings to the deaf person and to interpret his testimony or statements.

(3) (a) In any proceedings in which a deaf person may be subjected to confinement or criminal sanction or in any proceeding preliminary thereto, including a coroner's inquest, grand jury proceedings, and proceedings relating to mental health commitments, the presiding judicial officer shall appoint a qualified interpreter to assist the deaf person throughout the proceedings.

(b) Upon arresting a deaf person for an alleged violation of a criminal law and prior to interrogating or taking a statement of the deaf person, the arresting law enforcement official shall make available to the person, at the earliest possible time, a qualified interpreter to assist the person throughout such interrogation or taking of a statement.

(c) No statement, written or oral, made by a person who is deaf in reply to a question of a law enforcement officer or any other person having a prosecutorial function in any criminal or quasi-criminal proceeding may be used against that deaf person unless either the statement was made or elicited through a qualified interpreter and was made knowingly, voluntarily, and intelligently or, in the case of waiver, the court makes a special finding that any statement made by the deaf person was made knowingly, voluntarily, and intelligently.

(d) This subsection (3) does not apply to apprehensions, arrests, or statements involving a violation of the traffic laws of Montana.

History: **En. Sec. 3, Ch. 245, L. 1979.**

Cross-References

Treatment of developmentally disabled, Title 53, ch. 20, part 1.

Treatment of seriously mentally ill, Title 53, ch. 21, part 1.

49-4-504. Preliminary determination. The appointing authority may not appoint a qualified interpreter in any case until he makes a preliminary determination that the qualified interpreter is able to accurately communicate with and translate information to and from the deaf person in the case.

History: **En. Sec. 4, Ch. 245, L. 1979.**

49-4-505. Intermediary interpreter to be used. If a qualified interpreter states that he is unable to render a satisfactory interpretation and that an intermediary interpreter will improve the quality of interpretation, the appointing authority shall appoint an intermediary interpreter to assist the qualified interpreter subject to the same provisions that govern a qualified interpreter under this part.

History: **En. Sec. 5, Ch. 245, L. 1979.**

49-4-506. Interpreter in full view. In any action or proceeding in which an interpreter is required to be appointed, the court or administrative authority may not commence proceedings until the appointed interpreter is in full view of and spatially situated to assure proper communication with the deaf person or persons involved as participants.

History: **En. Sec. 6, Ch. 245, L. 1979.**

49-4-507. Coordination of interpreter requests. (1) Whenever an appointing authority is required to appoint an interpreter, the authority shall request the department of public health and human services to furnish the authority with a list of qualified interpreters. If the choice of qualified interpreters does not meet the needs or wishes of the deaf person, the appointing authority shall appoint another qualified interpreter.

(2) The Montana association of the deaf and the Montana registry of interpreters for the deaf shall provide the department of public health and human services with a list of qualified and available interpreters.

(3) The only function of the department of public health and human services is to maintain the list referred to in subsection (2).

History: **En. Sec. 7, Ch. 245, L. 1979; amd. Sec. 237, Ch. 546, L. 1995.**

49-4-508. Oath of interpreter. Every interpreter appointed to interpret for a deaf person, before entering upon his duties, shall take an oath that he will make a true interpretation in an understandable manner to the person for whom he is appointed and that he will repeat the statements of such person in the English language to the best of his skill and judgment.

History: **En. Sec. 8, Ch. 245, L. 1979.**

49-4-509. Compensation. An interpreter appointed to interpret for the deaf is entitled to receive a reasonable fee for his services, together with his actual expenses for travel and transportation. The appointing authority shall set the fee. When the interpreter is appointed in a criminal proceeding, the fee shall be paid out of the county general fund; and when the interpreter is otherwise appointed, the fees shall be paid out of funds available to the appointing authority.

History: En. Sec. 9, Ch. 245, L. 1979.

49-4-510. Waiver. The right of a deaf person to an interpreter may not be waived except by a deaf person who requests a waiver in writing. Such waiver is subject to the approval of counsel to the deaf person, if existent, and is subject to the approval of the appointing authority.

History: En. Sec. 10, Ch. 245, L. 1979.

49-4-511. Privileged communications. Any information that the interpreter gathers from the deaf person pertaining to any proceeding then pending shall at all times remain confidential and privileged, on an equal basis with the attorney-client privilege, unless such deaf person desires that such information be communicated to other persons.

History: En. Sec. 11, Ch. 245, L. 1979.

Cross-References

Attorney-client privilege, 26-1-803.

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